Commonhold Compared: A Comparison of Commonhold with

"Residents' Management Company Leasehold" Tenure

by

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COMMONHOLD COMPARED: A COMPARISON OF COMMONHOLD WITH ‘RESIDENTS’ MANAGEMENT COMPANY LEASEHOLD’ TENURE

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This dissertation compares commonhold, as enacted by the Commonhold and Leasehold Reform Act 2002, with ‘RMC Leasehold’ – long leasehold, with the freehold owned by the leaseholders through a Residents’ Management Company. Its thesis is that commonhold is not always superior to RMC Leasehold; that, in several respects, RMC Leasehold may be preferable; and that the two models of ownership should therefore continue to co-exist. It argues that the Aldridge Committee in 1987 ignored the existence of RMC Leasehold, and that therefore its commonhold proposals did not benefit from experience of it. It emphasised the ‘wasting asset’ deficiency of leasehold, and overlooked the ‘mismatch’ between the ground landlord’s financial stake and its powers, an imbalance which may be advantageous when the leaseholders collectively constitute the landlord.

Commonhold and RMC Leasehold are compared, focussing on themes such as the tenurial aspect: how far commonhold can deliver freehold ownership as it is generally understood, and the implications of its limitations on the control of dispositions; how negative and positive obligations may be enforced within commonhold and RMC Leasehold developments, both between the body corporate and flat-owners and between flat-owners inter se; the levying and status of service charge funds and their commonhold equivalents; how leases and the Commonhold Community Statement may be varied; and the position of the flat-owners if the body corporate becomes insolvent or a majority wishes to sell for redevelopment.

The study concludes that, although the inapplicability of forfeiture can be seen as making the unit-holder more secure, the leaseholder has the advantage, both on insolvency, and where the majority wishes a sale; that it is less likely that an RMC Leasehold development will change its character; and that RMC Leasehold may, therefore, be more appropriate for flat-owners who prefer to accept the restrictions inherent in a more regulated community.
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Chapter 1: Introduction: The purpose and thesis of this study

Flat ownership involves the horizontal division of buildings, and in English law this calls for a special vehicle, since the freehold generally used for houses, and generally for undivided buildings, is unsuitable. The two vehicles compared in this dissertation are commonhold and ‘Leasehold with a Residents’ Management Company’ or ‘RMC Leasehold’. Flats are more often created using ‘ordinary’ leasehold tenure, i.e. where flat owners are the leaseholders from a developer holding as an outside ground landlord (‘OGL Leasehold’). Commonhold was enacted to be an improvement on OGL Leasehold, but commonhold and RMC Leasehold are much closer in many ways, and it is those forms of flat ownership which need to be compared.

After an extended gestation period a commonhold scheme has been enacted in Part 1 of the Commonhold and Leasehold Reform Act 2002 (‘CLRA’) to facilitate the freehold ownership of horizontally-defined units. When commonhold came into force on 27 September 2004, English law thus finally caught up with the strata title and condominium legislation of the principal common law jurisdictions around the world. However, very few commonholds have been established, and it is understood few are in the pipeline. This certainly suggests that commonhold as enacted is not sufficiently superior to existing models of ownership to overcome conservatism within the legal profession and

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1 Defined later in this chapter.
2 Defined later in this chapter.
3 Including vertically divided parts of buildings.
4 Defined later in this chapter.
5 Defined later in this chapter.
6 As of 13 July 2007 there were 13 registrations in respect of 11 commonhold developments (private communication from Land Registry).
7 It was reported in March 2006 (C Baker, ‘A better system of Land Tenure’ ([2006] EG 173-174)) that Crest Nicholson ‘would adopt a commonhold structure for the development of the Oakgrove Millennium Community scheme in Milton Keynes’, but it has not yet been registered. Oakgrove Sustainable Management Organisation (‘OSMO’), a subsidiary of Hyde Housing Association, would provide common services, including combined heat and power and information and communication technology, and also ‘in addition to providing estate management services to each commonhold association, OSMO will also assist in the administration of the associations’.
property industry, but more worryingly it may suggest inferior features of commonhold which are either inherent to the concept, or are contained in the enacted scheme.

Commonhold scores heavily over OGL Leasehold, whether the outside ground landlord is the original developer, or an investor. It was against this comparator that the Aldridge Committee in 1987 proposed commonhold. Thus the Aldridge Committee failed to take cognisance of the existence of a superior model of leasehold: long leasehold, where the freehold reversion to the flats is vested in a Residents’ Management Company, or ‘RMC Leasehold’, and this oversight was repeated by subsequent Government papers which also largely ignored the existence of this model. It is not suggested that RMC Leasehold is always superior to commonhold. An attempt will be made to show that commonhold is not always obviously superior to RMC Leasehold, and that, in several respects, RMC Leasehold may be preferable; that overall, RMC Leasehold is sometimes, perhaps even often, to be preferred to commonhold; and that the two models of ownership both can and should continue to co-exist. That is the thesis to be explored, shortly stated.

Aspects in which RMC Leasehold scores over commonhold because of the particular way in which commonhold has been enacted will be differentiated from aspects of superiority intrinsic to either form of tenure. This should identify developments where RMC Leasehold is preferable to commonhold, and vice versa, and also pinpoint certain amendments necessary to the commonhold scheme to maximise its advantages. However, certain advantages of RMC Leasehold are intrinsic, and no amount of amendment will remove completely the role of the RMC Leasehold.

The two forms of tenure should continue to co-exist, and no steps should be taken to prohibit or to artificially restrict the adoption of RMC Leasehold tenure where it is appropriate. The market should be left to adjudicate between the available vehicles.

Now to define some key terms.
1. ‘Horizontal division’
Commonhold, RMC Leasehold and OGL Leasehold are all intended to deal with problems arising from the horizontal division of buildings. It will be assumed in this study that any such horizontal division is substantial. This excludes from consideration ‘flying’ freeholds where the building is divided essentially vertically but part of one unit overhangs another unit.®

2. Terminology applicable to flats
In this study ‘flat’ describes a horizontally divided part of a building, and ‘block’ refers to the whole building.11 The owner of the flat in a commonhold will be described as the ‘unit-holder’; in an RMC Leasehold or OGL Leasehold he or she will be referred to as the leaseholder rather than as the lessee or the tenant. ‘Flat-owner’ will be used as a neutral term applicable to both commonholds and leaseholds.

3. Terminology applicable to the tenure of flats
3.1 ‘Commonhold’
‘Commonhold’ is the English term for what is in Australia called a ‘strata title’ and is in the United States called a ‘condominium’, and is used to describe the

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9 Sometimes the term ‘flying freehold’ is reserved for an entirely ‘non-grounded’ freehold, and the phenomenon described is referred to as a ‘creeping freehold’. The latter has caused problems in defining a ‘house’ for the purposes of the Leasehold Reform Act 1967 (‘LRA 1967’); see, e.g., Malekshad v Howard de Walden Estates Ltd [2003] UKHL 49, [2003] 1 AC 1013.
10 Estate agents seem to have discarded the ‘flat’ in favour of the North American term ‘apartment.’
11 In those cases where a commonhold or RMC leasehold includes more than one building, ‘block’ refers to the development as a whole (and not to an individual building) unless the context clearly requires otherwise.
12 ‘Unit owner’ in the Aldridge proposals and the 1990 and 1996 draft Bills.
13 This rather than ‘lessee’ or ‘tenant’ is used by other modern authors when discussing long leasehold e.g. D Clarke in ‘Occupying Cheek by Jowl’ (‘OCBJ’) in S Bright and J Dewar (eds) Land Law: Themes and Perspectives (Oxford, OUP, 1998).
14 ‘Unit titles’ in the Australian Capital Territory, and Northern Territory (and also in New Zealand).
system as enacted unless the context makes clear that an earlier proposed system is being discussed. Amendments to the basic co-ownership rules\textsuperscript{15} meant that strata titles and condominiums could not be transported direct to England and Wales from other common law jurisdictions, though there is clearly a kinship between the three systems.

What are the characteristics of a commonhold or strata title scheme?\textsuperscript{16} The present writer would suggest the following: \textsuperscript{17}

1. The principal aim will be to facilitate the ownership of horizontally-divided buildings.
2. A flat-owner is enabled to have a freehold or absolute registered title to a flat.
3. A specially designed corporate body managed by the flat-owners will own and maintain the common parts and communal facilities.
4. Flat-owners will automatically become members of the corporate body, and cease to be members on disposing of their flat.
5. Provision will be made for the insurance of the common parts and the individual units.
6. Where appropriate, provision will be made for reserve funds to spread the cost of repairs and for the eventual replacement of equipment with a high capital cost.\textsuperscript{18}
7. Standard regulations will secure a degree of uniformity and common practice but with provision for flexibility.
8. Positive obligations will be enforceable within the commonhold.\textsuperscript{19}
9. A commonhold unit will be acceptable as security to prime mortgage lenders.\textsuperscript{20} All the above are likely to contribute to this, but additionally there will be provisions to ensure that not only will a lender be able to realise its security as with an ordinary freehold property, but that such security continues

\textsuperscript{15} In particular, Law of Property Act 1925 ('LPA 1925'), s 34.
\textsuperscript{16} Those of a condominium system will be similar, though there will be some differences of detail and emphasis.
\textsuperscript{17} Some of these are derived from OCBJ 402-3, but the writer has added to and adapted these.
\textsuperscript{18} E.g. lifts, and boilers and swimming pools where applicable.
\textsuperscript{19} Even if this is not possible under the general law.
on the termination of the commonhold, and to ensure that the lender can protect its security from being compromised by decisions taken by the corporate body.

Not all writers would necessarily accept all of these as essential characteristics. All could be the subject of discussion or qualification.

Although the principal aim of a commonhold statute will be to provide for the ownership of horizontally-divided premises such as blocks of flats, commonhold could be used for any development, even of freestanding buildings, which involves a substantial degree of shared facilities: a group of houses with a shared private sewerage system, an industrial estate with a private access road, a ‘gated community’ of detached dwellings, a development of seaside or countryside chalets with shared leisure facilities, etc.

Clarke has argued that it should be possible to create a commonhold based on a leasehold title, which at first glance might appear to contradict Provision 2 – though one might argue that this still an ‘absolute registered title’.

Provisions 3 and 4 are likely to be fundamental, though what is meant by a ‘specially designed corporate body’ is a matter upon which opinions would differ. The Aldridge Report, following Australian strata title models, opted for a sui generis body corporate. Commonhold as enacted provides that the ‘commonhold association’ (‘CHA’) will be registered under the Companies Acts, but with a prescribed form of Memorandum and Articles of Association. Opinions may differ as to whether this satisfies the requirement.

Provision 5 needs to be carefully considered. If each unit in the development is a freestanding building, there may be no need to insist on the

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20 I.e. those who are prepared to lend at the lower rates of interest which are available within the mortgage market
21 Clarke in OCBJ 402-3 includes most of these.
22 Contributions for the upkeep of a private sewerage system or an access road could well be accommodated by an estate rentcharge scheme, but, for its possible shortcomings, see ch 3, n 12; and such a scheme would have additionally (a) to ensure that some entity was responsible for the repairs and maintenance and (b) to provide for membership of this entity.
23 OCBJ 402, No 1.
insurance of individual units. But even then it will be necessary to ensure that there is public liability insurance to cover the common parts.

Provision 6 may not be essential in developments — even blocks of flats — with few communal facilities, but it is likely to be necessary in developments of any complexity.

Provision 7 is likely to be desirable, but some systems do not emphasise this (e.g. some condominium schemes). Commonhold as enacted has moved away from the Aldridge proposals on this, though the jurisdictions which first established strata title schemes are finding that standardisation is an ideal bought at too high a cost, and have introduced or are considering introducing provisions which allow for greater flexibility.

Provision 8 is not mentioned by Clarke, but it will be essential in any commonhold including horizontally-divided buildings, and desirable even in others.

One could argue that Provision 9 would not be required if the ‘target purchasers’ would not need a mortgage — either because they were retired, or were wealthy — but the absence of such provisions is likely to affect the saleability of units in most commonholds.

3.2 ‘Strata title’ compared with ‘condominium’ systems

A distinction is sometimes drawn between the Australasian strata title systems and United States condominium systems. Broadly speaking, strata title systems have tended to rely on Torrens systems of land registration, and to be characterised by a *sui generis* body corporate to manage (but not generally to own) the common parts, and by having the content of the standard regulations

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24 See ch 5, text to nn 131-152 for how regulations made under the CLRA deal with this.

25 See ch 5, n 130.

26 For the examples of New South Wales and New Zealand, see ch 5, n 284.

27 The importance of the enforceability of positive covenants for flat ownership is recognised in *Transfer of Land: The Law of Positive and Restrictive Covenants*, Law Com No 127 (London, HMSO, 1984) (‘Law Com No 127’) at 4.5 and 6.7 - 6.10. It is discussed in detail in ch 3.

28 For an argument that the differences between the Torrens systems and the English system of Land Registration have been exaggerated, and that the latter can be seen as a variety of the former, see P O’Connor, ‘Registration of Title in England and Australia: A Theoretical and Comparative Analysis’ in E Cooke (ed), *Modern Studies in Property Law Vol 2* (Oxford, Hart, 2003).
prescribed by statute (or by secondary legislation). Condominium systems, on the other hand, have tended to be based on US systems of deeds registration; there is less prescription on the form of the management body (even unincorporated associations are to be found); and while there may be some minimum standards, regulations tend to be document-based and drafted *ad hoc* for each development.

The original Aldridge proposals were heavily based on strata title principles; commonhold as enacted is essentially still a strata title system, but with greater reliance on *ad hoc* drafting of documents, and so tending, in that respect, towards a condominium system.

### 3.3 Terminology in the United States

Some interesting distinctions are drawn by Katharine Rosenberry, a Californian expert in this area. Although she does not define 'commonhold', she makes some useful distinctions in describing four types of 'commonhold community':

1. **The Condominium (in Australia, Strata Titles)** - the unit owner owns a freehold interest in a unit coupled with a tenant-in-common interest in the common area, and perhaps an interest in an exclusive use common area.

2. **Housing Co-operative (in New South Wales, Company Titles Scheme)** - the corporation owns the entire structure and each owner has the exclusive right to possess a portion of the building coupled with an interest in the corporation. The form of ownership is similar to a block of flats where all of the tenants have purchased their flats.

3. **Planned Community** - the unit owner owns a freehold interest in a separate area, sometimes called a unit or lot, coupled with an interest in the association. The association owns the common area.

4. **Master Planned Communities** - these are a combination of one or more of the above. This form of ownership is particularly valuable in a mixed-use building where it is desirable to have one association for the commercial property and one for the residential property. Each association has its own common area and rules, and each is also subject to the rules of the master association that also

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29 KN Rosenberry *Commonhold Law: Problems and potential solutions* (York, York Publishing Services, 2000) 5 (her words are quoted, but with some omissions (...)). Her views were presented to the Lord Chancellor's Department's Commonhold Working Party in an unpublished paper *Issues Raised in the Creation and Operation of Commonhold Communities Law* which is an earlier draft of the published work.
generally owns common property. In this case both the commercial and residential owners have voting rights in the master association.

She goes on to say that England was considering only Planned Communities and Master Planned Communities. On this analysis, the CLRA has enacted Planned Communities, but not Master Planned Communities.

Her terminology is useful to distinguish between the individual entities, especially when analysing United States condominium legislation, but to apply the term ‘commonhold’ to all of them is idiosyncratic, and inaccurate. The origins of the term ‘commonhold’ have already been explored elsewhere by the present writer. It has been used only of the various proposals for what is essentially a strata title system in England and Wales, and has not to the writer’s knowledge ever been used elsewhere as a compendious title for flat ownership schemes in general. There is no historical justification for Rosenberry’s use of the term ‘commonhold’; it has not been generally adopted, and it will not be used in that sense in this study.

3.4 ‘RMC Leasehold’
In this study ‘RMC Leasehold’ will be used to describe developments in which flats are owned leasehold, and the freehold reversion to the flats, and any common parts, are owned by a limited company which is a ‘Residents’ Management Company’ or ‘RMC’ - a company, limited either by shares or by guarantee, which is owned by the leaseholders, and with no outsider having any interest in it. It will be assumed that the leasehold interests are long, (i.e. typically in this context 99, 125 or 999 years, but nothing turns on the precise length), granted at a premium which represents the capital value of the flat in question, and at a rent which is either nil, or a peppercorn, or a nominal rent. In some cases the rent may

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30 When she was writing.
32 The respective advantages and disadvantages of these are discussed in ch 6.
33 Described in E F George and A George, The Sale of Flats (5th edn, London, Sweet and Maxwell, 1984) 177 as the purest form of what is there termed a ‘lessees’ management company’.
34 There is some evidence to suggest that 999 year leases are were more common in the north of England: A Offer, Property and Politics (1870 - 1914): Landownership, Law, Ideology, and Urban Development in England (Cambridge, CUP, 1981) suggests that they predominated in a cluster of Lancashire towns (map and key at 116-7).
have represented the original share of the unimproved capital value of the land, but, more often, the rent has no real relation to the value of the land.

To avoid confusion, it will be important to note that some RMCs do not own their own freehold, a situation usually arising from some form of tripartite lease arrangement. These are referred to as RMCs, but tripartite leasehold schemes are not considered in this study to be ‘RMC Leasehold’. Variations on the tripartite lease arrangement most commonly encountered are where:

1. the RMC is a party to every lease but lacks any estate in the land;
2. the RMC is a party to every lease, and has had the common parts demised to it, but does not hold a reversionary interest in any of the flats;
3. the RMC is granted a headlease of the complete development, and the individual leaseholders are sub-lessees of the RMC. This last category approaches very close to RMC Leasehold in creating privity of estate and a power of forfeiture, but there may be the ‘wasting asset’ problem unless the headlease is very long. The freeholder retains an interest in the development, in particular the ground rent, so it also has features of OGL Leasehold. For simplicity this category is excluded from the term RMC Leasehold.

The variations of structure are discussed by M Plant ‘Management Companies: How and Why?’ (1991) LSG No 21, p 24 and No 22, p 26. (Although the article is useful, the author omits to consider some of the possible variants).

Any OGL Leasehold development may achieve a status approximating to this if the leaseholders should exercise the Right to Manage (‘RTM’) (CLRA, pt 2, ch 1).

This is of less importance with leases granted since 1 January 1996 (when the Landlord and Tenant (Covenants) Act 1995 (‘L&T(C)A’), s 12, came into effect), as it is no longer necessary for an assignee to enter into a Deed of Covenant with the RMC in order that the leaseholder’s covenants may be enforced by it, or vice versa.

It should be noted that a development set up as (1) or (2) may become, in effect, type (3), if the freeholder grants a concurrent lease of the whole of the development to the RMC, either as part of a pre-arrangement, or at the later request of the RMC.
Tripartite lease schemes can be transformed into 'RMC Leasehold' if the RMC acquires the freehold reversion, either by negotiation, or under compulsory powers.\textsuperscript{39}

RMC Leasehold in the fullest sense requires that (i) all leaseholders are members of the RMC and (ii) no one other than a leaseholder can be a member of the RMC. Problems may arise on a subsequent purchase of the freehold reversion if not all the leaseholders join in the acquisition, that is, there are 'non-participating leaseholders'. Here separate companies\textsuperscript{40} may be needed to own the freehold and to manage the development and neither is then an RMC in the sense used in this study. Similar problems can arise if leaseholders under OGL Leasehold acquire the freehold, but not all participate.

Developments where most, but not all, of the leaseholders are members of the RMC may well enjoy most of the benefits of RMC Leasehold tenure,\textsuperscript{41} but this study will take RMC Leasehold in its 'pure' form as the basis of comparison with commonhold.

\subsection*{3.5 'OGL Leasehold'}

'OGL Leasehold' – 'Outside Ground Landlord Leasehold' – includes any form of leasehold ownership which does not satisfy the previous definition of 'RMC Leasehold', and thus includes those variants of leasehold where there is an RMC which does not own the freehold.\textsuperscript{42} In any event, OGL Leasehold in its various forms is not the primary focus of comparison, although some comparisons may be made in passing. Tenurial issues such as the enforcement of covenants, forfeiture

\textsuperscript{39} I.e. the pre-emption provisions of the Landlord and Tenant Act 1987 ('LTA 1987'), pt I, or the collective enfranchisement provisions of the Leasehold Reform, Housing, and Urban Development Act 1993 ('LRHUDA'), pt I, ch I (as amended).

\textsuperscript{40} To avoid the complication of having two companies, participating leaseholders may be prepared for the existing RMC to acquire the freehold, thus, in effect, subsidising the non-participants.

\textsuperscript{41} For this reason the non-participating leaseholders, or their successors, who will already be enjoying the advantages of RMC Leasehold, may see little point in making the financial contribution required to purchase a share in the RMC.

\textsuperscript{42} Even if the RMC has an estate which is reversionary to the leases of the flats and thus is the landlord of the leaseholders. As pointed out, in such a scheme the leaseholders will enjoy most of the advantages of RMC Leasehold, but for the sake of clarity, the term will be restricted to the purer form.
and variation of leases are the same as between OGL Leasehold and RMC Leasehold; when discussing matters such as the structure of the corporate vehicle, or its insolvency, the issues will simply not be relevant to leaseholders within an OGL Leasehold.

With these definitions out of the way we can turn to the nature of the problem that commonhold was intended to address.
Chapter 2: The Issue of Tenure

1. THE PROBLEM – AN HISTORICAL OVERVIEW

Why can’t one own a flat as a freehold? Every conveyancing solicitor in England and Wales has been asked this question some time by the prospective purchaser of a flat. A property lawyer answers that the ownership of land divided horizontally is insecure unless one can enforce positive obligations, and that English law does not normally allow the burden of positive obligations to run with the land.¹ Leasehold tenure involves privity of estate,² which enables the burden of positive covenants to run with the leasehold flat, and also with the reversion. Other devices³ may suffice for buildings which are freestanding or divided essentially vertically, but which share some facilities: estate rentcharges have become fairly common for developments such as factories with a private sewerage system⁴ or houses with a shared private access road⁵ – but leasehold is the only satisfactory scheme for flats and other horizontally-divided buildings, and is well-nigh universally adopted.

1.1 The defects of OGL Leasehold⁶ tenure

Leasehold suffers from well-documented shortcomings,⁷ which can be summarised as follows:

¹ Austerberry v Oldham Corporation (1885) 29 Ch D 750 (CA); confirmed by the House of Lords in Rhone v Stephens [1994] 2 AC 310 (HL).
² Now set out in the L&T(C)A, s 3.
⁵ Leasehold does not work well for houses with common services because of the risk of enfranchisement under the LRA 1967 (as amended) (see N Roberts, ‘The ‘Widows and Orphans’ of Leasehold Reform’ in E Cooke (ed), Modern Studies in Property Law Vol 2 (Oxford, Hart, 2003)).
⁶ I.e. long leasehold with an outside ground landlord: see ch 1.
⁷ E.g. in Leaseholds – Time for a Change? (London, Building Societies Association, 1984); Aldridge 1.3 - 1.4 and OCBJ 389-91.
(1) A lease is a wasting asset, especially when less than 80 years\(^8\) remain, and mortgaging shorter leases is difficult.

(2) A lease is liable to forfeiture for non-payment of ground rent and service charges, and occasionally occurs for breach of some non-financial covenant, although statutory provisions\(^9\) mean that forfeiture of residential leases is rare.\(^{10}\)

(3) Leasehold tenure demonstrates a marked ‘mismatch’ between the limited financial stake of the ground landlord, and the landlord’s powers.

(4) Leases are drafted on an _ad hoc_ basis. There is therefore no guarantee that it will make satisfactory provision for the repair, maintenance, insurance and management of the block, and each lease has to be checked and reported on individually, resulting in expenditure of unnecessary time and effort. Additionally, leases within a block may be drafted in different terms, which may not always ‘mesh’ together.

Numerous reports and articles have recognised these defects in flat ownership, but what have been seen as the _principal_ defects has varied over the years. The *Wilberforce Report\(^{11}\)* emphasised difficulties in managing flats, but did not mention the wasting asset issue at all. The 1984 Law Commission Report\(^{12}\) saw the main problems as (a) making the burden of positive covenants run and (b) making suitable arrangements for management, but again did not mention the ‘wasting asset’ issue. It was the Building Societies Association report *Leaseholds: Time for a Change?\(^{13}\)* which first stressed the ‘wasting asset’ problem, partly no doubt in the interests of the lenders’ lobby, but also because that had been the main problem with long leasehold houses, leading to the enactment of the Leasehold Reform Act 1967. Although the Aldridge Committee was ostensibly appointed ‘…[f]ollowing the publication of the [1984] Law Commission Report… and the

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\(^8\) Under the CLRA, pt 2, when more than 80 years are outstanding, ‘marriage value’ is to be disregarded (ss 128, 136 and 146).

\(^9\) See ch 3, n 274-277 and text thereto.

\(^10\) Below n 103; and see ch 3, n 255 and text thereto.

\(^11\) Above n 3.

\(^12\) *Transfer of Land: The Law of Positive and Restrictive Covenants*, Law Com No 127 (HC 201, 1983-84) (London, HMSO, 1984) (‘Law Com No 127’).

\(^13\) Above n 7.
generally favourable response to it", the brief of the Committee was clearly to bring forward a condominium or strata title scheme, rather than to implement the *ad hoc* ‘development scheme’ proposed by the Law Commission. The Aldridge proposals - which have formed the basis of all subsequent proposals for commonhold in English Law - are, it is submitted, based on the following analysis:

1. the ‘wasting asset’ problem is seen as the principal defect of leasehold ownership;
2. the management problem is seen as a conflict of interests between those of the landlord and the leaseholders, and/or a lack of interest on the part of landlords in the property;
3. the unit-holders and the commonhold association (‘CHA’) are seen as having identical interests because the CHA is a democratic organisation of interested flat-owners.

This is a flawed analysis. It fails to recognise the mismatch between the capital value of the freehold reversion, and the powers of the landlord, as an important issue. Further, insofar as it does identify real problems with leasehold ownership, they can be solved, or at least substantially mitigated, if the freehold is owned by an RMC.

1.2 The RMC Leasehold model of ownership ignored

The thesis of this study is that commonhold is not always obviously superior to RMC Leasehold, and that, in several respects, RMC Leasehold may be preferable. The Aldridge Committee’s criticism of the leasehold ownership of flats, however, took no

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14 Lord Hailsham, the Lord Chancellor, replying on 6 May 1986 in a written Answer to a Parliamentary Question; quoted in para 1 of the Preface to the Aldridge Report.
15 As recommended by *Leaseholds: Time for a Change?* (above n 7).
16 The Aldridge Report is the first application of the term ‘commonhold’ to a strata title system. Contrary to what is implied in the Report, the term was not coined by the Committee: see N Roberts, ‘Commonhold: A new property term - but no property in a term!’ [2002] *Conv* 341.
17 *Aldridge* 1.21.
cognisance of the ‘RMC Leasehold’ model of flat ownership, even in contexts\(^\text{18}\) where some reference to this might be expected.

This omission is all the more surprising, since the most widely used monograph devoted a whole chapter\(^\text{19}\) to discussion of the issues involved. The *Nugee Report*\(^\text{20}\) mentions RMCs briefly, making the point\(^\text{21}\) that RMCs appeared to have a lower incidence of management problems, and so recommending that leaseholders who acquired the freehold under their proposed collective right of first refusal should do so through the medium of an RMC\(^\text{22}\) using a model Memorandum and Articles of Association\(^\text{22}\) such as in Sir Brandon Rhys Williams’s Co-ownership of Flats Bill 1983.\(^\text{24}\) *Leaseholds: Time for a Change?*\(^\text{25}\) had also recognised that RMCs were increasingly common, though it was claimed that they were often characterised by personal squabbles, a lack of expertise, and waning interest.\(^\text{26}\) The Aldridge Report, however, does not mention the existence of the RMC Leasehold model at all. The 1990 Consultation Paper\(^\text{27}\) mentions the possibility of the conversion of existing leasehold developments to commonhold,\(^\text{28}\) without recognising that the freehold might already be owned collectively by the leaseholders. Although such arrangements would have been less common before collective enfranchisement was introduced by the LRHUDA, many existed before,

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\(^{18}\) For example, when discussing the possibility of leasehold blocks wishing to convert to commonhold (*Aldridge* 4.4 and 4.11 (at (a)), there is no mention of the possibility that the freehold may already be owned by the leaseholders collectively.


\(^{20}\) Report of the Committee of Inquiry on the Management of Privately Owned Block of Flats (Department of the Environment, 1985) (‘Nugee Report’).

\(^{21}\) 7.9.13.

\(^{22}\) 7.9.15.

\(^{23}\) Ibid.

\(^{24}\) And his other bills: Roberts, above n 16.

\(^{25}\) Para 6(d).

\(^{26}\) If this is correct then it was surprising that the report proposed a strata title type system, which (it will be argued in ch 6) would inevitably involve some form of owners’ corporation.


\(^{28}\) Ibid 3.22.
either being originally set up by their developers on this model, or after consensual acquisition of the freehold reversion.29 Further, the Paper does refer20 to the conversion of freehold flats to commonhold, and there can be little doubt that even in 1987 there would have been far more ‘RMC Leasehold flats’ than freehold flats. Perhaps they were invisible because they were working well in practice, they did not raise problems of saleability and because they could have been converted to commonhold without specific provisions. The short 1996 Consultation Paper31 also makes no reference to RMC Leasehold.

Aldridge thus looked only at ‘OGL Leasehold’ as a tenure for flats, and proposed commonhold as an improvement for its defects. Had Aldridge looked at RMC Leasehold, commonhold would not have held such a clear advantage. Further, a detailed comparison of RMC Leasehold would have resulted in a better commonhold scheme. Perhaps even commonhold and RMC Leasehold might each be seen to have distinctive advantages, and to need to co-exist.

1.3 The ‘mismatch’ of long leasehold identified at a late stage

Brief mention has already been made of the ‘mismatch’ between the capital interest of the ground landlord in a block, and the powers which it enjoys. This is the fundamental problem of leasehold tenure for flats. The first publication clearly to identify this is Flats as a Way of Life,32 published as late as 1994. The authors put it thus:

A key problem is the fact that the freeholder or intermediate leaseholder will almost certainly be responsible for the repair, insurance and management of the building, with the costs being reimbursed by the flat-owners, and yet the flat-owners can influence, but not ultimately control the freeholder or intermediate leaseholder. There is therefore often a

29 Often in practice a reversion to 999 year leases. Presumably the prospect of the leases falling in was so remote that ground landlords were more willing to dispose of the reversion to the leaseholders. By this time the LTA 1987, pt I, was in force, so some freehold reversions would have been acquired under the ‘Right of First Refusal’, though the shortcomings of that Act are well known.

30 1990 Consultation Paper. 4.39 - 4.43.


32 T Dixon and G Pottinger (Reading, College of Estate Management, 1994).
mismatch between the level of potential control over the building by flat-
owners and the high level of their financial investment in the building. In a block of 20 flats sold on 99 year leases at nominal ground rents, developers may have ‘a genuine long term interest’ in the block which is greater than merely the capitalised value of the total ground rents, but their economic stake in the block is still minimal when compared with the aggregate value of the leasehold interests. Nevertheless, under the pre-2003 law, the developers’ powers of management are disproportionate to their financial stake - a fortiori, if 999 year leases are granted.

It is extraordinary that this key issue emerged so late in the day in the debate. Even Clarke, probably the leading English academic commentator, passes over the problem in his essay ‘Commonhold - A prospect of promise’ and again in ‘Occupying Cheek by Jowl’. It is also passed over by Crabb in her important article on the limited liability status of the CHA ‘The Commonhold Association - As you like it’.

So too the mismatch has not been identified as fundamental by Government Reports: the Aldridge Report, and the 1990 Consultation Paper (apart from a passing reference to ‘widespread complaints of poor management and excessive service charges.’) The 1996 Consultation Paper does briefly state that:

33 Ibid 6.
34 OCBJ 389.
36 Even though the value of the ultimate reversion may be negligible, the possibility of taking commissions and profits may make the purchase of the reversion to flats on 999 year leases an attractive proposition (OCBJ 389-390).
37 (1995) 58 MLR 486
38 See ch 1, n 13.
40 Para 2.5.
41 It should be borne in mind that the 1996 Consultation Paper was in effect supplemental to the 1990 Paper, and is a much briefer document.
...the leasehold system has various drawbacks and may fail to serve those tenants whose property interest for practical purposes outweighs that of their landlord.\textsuperscript{42} The Government Consultation of November 1998\textsuperscript{43} less explicitly states that the leasehold system 'has its roots in the feudal system and gives great powers and privileges to landowners.'\textsuperscript{44} Only in the Consultation Paper of August 2000 is this specific criticism spelled out:

The Government considers that the existing residential leasehold system is fundamentally flawed. It has its roots in the feudal system and gives great powers and privileges to landowners. If we were starting our system of property law from scratch today we would not contemplate a system where the balance of power was so heavily weighted in favour of one party (i.e. the landlord) at the expense of another (i.e. leaseholders).\textsuperscript{45}

This 'mismatch' argument has now been fully accepted in one of the leading works on the subject.\textsuperscript{46}

\textbf{1.4 The implications of identifying the 'mismatch' as the fundamental defect}

The 'wasting asset' problem is a significant issue for leaseholders with less than, say, 70 years unexpired, and will be of concern for all 99 year leaseholders within the

\begin{flushright}
\textsuperscript{42} Para 1.1. \\
\textsuperscript{43} \textit{Residential leasehold reform in England and Wales: A consultation paper} (Department of the Environment, Transport and the Regions ('DETR'), November 1998). It may be noted that this was on residential leasehold reform generally, rather than a proposed commonhold system. \\
\textsuperscript{44} The point makes good rhetoric, but is not accurate to state here, and in the 2000 Paper, that the leasehold system 'has its roots in the feudal system' as the modern lease post-dates the end of feudalism. The author of the Papers presumably had in mind that the long leasehold system originated when land ownership was concentrated in the aristocracy - 'feudalism' in a broad, but inaccurate sense. \\
\textsuperscript{45} Section 1, para 1 (p 107). \\
\textsuperscript{46} See \textit{Commonhold: The New Law} (Bristol, Jordans, 2002) at 1.23, 'The landlord of a block of long residential leasehold properties has - or had, prior to legislation culminating in the CLRA - control over repair, maintenance and insurance of the property. Although the exact powers would be determined primarily by the terms of the lease, it is likely that those terms would have been primarily fixed with the interests of the lessor in mind. Moreover, the ability to decide whether - and on what terms - fresh leases were to be granted to existing leaseholders similarly lay with the freeholder. The scope for abuse of the dominant position was considerable.' But note, the economic mismatch is not specifically identified.
\end{flushright}
foreseeable future, but it can be cured by the extension of individual leases. The extended lease at a peppercorn rent is further extendable. Yet many of the difficulties encountered with 99 year leases can be encountered even with 999 year leases, which suggests that the problem with the leasehold system is even more deep-rooted than the ‘wastage’: the fundamental problem is the ‘mismatch’.

Considering ‘mismatch’ as applied to RMC Leasehold tenure, the crucial question is whether it more acceptable for the landlord to enjoy those powers when it is an entity representing and controlled by the leaseholders. How does the distribution of powers between the leaseholder and the RMC compare with the distribution of powers between the unit-holder and the CHA under commonhold? Might the imbalance which is seen as a disadvantage under ordinary leasehold become an advantage under RMC Leasehold, as it would tend to favour the collective, rather than the individual interest? If they are different, then what would be the circumstances when RMC Leasehold might actually be preferred to commonhold, and vice versa?

1.5 The late recognition of the existence of ‘RMC Leasehold’
It was somewhat belatedly recognised that ‘RMC Leasehold’ does attempt to achieve at least some of the same aims as commonhold, and may also fulfil them. Flats as a Way of Life\(^48\) states that, when commonhold was explained to directors of Flat Management Companies of the RMC Leasehold pattern, they felt that ‘the arrangements they already had (i.e. ownership of the freehold and self-management) achieved the same ends’,\(^49\) or, as one solicitor opined ‘where you have a management company owning the freehold, you effectively have commonhold.’\(^50\) That ‘RMC

\(^{47}\) If necessary under LRHUDA, pt I, ch II.
\(^{48}\) Above n 32.
\(^{49}\) Ibid 65.
\(^{50}\) Ibid also at 65. Ironically, he went on to say that ‘I think the advantage of commonhold is it would have to come in retrospectively and affect existing schemes…[and] that there will be statutory obligations imposed’ - which is not part of the 2002 scheme. Further, the editors included in their report (at 71) the view that ‘Commonhold would therefore also avoid the involvement of Company Law, which applies to the FMC [i.e. RMC] system, and bring the whole of flat management into the sphere of Property Law’, which again has not proved true.
`Leasehold’ approximated to commonhold is set out in ‘Commonhold Again’, an editorial in the *Conveyancer*. Farrand is quoted to the effect that commonhold when enacted would provide an ‘otiose’ system of title, and the editor concurred that ‘the present leasehold system can be “made to work”.’

Two articles published since commonhold was enacted have drawn explicit comparisons between commonhold and RMC Leasehold. Kenny, in another editorial in the *Conveyancer* considered that the differences were not great, and that RMC Leasehold retained certain advantages, in particular in that there was less scope for the oppression of a minority by the majority. He also regretted the absence in commonhold of two of the principal advantages found in other jurisdictions: vetting of schemes for compliance with prescribed rules, and a convenient mechanism for dispute resolution.

Brenan specifically compares commonhold and ‘leasehold with a Leaseholders’ Management Company’. He draws attention to the proposition that legislation designed for ‘outside’ ground landlords now over-regulates LMCs, and that they should be allowed to convert to commonhold, otherwise they will be pressing for separate legislation to meet their needs. These themes will also be picked up in future chapters.

RMC Leasehold was not therefore in the sights of the Aldridge Committee, or the legislation as enacted; the balance of powers between what the individual owner and the owners collectively is different in RMC Leasehold from in commonhold; and against this background we consider the thesis that commonhold is not always obviously superior to RMC Leasehold, and that, in several respects, RMC Leasehold may be preferable. RMC Leasehold is sometimes, perhaps even often, to be preferred to commonhold, and that the two models of ownership both can and should continue to co-exist.

52 In the latest preceding *Bulletin of Emmet on Title* (London, Pearson Professional, 1996 -).
54 Although not stated, New South Wales is the most obvious example.
56 The term includes instances where a leaseholders’ company does *not* own the freehold.
57 I.e. relieving the burden of regulation on LMCs.
The remainder of this chapter will explore how the balance between each varies in the basic issue of tenure (including control of dispositions), and the remaining chapters will go on to examine the issues of the enforcement of covenants, the levying of contributions towards the running expenses of the scheme, the variation of the governing documents, and the corporate structure, including the position on insolvency.

2. THE DESIGNATION OF THE TENURE
At the basic level of tenure, there is clearly a difference between ownership of a leasehold flat - even in an RMC Leasehold scheme - and ownership of a commonhold unit. The latter will be owned as a freehold, or, more properly the ‘fee simple absolute in possession’ - the closest that English Law allows to the outright ownership of land. ‘As an estate of potentially unlimited duration, it represents the amplest estate which any tenant can hold’. As such it is ‘for all practical purposes, equivalent to full ownership of the land itself’, the closest that the Common Law comes to dominium. Leasehold, on the other hand - more properly ‘the term of years absolute’ - represents ownership, but for a period of fixed maximum duration, and hence must be an estate which is inferior to a freehold. More detailed analysis will demonstrate that how ownership of a flat is designated may be of little relevance in practice. The more one compares commonhold tenure and ‘RMC Leasehold’ tenure, the more it will be seen that what really matters are the incidents of

58 It may be argued that the distinction between freehold and leasehold is not a matter of tenure in the strict historical sense. It is submitted, however, that there is sufficient justification now for referring to leasehold as a form of tenure (see Megarry and Wade, 3-015).

59 Elements 1.125.

60 Mabo v Queensland (No 2) (1993) 175 CLR 1 at 80 per Dean and Gauldron JJ.

61 One might add that the spread of registered title, and the enhanced protection given to registered title from adverse possessors as a result of the Land Registration Act 2002, has accentuated the tendency for an absolute registered title to draw closer to civil law dominium – it has been observed that the Crown’s ultimate radical title is becoming irrelevant: E Cooke, ‘The Land Registration Bill 2001’ [2002] Conv 11 at 14.

62 There is a limited exception in the case of a lease of land comprised in the Crown Estate, where there may technically be no fee simple - though even this exception will be less commonly encountered if the Crown grants itself a fee simple (under LRA 2002, s 79) in order that it owns an estate which may be registered.
ownership that are applicable to each. These are different, but one form of tenure is not necessarily superior to the other.

It is easy to assume that, the more ownership approximates to freehold, the better it must be for the flat-owner, a belief encouraged by abuses of the leasehold system by OGLs of both houses and flats. In RMC Leasehold the powers that would otherwise be exercised by an outsider must be exercised by the leaseholders collectively through their RMC. So in RMC Leasehold, as in commonhold, all rights and powers that may exist in respect of a given piece of land are *ex hypothesi* vested in the flat-owners, either individually or as members collectively of a community. When comparing RMC Leasehold with commonhold, the issue becomes which system strikes the better balance between the interests of the flat-owner as an individual and as a member of a community. Put as a choice between a system where an individual flat-owner may lose his stake in the property, or one where it is inviolable, a flat-owner is likely to opt for the latter; but if the price of that system is that he or she may have to make good a neighbour’s default on financial contributions, or that the flat-owner is left without an effective remedy when a neighbour flagrantly disregards reasonable restrictions in the commonhold community statement (‘CCS’) then the choice becomes a more difficult one.

### 2.1 Commonhold - a third estate?

Before considering the incidents of ownership of a leasehold flat or a commonhold unit, should commonhold have been constituted a ‘third estate’ rather than a sub-species of freehold, as adumbrated by Clarke in ‘Commonhold: A Prospect of Promise’? He states that the idea was rejected because it would have necessitated fundamental changes to the LPA 1925 and to the Land Registration Act 1925 (‘LRA 1925’). He does not make it clear precisely how commonhold would have fitted in to the existing freehold/leasehold taxonomy, unless as a ‘sub-species of freehold’ - as he described it in 1995. Again, in 2002 he stated:

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63 The fact that there will inevitably be problems in ‘living cheek by jowl’ also means that it is all too easy for such problems to be blamed on the prevalent system of ownership.
64 Or, quite possibly, the neighbour’s tenants or licensees.
65 (1995) 58 MLR 486 at 496; he also refers to it in Commonhold: The New Law at 2.4.
66 Ibid.
Commonhold is really an entirely new and essentially separate form of land holding that deserved to be treated independently of standard freehold and leasehold\(^67\) - though he does not clarify what would be the full consequences of this, and what advantages it would bring. Would it mean, for example, that the CHA would own the freehold of the entire commonhold, with individual unit-holders owning a subordinate 'commonhold estate' in a unit? If so, then the general public might claim that it was still not possible to own a flat as a freehold. It is not an idea which other commentators have explored. Further, it is difficult to see how commonhold as a 'third estate' squares with Clarke's advocacy of permitting a commonhold of commercial units on leasehold land.\(^68\) A commonhold estate within a leasehold development would have slightly different characteristics from one within a freehold, leading to four potential estates, rather than three. Commonhold seems best considered as 'a new kind of freehold ownership with special statutory attributes', as described in the 1996 draft Bill.\(^69\) According to the Lord Chancellor's Department, 'Commonhold is a new way of holding freehold land, not a new form of tenure.'\(^70\) Although the brief of the Aldridge Committee was [to] produce detailed proposals for an integrated, technically effective and simple scheme which will meet the problems raised by combined ownership of land and would be suitable for adoption in blocks of flats, blocks of commercial property, and shared residential estates\(^71\) this was interpreted by the Committee as providing an appropriate legal structure for freehold flats.\(^72\) \(^73\)

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\(^69\) Cl 1(1). Other draft bills did not contain this description of it, and neither does the CLRA.

\(^70\) Message from the Lord Chancellor's Department, 9 July 2003, quoted by JG Riddall, 'What is the Nature of an Interest in Commonhold Land?' [2003] Conv 351, at 358-9 (within P Kenny's 'Conveyancer's Notebook').

\(^71\) Preface to Aldridge, para 1.

\(^72\) Aldridge 1.1 'It gives people the chance to own flats freehold, without the present drawbacks, but the scheme can also apply to offices, commercial and industrial premises and other properties.' – and note the title to the Report (see ch 1, n 8).
3. COMMONHOLD AND RMC LEASEHOLD – THE ‘STICKS IN THE BUNDLE’

It has been suggested above that the *incidents* of commonhold and RMC Leasehold tenure are what really matters. If one adopts the shorthand of the ‘bundle of rights’ theory of property ownership, in commonhold some of the ‘sticks in the bundle’ can be seen as having been removed from the incidents of ownership of the individual unit-holder and appropriated to the CHA. The unit-holders as a body, will still enjoy all the usual incidents of ownership over the commonhold as a whole.75

The same must be true also of an RMC Leasehold scheme. As the community of leaseholders owns the freehold reversion to their leases, they too can collectively enjoy all the incidents of outright ownership over the development as a whole. There will, however, be differences - which will form the substance of this study - between how the ‘sticks in the bundle’ are allocated between the individual unit-holders and the body corporate in a commonhold and in an RMC Leasehold scheme respectively. In commonhold, the allocation of the ‘sticks in the bundle’ has been prescribed by the CLRA and the statutory instruments made under it, with some scope for an individual CCS to fine-tune the allocation. In RMC Leasehold, the allocation of ‘the sticks’ is determined partly by common law, partly by statutory provisions, and partly by the individual lease. Both commonhold and RMC Leasehold are also

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72 It is argued by JG Riddall (above n 70) that an interest in commonhold land is not a legal estate because under CLRA, s 49 it is liable to be determined, and that therefore, as a determinable fee, under LPA 1925 s 1(1) it is capable of subsisting in equity only. The reply by R Frost in ‘Further to the Nature of Commonhold’ at [2004] Conv 163 at 164-5 (within P Kenny’s ‘Conveyancer’s Notebook’) seems convincing, i.e. although under CLRA, s 49(3) the fee is liable to be divested in favour of the CHA, it becomes the owner of the fee, and so it does not determine: a determinable fee would revert to the grantor.

73 The metaphor runs throughout *Elements*, esp ch 2, and has been adopted by the judiciary in e.g. *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285 per J: ‘Property, in relation to land, is a bundle of rights exercisable with respect to the land’ and also in *PruneYard Shopping Center v Robins*, 447 US 74 at 82 (1980) per Rehnquist J: the right to exclude strangers is ‘one of the essential sticks in the bundle of property rights’.

74 This of course pre-supposes that the land in question has an entirely ‘clear’ freehold title before the commonhold is established. There will of course be cases where the original title is subject to e.g. easements or restrictive covenants.
governed by the Companies Acts, and the relevant Memorandum and Articles of Association, though under commonhold the basic format of these will be prescribed by regulation.

3.1 Horizontal division
The whole point of using leasehold tenure as a medium for the ownership of flats is to be able to enforce the positive obligations which are a concomitant of the horizontal division of land, and which cannot practicably be enforced with freehold ownership. Just as lay people are apt to describe the long leasehold ownership of houses as though the leaseholder owns the building, whilst the ground landlord owns the land, it can be assumed when leaseholders own flats on long leases that only the land still belongs to the ground landlord. (This assumption is more common among lay people, but can also colour lawyers' thinking about leasehold developments). Again, there seems to be an assumption deep-down that only land in the popular sense of a part of the earth's surface can be truly owned. If one takes the statutory definition of land - which, it is submitted, does no more than state the position of the common law - as including buildings, then it is arguable that leasehold is no more appropriate than freehold in accommodating the complications of strata

76 Leasehold Reform in England and Wales (Cmd 2916) (London, HMSO, February 1966), the White Paper preceding the LRA 1967, stated that the Act was intended to allow leaseholders to acquire their freehold at a price reflecting that 'in equity the bricks and mortar belonged to the .... leaseholder and the land to the landlord' (para 11).

77 This view slips out, for example, in the judgment of the US Court of Appeals for the District of Columbia in Javins v First National Realty Corp (1970) 428 F 2d 1041 at 1074, where it was stated: 'The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in land some 30 or 40 feet below, or even to the bare right to possession within the four walls of his apartment.'

78 LPA 1925, s 205(1)(ix).

79 Going back at least as far as Coke, Co Litt 48b: 'A man may have an inheritance in an upper chamber though the lower buildings and soil be in another'.

80 The statutory definition does not include airspace: below n 84.
ownership. Whether a flat is owned leasehold or freehold, if the building in which it is situated is destroyed, the flat-owner is left with an unsupported stratum of airspace, whether held indefinitely or for a term. We assume that a ‘flying freehold’ is undesirable, but in reality a leasehold which is not ‘grounded’ is equally a ‘flying leasehold’ and is acceptable only because a lease is likely to provide for the building in which it is situated to be rebuilt if it should be destroyed. If for any reason this were not possible - for example, if the building were uninsured - the leaseholder would still be left with a lease of unsupported airspace. If this resulted in the frustration of the lease then the leaseholder would be left with nothing.

If leases within an RMC Leasehold scheme were frustrated, the (former) leaseholders would, as members of the RMC, own between them the freehold of the site and could realise its redevelopment value. If a commonhold block were destroyed, and could not be rebuilt, then the CHA would have to be wound up, and in the liquidation the redevelopment value of the site would accrue to the unit-holders. In neither case would it seem likely that - as might in theory happen with a true ‘flying freehold’ - an owner would be left with ownership of a pocket of airspace.

81 This term appears in the speech of Lord Russell of Killowen in *National Carriers v Panalpina Ltd* [1981] AC 675 (HL). Although he (dissenting) would have held that a lease could not normally be frustrated, he stated (at 709B): ‘I would reserve consideration of cases of physical destruction of flying leaseholds’, treating them as potentially equivalent to cases of ‘the total disappearance of the site comprised in the lease into the sea.’ It is interesting that the editor of the headnote wrongly referred (at 676B) to this as ‘the physical destruction of freeholds’ (italics added), presumably as the notion of a ‘flying leasehold’ was so unfamiliar.

82 Which the majority in *National Carriers v Panalpina* accepted as a possibility, and even Lord Russell was (it seems) prepared to countenance in these circumstances: above n 81.

83 See ch 6.

84 This concept was described in K Gray, ‘Property in Thin Air’ [1991] *CLJ* 252 at 258-9. Gray and Gray further discuss the concept in *Elements* 1.40. The possibility seems held open by *Reilly v Booth* (1890) 44 Ch D 12 (CA), 23 (Cotton LJ) and at 26-27 (Lopes LJ) and *Melluish v BMI (No 3) Ltd* [1996] 1 AC 454 (HL), though neither case is unequivocal English authority for the proposition. Law Com No 127 at 4.46, n 1, accepts that ‘an estate can exist in what has become airspace’ (italics added: Gray goes further than this and says that an estate can be created in airspace). It should be observed that the US and Commonwealth cases cited in *Elements* in the footnotes to 1.40 deal either with the specific issue of local land taxation (*Macht v Department of Assessments of Baltimore City* 296 A2d 26.)
In purely tenurial terms, therefore, leasehold would not seem inherently more or less suitable for strata ownership than freehold: leasehold has been adopted for flat ownership so that positive obligations can be enforced.

3.2 Ownership limited by time
The most obvious difference between a leasehold within an RMC Leasehold development and a freehold unit within a commonhold is that the former is time-limited, and the latter exists in perpetuity. But although this is a difference in legal theory, the practical consequences of this distinction can easily be overstated, and such practical differences as there are between leasehold and commonhold ownership may be surprising. If a lease is granted for 999 years (or is subject to successive extensions - see below) it is likely that, if the building has to be demolished and the site redeveloped, the lease will have to be brought to an end long before the lease expires by effluxion of time. With commonhold, although 80% of unit-holders would have to consent to any voluntary termination for redevelopment, it is clear that a unit-holder in the 20% minority could be deprived of his unit (though not, of course, of the value represented by it) against his wishes. Further, any leaseholder of a flat (whether or not within an RMC Leasehold) will have the right to claim an extended lease under Chapter II of the LRHUDA; as he or she is entitled to the new lease at a peppercorn rent, he or she can, by a once-and-for all payment,

162 (1976) (lease of airspace granted to ensure that adjacent tall building retained rights of light and air, not otherwise recognised in Maryland); Re Trizec Manitoba Ltd and City Assessor for the City of Winnipeg (1986) 25 DLR (4th) 450 (lease of airspace over underground car park granted to allow for its development); and Auckland City Council v Ports of Auckland Ltd [2000] 3 NZLR 614 (local taxation of underground and overground telephone installations); or deal with part of a building rather than airspace per se (Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd (1971) 124 CLR 73 and Ratto v Trifid Pty Ltd [1987] WAR 237).

85 CLRA, s 45.

86 A leaseholder, whether within an RMC Leasehold or not, may in fact be in a stronger position than a unit-holder here; leasehold may, however, lean too far in favour of giving security to the leaseholder: see ch 6, text to nn 284 to 319.

87 The leaseholder can, in effect, add a further 90 years to the unexpired residue of his lease: LRHUDA, s 56(1).

88 Ibid.
both capitalise any rent and acquire all the capital value in the reversion of the flat, so getting 'a perpetually renewable lease without rent - as close to a freehold as one can get.' This does, not, however, give the leaseholder any right to acquire the capital value locked in the reversion as a whole - including rights to add additional storeys, or to build in the common parts. But this matters little with an RMC Leasehold, as the individual leaseholder will by being a member of the RMC share in deciding whether it is utilised, and, if so, how; and, if it is utilised, will share in this value. Clarke does not explore how this lease - 'as close to a freehold as one can get' - differs from the 'freehold with special attributes' within a commonhold.

Ironically, it will almost certainly be easier to bring to an end against the wishes of the unit-holder the theoretically perpetual ownership offered by commonhold than it is to bring to an end a leaseholder's interest in a flat. This is not necessarily a defect: many would argue that it should be possible to gather in all interests at the end of the useful life of a building so as to facilitate redevelopment. These issues are further considered in more detail in Chapter 6. It may be that at some deeply visceral level, ownership in perpetuity can exist only in land as popularly understood - land as part of the surface of the earth - rather than land as defined in law.

3.3 Ownership limited by financial obligations

The lay person might assume that the liability to pay a rent will distinguish holding a flat under a lease from ownership of a unit within a commonhold, but this cannot be upheld as a distinction. First, rent is not a prerequisite for a lease. Clarke notes, in OCBJ (399, n 124), that this right can be exercised more than once, but that on a subsequent lease extension a nil or nominal payment would be appropriate.

90 OCBJ 399.

91 LPA 1925, s 205(1)(ix). The statutory definition may not be entirely comprehensive, as it does not specifically include a 'column of airspace' (above n 84).

92 LPA 1925, s 205(1)(xxvii); it is assumed that, in the face of this clear statutory authority, Lord Templeman's suggestion to the contrary in Street v Mountford [1985] AC 809 (HL) 818E must refer to periodic tenancies.

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89 Clarke notes, in OCBJ (399, n 124), that this right can be exercised more than once, but that on a subsequent lease extension a nil or nominal payment would be appropriate.
have participated in the enfranchisement, if the leases are varied, they may well reduce their ground rent to nil or a peppercorn. Further, the obligation to contribute to the service charge is of far greater practical significance, and with commonhold there will be the equivalent of the ‘commonhold contributions’ (i.e. the commonhold assessment and the reserve fund levy(ies)). Finally, it is possible for a freehold to be subject to an estate rentcharge so this is clearly not a fundamental distinction. A more detailed comparison of the way in which financial contributions may be exacted in commonhold and in RMC Leasehold is deferred to Chapter 4, but both commonhold and RMC Leasehold will require a flat owner to make financial contributions, so this cannot be seen as a fundamental difference between the two tenures.

3.4 Ownership subject to forfeiture
The possibility of forfeiture marks a sharp distinction between ownership of a commonhold unit and of a long leasehold flat. The unit-holder cannot directly lose ownership under any circumstances for failure to comply with the obligations or conditions of the CCS; failure to pay commonhold contributions can, however, give rise to the loss of the unit indirectly, by the CHA obtaining a court judgment, securing it with a charging order, and then obtaining an order for sale.

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93 Often referred to as ‘participating leaseholders.’ The precise status of such a decision is not clear. Presumably the RMC could later resolve to collect the ground rent, unless the lease had been varied in the meantime.
94 Which may or may not technically be reserved as rent: see ch 4, n 14 and text thereto.
95 This expression is defined and discussed in ch 4, text to n 34.
96 Rentcharges Act 1977, ss 2(3),(4).
97 And indeed ordinary leasehold.
98 CLRA, s 31(8): ‘A commonhold community statement may not provide for the transfer or loss of an interest in land on the occurrence or non-occurrence of a specified event.’ The origins of this are considered in ch 3, n 254.
99 Under the Charging Orders Act 1979; if the unit is jointly owned, the unit-holders are likely both to be liable for the contributions, and so the charging order could be against the legal estate in the unit, not merely in the proceeds of sale thereof: Charging Orders Act 1979, s 2(1)(b)(iii) and Clark v Chief Land Registrar [1993] Ch 294 (Ch).
With a leasehold flat, on the other hand, even if it is RMC Leasehold, forfeiture is possible both for non-payment of rent or service charge\(^{101}\) and for breach of any other covenant. Whatever the reason for attempting forfeiture, the procedure will be circumscribed by numerous safeguards.\(^{102}\) For any of these reasons, however, a forfeiture may eventually come about. Cases of forfeiture of long leaseholds are rare,\(^{103}\) but do occasionally occur. The possibility of forfeiture leads commentators such as van der Merwe to opine that ‘Forfeiture militates against leasehold ownership approximating to freehold flat ownership.\(^{104}\) This is not logical, as with a freehold flat\(^{105}\) subject to an estate rentcharge supported by a right of re-entry, forfeiture would remain the ultimate sanction for breach. Further, as van der Merwe himself notes, civil law systems vary as to whether persistent breach of the by-laws can result in a forced sale of the flat.\(^{106}\) Forfeiture is particularly draconian, as it can result in the loss not only of the leaseholder’s home, but also of all of his or her financial investment in the property. The proposals to modernise forfeiture contained in the Law Commission’s 2004 Consultation Paper\(^{107}\) would have retained this unfairness, although the Report\(^{108}\) which was produced following the consultation now contains proposals to allow the court to order the sale of the lease, rather than its

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\(^{100}\) Assuming that the charging order is against the legal estate, the charging order will take effect as an equitable charge in writing under hand (Charging Orders Act 1979, s 3(4)), and therefore the CHA as equitable chargee would have to apply for an order for sale under LPA 1925, s 90.

\(^{101}\) Whether the ‘rent procedure’ or the ‘s 146(2) notice’ procedure applies to forfeiture for non-payment of service charge will depend upon whether or not the service charge is reserved as rent: see Escalus Properties Ltd v Robinson [1995] 4 All ER 852 (CA).

\(^{102}\) See ch 3, n 274-279 and text thereto.

\(^{103}\) ‘Both LEASE and Ministers say that the incidence of people losing their homes through forfeiture is very small.’ (Mr David Lepper MP, HC Deb vol 377 col 491 (8 January 2002)).

\(^{104}\) CG van der Merwe, ch 5 ‘Apartment Ownership’ in AN Yiannopoulos (ed) vol VI of The International Encyclopedia of Comparative Law (Tubingen, Mohr, and Dordrecht, Martinus Nijhoff, 1994), para 483, p 183).

\(^{105}\) Or perhaps a freehold maisonette - see discussion ibid.

\(^{106}\) Above n 104 at paras 257-9, pp 104-7; and see ch 3, n 281.


\(^{108}\) The Termination of Tenancies for Tenant Default, Law Com No 303 (London, TSO, 2006) (‘Law Com No 303’).
effective confiscation.\textsuperscript{109} Nevertheless, the existence of forfeiture marks an important distinction, and forfeiture will be no fairer to the leaseholder in RMC Leasehold than in OGL Leasehold. Although the loss of the lease will be balanced by a corresponding increase in the value of the reversion, this value will accrue equally between all the members of the RMC. The defaulting leaseholder may not see even his aliquot share. If the RMC is a company limited by guarantee the termination of the lease is likely to mean that the former leaseholder will \textit{ipso facto} cease to be a member; if the RMC is a company limited by shares, the former leaseholder will generally retain them, though the directors of the RMC may well have power to transfer them to a new flat-owner.

Forfeiture will result in the leasehold title coming to an end;\textsuperscript{110} if registered, it will be closed. Any subsequent ‘sale’ of the flat by the ground landlord will be by the grant of a new lease, resulting in a new leasehold title. If the existing lease is forfeited, the existing leasehold title could not be kept alive for a subsequent sale.\textsuperscript{111}

3.5 The practice of the Land Registry

When one examines the relationship of the title to a commonhold unit with the title to the common parts, the distinctive nature of the former becomes apparent. Normally an existing freehold title absolute will be converted into a freehold estate in commonhold land by filing the appropriate application and supporting documents.\textsuperscript{112} At this point, although the land will technically be ‘commonhold land,’\textsuperscript{113} the commonhold will not have been ‘activated.’\textsuperscript{114} The developer will be registered, under separate title numbers, as the proprietor of the common parts and of each of

\textsuperscript{109} Such a scheme was proposed by Clarke in a presentation to a seminar at the Institute of Advanced Legal Studies in London on 29 March 2004.

\textsuperscript{110} It seems better not to describe the term as ‘merging’ in the reversion, as this is not merger \textit{stricto sensu}.

\textsuperscript{111} \textit{Aliter} if forfeiture were replaced by an order for sale.

\textsuperscript{112} CLRA, s 2; and see e.g. D Clarke, L Crabb and N Roberts, \textit{Clarke on Commonhold} (looseleaf edn, Bristol, Jordans, 2004) (‘\textit{Clarke on Commonhold}’) ch 10.

\textsuperscript{113} CLRA, s 1.

\textsuperscript{114} Not a term used in the CLRA, but one adopted by Clarke in \textit{Commonhold: The New Law} (3.2) and in \textit{Clarke on Commonhold} (4[3]).
units. When the first unit is sold off, the commonhold will become ‘activated’: at that point the common parts will be registered in the name of the CHA, and the unsold units will remain registered in the name of the developer.

Although the individual units and the common parts are technically separate, independent titles, in a sense title to the units remains subsidiary to the title to the common parts. Although a separate freehold title, the title to each unit is shown on the Land Registry filed plan as within the commonhold, and a search against the unit in the Public Index Map will reveal both titles. The plan for a commonhold unit will continue to show the boundary of the whole commonhold. In a very real sense, title to the unit remains within the master title to the commonhold: one freehold title contained within another.

This arrangement thus approximates to the sale of a leasehold title, where there is a separate title to any registrable leasehold, but it is noted as an entry in the Charges Register of the parent title. Any Public Index Map search against an individual unit will reveal the numbers both of the leasehold title to that unit, and the title to the freehold reversion. With a development of ordinary freehold properties, on the other hand, units that are sold off will be removed from the parent freehold title, and a Public Index Map Search against a unit once sold will not reveal the freehold title of which it formerly formed part. Similarly the new freehold title will not contain any reference to its having formed part of the parent title, unless required for other reasons.

115 There is a difference here between commonhold and when standard freehold houses (or leasehold flats) in a development are sold off. In the latter case the new title numbers will be allocated as the plots are successively sold off, the unsold plots remaining in the developer’s title until then.

116 See, for example, the example of a residential CCS plan shown on p 22 of Land Registry Practice Guide No 60, Commonhold.

117 Commonhold (Land Registration) Rules 2004 SI 2004/1830 r 26: ‘If a person who applies for a search of the index map requires the title numbers of the units in relation to a commonhold, he must insert the common parts title number followed by the words ‘common parts’ in panel 2 of Form SIM in Schedule 1 of the main rules or supply a plan of the commonhold land showing sufficient detail to enable the land to be clearly identified on the Ordnance Survey map.’

118 Whether the freehold or a superior leasehold.

119 E.g. because easements are granted or reserved, or restrictive covenants are imposed.
The practice of the Land Registry, therefore, has to reflect that although a title to a unit within a commonhold is a freehold, it is of a distinctive sort. One could argue that having two registrable interests existing simultaneously in the same land, although unusual, is not unique: title to a rentcharge is a subsidiary interest within (normally) a registered freehold, and a Public Index Map search would reveal both titles. But the rentcharge, whilst an interest in land which is capable of subsisting at law, and of substantive registration, is clearly not an estate within the meaning of LPA 1925, section 1(1). In commonhold, however, we encounter two apparently concurrent fee simple estates. It may be argued that there is, strictly speaking, no conflict here: the result of excluding the ‘structure and exterior’ of a building containing more than one unit from the definition of a unit is that they automatically are comprised within the common parts, so no part of the building can simultaneously be comprised within two fee simples. Nevertheless, the upshot of this is that the fee simple of any unit is intimately and intricately intertwined with the fee simple of the common parts: the former is encapsulated within the matrix formed by the latter. It is very much a continuation of the ‘internal box’ model usually adopted for modern leasehold flat developments. ‘Internal box’ may, indeed, represent a simplification of the actual set-up: if load-bearing parts of the structure, or ‘relevant services,’ are situated physically within a unit, then they must be

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120 The obvious example of having freehold and leasehold interests simultaneously existing in the same land is not considered, as that is distinctive of leasehold, including RMC Leasehold, flats.

121 LPA 1925, s 1(2)(b).

122 LRA 2002, s 3(1)(b).

123 Although one must note that the ‘estates, interests and charges’ referred to in subsections (1) and (2) of s 1 of the LPA 1925 are all included within the expression ‘legal estates’ which is used in subsection (4). There would appear to be a distinction between an ‘estate in land’ (i.e. a fee simple absolute in possession, or term of years absolute) and a ‘legal estate’, which includes the estates in land, but also includes the ‘interests and charges’ referred to in subsection (2). LRA 2002, s 3(1) also uses the term ‘estate’ in both senses. This inconsistency in the basic terminology of the LPA 1925 is little remarked, save briefly in Megarry and Wade at 4-038.


125 CLRA, s 25(1).

126 A term commonly used by surveyors: see R Castle, ‘Commonhold Revisited’ (1996) 140 Sol Jo 1018.
excluded from it. The common parts may therefore intrude through an individual unit.

Land Registry practice therefore suggests that, although the title to a commonhold unit is in theory an independent freehold, it does in fact and in practice remain very much dependent upon the ‘parent’ title of the CHA to the common parts. Indeed, the practice of the Land Registry treats a commonhold unit more like a leasehold title than a ‘sale off’ of a property within an ordinary freehold development.

3.6 Restrictions on Dispositions

The ability to restrict dispositions - meaning in this context transfers, lettings, and charges - will mark a significant difference between commonhold and RMC Leasehold.

3.6.1 Freedom of disposition - a fundamental aspect of freehold

Whilst it is possible to envisage a requirement of consent from a third party to dispose of a freehold estate, the concept of free disposition of a freehold does seem to be deeply embedded in English law. The principle has a long history. Simpson remarks that

[i]n Glanvill’s time it is doubtful whether a tenant was entitled to alienate his holding without the consent of his lord

but Quia Emptores in 1290 finally recognised that

...from henceforth it shall be lawful for every freeman to sell at his own pleasure his lands and tenements, or part of them.

Restrictions on the disposal of freehold properties are very rare. Options and rights of pre-emption are more common, but these are usually bestowed by contract, to which a property owner voluntarily submits. Such a right may occasionally be reserved to the vendor on a sale, but it must be rare for a purchaser to agree to this. Further,

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127 Commonhold Regulations, reg 9(1)(b).
128 And such requirements are occasionally found in modern English Law: below, text to nn 131-132.
130 Ibid. As recently as Merttens v Hill [1901] 1 Ch 842 (Ch) it was confirmed that the payment of a fine on alienation of freehold land was inconsistent with Quia Emptores.
131 As a limited exception, prior to the introduction of the ‘Right to Buy’ public sector housing under the Housing Act 1980, some local authorities - including Southampton City Council - which were
once the option or right of pre-emption was exercised, it would come to an end. Long
term restrictions on alienation of a freehold are even rarer. The restrictions on the
sale of ex-public sector housing in National Parks, Areas of Outstanding Natural
Beauty, or other designated rural areas, are the only example that readily comes to
mind. Usually such restrictions are that a ‘relevant disposal’ may be made only
with the consent of the (former) landlord, but that such consent should not be
withheld if the proposed disposal is to someone who satisfies a condition of local
residence or employment. They do not sit easily with the English conception of
freehold ownership. The highly unusual nature of this restriction seems to be
unremarked both in leading textbooks on Land Law and in texts on Housing
Law. It is not surprising that freedom of disposition was seen as fundamental if
commonhold was to be a species of freehold ownership.

selling council houses voluntarily to their tenants, imposed a restriction on sale, giving the Council a
right of pre-emption at the original price if the property were sold within, say, seven years.
Presumably this was acceptable to buyers, as it was a way of becoming an owner-occupier rather than
a council tenant. Under the Housing Act 1980 this restriction on disposal was replaced by a financial
charge securing the repayment of the discount on a sliding-scale.

and Tenant (18th (looseleaf) edn, London, LexisNexis Butterworths, 1988 - ) (‘Hill and Redman’) at
A[7243].

133 The restriction may also take the form, with the consent of the Secretary of State, or the Housing
Corporation, as a right of pre-emption at market value for ten years. (This right of pre-emption
becomes the norm on all public sector sales under the Housing Act 2004: new s 155A(1) in HA 1985).

134 For differing views as to the effect of such conditions, see the rival submissions of the parties in Re
Milius’s Application [1996] EGLR 209 (LT) (according to Westlaw one of the few decisions to
consider HA 1985, s 157).

135 Such as Megarry and Wade, Elements and EH Burn, Cheshire and Burn’s Modern Law of Real
Property (16th edn, London, Butterworths, 2000) (‘Cheshire and Burn’).

136 E.g. A Arden, QC and C Hunter, Manual of Housing Law (7th edn, London, Sweet & Maxwell,
2003); J Morgan Textbook on Housing Law (Oxford, OUP, 1998); CP Rodgers Housing Law -
Residential Security and Enfranchisement (London, Butterworths, 2002) and G Robson and D Roberts
A Practical Approach to Housing Law (London, Cavendish, 2005) all refer to the ‘Right to Buy’
(Robson and Roberts only very briefly), but none refers to HA 1985, s 157. S 157 is noted in Ruoff
Partington and C Hunter, Arden and Partington on Housing Law (2nd (looseleaf) edn, London, Sweet
3.6.2 The legislative history of freedom of disposition under commonhold

The present Government has been resolute in maintaining that commonhold should approximate as closely as possible to ordinary freehold ownership. This principle can be traced back to the Aldridge Report. Whilst a leaseholder may have to obtain consent to assign, this was thought to be incompatible with the freehold ownership which was the aspiration of commonhold. Further, in the Aldridge Report the power to lease was seen as an incident of freehold ownership, and it saw no reason why unit-holders should not grant long leases of units. The Report therefore proposed to make tenants liable for service charges, the provisions differing, depending on whether the lease was short or long. This is reasonable, if the aim is for commonhold to approximate as closely as possible to freehold. A provision preventing the Commonhold Declaration from including any restriction on alienation was therefore included in the 1990 and 1996 draft Bills, backed up by a provision voiding any provision which purported to determine the unit-holder’s interest on the occurrence of any specified event, as this would be to re-introduce forfeiture by the back door.

The 1990 and 1996 draft Bills defined ‘dispositions’ as including ‘any power to transfer the fee simple of the unit or to grant any estate, interest or right in, over or in relation to the whole or any part of the land comprised in the unit’, thus including any charges or tenancies, and including also a long lease granted at a premium. The 1990 Consultation Paper, however, did raise the issue of whether

(1994 Reissue) (London, Butterworths, 1994) para 1719 and in the annotation in Current Law Statutes, but nowhere is it noted that placing restrictions on the disposition of a freehold is highly unusual.

137 Aldridge 6.3, 7.20(b).
138 Aldridge 6.6.
139 I.e. up to 21 years: Aldridge 10.13 - 10.14.
140 I.e. over 21 years: Aldridge 10.15 - 10.16.
141 As the CCS was then called.
142 1990 draft Bill, cl 17(2)(a); 1996 draft Bill, cl 7(2)(a).
143 1990 draft Bill, cl 17(2)(b); 1996 draft Bill, cl 7(2)(b).
144 1990 draft Bill, cl 17(7)(a); 1996 draft Bill, cl 7(3).
145 A provision (cl 39) was included in the 1990 draft Bill to allow the CHA to demand service charges directly from a long leaseholder without first demanding them from the unit-holder.
it should be possible to grant long leases of units at all, a conundrum inherent in commonhold. On the one hand, if it is to approximate as closely as possible to ordinary freehold ownership, it should be possible to create even long leases out of a unit; on the other hand, this might mean that the abuses and shortcomings of the leasehold system could re-appear in commonhold developments.

By the time the 1996 draft Bill was published, the decision had been taken, for the reason given above, to ban long leases of commonhold units. It therefore banned tenancies of more than 25 years,\textsuperscript{147} regardless of whether a premium had been paid, and with no attempt to distinguish between residential, commercial, or mixed-use lettings.

The CLRA approaches the problem in a more sophisticated manner, though this leads to greater complexity. The Act no longer refers to ‘dispositions’, but provides that the CCS may not prevent or restrict the \textit{transfer} of a unit;\textsuperscript{148} to prevent the re-introduction of forfeiture, there is a provision preventing the CCS from providing ‘for the transfer or loss of an interest in land on the occurrence or non-occurrence of a specified event.’\textsuperscript{149} Other dispositions are dealt with separately. To ensure that commonhold units are readily mortgageable,\textsuperscript{150} the Act provides that the CCS cannot restrict a unit-holder’s ability to grant a charge over the \textit{whole} of his unit,\textsuperscript{151} a provision that no charge can be created in \textit{part} of a unit prevents units being subdivided as a result of mortgagees exercising their power of sale.\textsuperscript{152} The CHA has to consent in writing to the transfer of part of a unit.\textsuperscript{153}

\textsuperscript{146} Paras 4.53 - 4.60.
\textsuperscript{147} Cl 2(3). The 25 year limit was to accommodate commercial lettings.
\textsuperscript{148} CLRA, s 15(2).
\textsuperscript{149} CLRA, s 31(8).
\textsuperscript{150} Although misgivings on the part of lenders as to the status of their security if the CHA should become insolvent have so far prevented commonhold from being widely accepted by mortgage lenders – see ch 6, n 262.
\textsuperscript{151} CLRA, s 20(1)(b) and s 20(6)(a).
\textsuperscript{152} CLRA, s 22. (If the chargee were to exercise his power of sale, it would create a part-unit without the necessity to obtain the appropriate consents).
\textsuperscript{153} CLRA, s 21(2)(c). Consent would have to be given by a special resolution: s 21(8), applying s 20(4).
The rationale behind these restrictions is understandable. If parts of units could be transferred without the consent of the CHA, this might allow the character of the commonhold to be changed against the wishes of the majority. One may question whether the consent of a 75% majority of the votes of one's neighbours should be required if one wants to transfer, say, one or two rooms (if it is feasible), or even a storage cupboard, from one flat to another, but otherwise large flats could be subdivided and so transform the character of a block. Such restrictions would also apply if a garage or parking space were included within one unit and were to be transferred to another. This may seem at first sight unduly restrictive, but parking can be a very sensitive issue in blocks of flats, particularly where there is a shortage of spaces, and the commonhold community may have a powerful interest in ensuring that outright transfer does not result in flats being left without parking spaces. A unit-holder who wishes to allow another unit-holder to use a garage or parking space can grant temporary permission by licence or by a short tenancy agreement.

Not allowing the CHA to have any control over the transfer of units sends out the clear message that commonhold ownership is intended to approximate as closely as possible to freehold ownership.

3.6.3 Consent to assignment within RMC Leasehold

Under RMC Leasehold the consent of the landlord can be required to an assignment of the whole or part of demised property, and to a sub-letting of the whole or part. Virtually all long leases of flats seem to contain an outright prohibition on the assignment of part of the demised property, or on the sub-letting of part. This would not prohibit the ad hoc assignment or sub-letting of part with permission. In the case of an RMC ground landlord this could in fact be more easily be obtained

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154 I.e. those set out in s 20(4) (applied to s 21(2)(c) by s 21(8)).
155 As illustrated by Montrose Court Holdings Ltd v Shamash [2006] EWCA Civ 251, 2006 WL 755478, a dispute over parking restrictions, which reached the Court of Appeal.
156 The 75% for a special resolution may still mean in a large development that the required votes are obtained from those who are least likely to be affected by any change. Cf changes of use of a commonhold unit, discussed in ch 5, text follg n 206.
157 As in any leasehold tenure.
158 If the demise includes a garage, there may be provisions to allow the separate sub-letting of the garage.
than with the transfer of part under commonhold, as consent could be given by an affirmative vote passed by a simple majority of the directors,\textsuperscript{159} whereas commonhold would require a special resolution of the unit-holders.\textsuperscript{160}

It seems unknown for a residential long lease to require the consent of the ground landlord to the charging of a flat. As noted, the CLRA forbids\textsuperscript{161} any restriction on the unit-holder charging the whole\textsuperscript{162} of his unit. Commonhold and RMC Leasehold would seem to be identical in this respect, so this needs no further discussion.

The position with regard to assignments of the whole of the demised premises is more difficult to ascertain. Some commentators\textsuperscript{163} seem to assume that consent is rarely or never required for the assignment of the whole of the demised property.\textsuperscript{164} The present writer's personal experience is rather different. Although the landlord's licence to assign is rarely required with flats outside the Greater London area, it becomes a little more common within the Greater London area, and the closer to central London, and the more prestigious the flat, the more likely it is that licence to assign will be required. Even in central London boroughs such as Westminster, and Kensington and Chelsea, licence to assign seems to be required in only a minority of blocks, but in those areas it is not particularly unusual.

If licence to assign is required\textsuperscript{165} then it would be subject to the provisions of section 19 of the Landlord and Tenant Act 1927 and would take effect as a fully-

\textsuperscript{159} Subject to the possibility of the leaseholders - or such of them as are members of the RMC - making a direction to the directors under art 70 of Table A (in the Companies (Tables A to F) Regulations 1985 SI 1985/805). Such a direction would, not, however, invalidate any prior act of the directors, including any consent previously given (ibid).

\textsuperscript{160} Above n 153.

\textsuperscript{161} CLRA, s 20(1).

\textsuperscript{162} As opposed to charging of part, which is proscribed by the CLRA itself: s 22.

\textsuperscript{163} E.g. Kenny, above n 53, at 3, states: 'in modern leases of flats there is rarely any restriction on a transfer of the whole of the lease. Any such restriction is a detriment to the mortgageability of the lease and in general terms no client would be advised to purchase such a long lease.' Aldridge (7.20(b)) lends support to the present writer's view: '...The control of dispositions is a common characteristic of the leasehold system, and incompatible with freehold ownership.'

\textsuperscript{164} Flats which are intended for occupation by the elderly are clearly an exception.

\textsuperscript{165} I.e. there is a qualified covenant against assignment.
qualified covenant against assignment. There is a substantial amount of case law on what are reasonable grounds to withhold consent, but, except for some older cases, this mainly relates to commercial lettings (where there is almost invariably a qualified covenant against assignment), or to cases where a proposed assignment has implications for security of tenure or enfranchisement. Nevertheless it seems that issues relating to the identity of the proposed assignee, or the manner in which he is likely to use or occupy the premises, would amount to reasonable grounds to withhold consent. The lack of modern case-law on assignment of residential leases in other cases may support the view that licence to assign is rarely required in modern residential leases, or alternatively, it may suggest it rarely presents any problems in practice. Rayburn v Wolf is a rare example of a reported dispute over licence to assign a 99 year lease; in this case, there was about 79 years unexpired on a flat in a ‘high class block of flats’ in Hampstead. The proposed assignment was to an American attorney who might take up residence, but not until he retired in approximately 20 years time. He intended to sub-let in the meantime. The landlord objected on the basis that most of the flats were being occupied by the

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166 I.e. a covenant not to assign without consent, such consent not to be unreasonably withheld.

167 For restrictions upon dealing with leases, see Hill and Redman, ch 5; for examples of the case law, see paras A[2629] - A[2680]. Bromley Park Garden Estates Ltd v Moss [1982] 1 WLR 1019 (CA) involved a residential tenancy, though this was a three-year lease, and the factual background was unusual.

168 Bickel v Duke of Westminster [1977] QB 517 (CA) involved a residential lease of a house, and enfranchisement under the LRA 1967. Swanson v Forton [1949] Ch 143 (CA), Dollar v Winston [1950] Ch 236 (Ch) and Thomas Bookman Ltd v Nathan [1955] 1 WLR 815 (CA) all involved assignments of short leases which would if allowed have resulted in the assignee getting Rent Act protection and ultimately a statutory tenancy. Deverall v Wyndham [1989] 1 EGLR 57 (Ch) and West Layton Ltd v Ford [1979] QB 593 (CA) both involved sub-lettings under short leases, which were affected by changes in the provisions for security of tenure.

169 Hill and Redman A[2629], sub-para (a); Bromley Park Garden Estates Ltd v Moss (above n 168) at 1027-9, and Houlder Brothers & Co Ltd v Gibbs [1925] Ch 575 (CA) per Warrington LJ at 585-6.

170 It may be noted that, although there are legal principles to be applied, whether the landlord’s consent to an assignment is being unreasonably withheld is ultimately a question of fact: Ashworth Frazer Ltd v Gloucester City Council [2001] 1 WLR 2180 (HL).

171 [1985] 2 EGLR 235 (CA).

172 Per Browne-Wilkinson LJ at 235E.
leaseholders, and that sub-tenants had caused difficulties in the past. The Court of Appeal held that the landlord was not entitled to refuse consent, because the lease clearly envisaged sub-letting, and contained provisions giving the landlord close control over this. By implication, if the lease had prohibited sub-letting, the landlord would have been in a stronger position to refuse consent to the assignment.

There is, therefore, somewhat of a dearth of authority on what may amount to reasonable grounds to refuse consent to the assignment of a long residential lease, but it would appear that refusal may be based on the identity of the assignee, or the manner in which it is likely that the premises will be used or occupied. There is clearly, however, scope here for RMCs who have the power to refuse consent to assignments to use it in the same way as do tenants’ co-operatives (as opposed to condominiums) in the United States, that is, to maintain the character of the building - or of its occupants. In New Zealand the ability to require consent to membership of the company is one reason why flat-owners may prefer to retain flat-owning companies rather than to convert to Unit Titles.

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173 The nature of the problem was put like this (ibid 235J): the landlord (who, unusually, was resident in the block) deposed that ‘...underleases give rise to problems; that in the past they have on occasions given consent to underleases during the temporary absence abroad of various tenants; that it is on the whole young people who are interested in taking short leases at rack rents; that their habits and attitudes are not the same as those of the majority of the residents of the block, who are middle-aged or elderly professional people, which has given rise to friction; and that there have been difficulties, given that the flat is occupied by an underlessee, in ensuring that the head tenant controls the way in which the flat is temporarily being occupied by the underlessee.’

174 Or, arguably, if it had restricted it in a way requiring that lettings should be only temporary and short-term: below, text to n 210, as to the practicality of this.

175 Particularly, it seems, in New York. The pickiness of Manhattan’s co-op boards is notorious. It was reported on the BBC website on 30 April 2002 (‘New York apartment board ‘bans smoking’’), that a Manhattan apartment board had banned smokers from buying any apartments in its building <http://news.bbc.co.uk/hi/english/world/americas/newsid_1960000/1960521.stm> accessed 19 July 2007. The report also suggested that some Manhattan co-op boards ‘regulate everything from noise levels to the size of dog allowed. Some of the most difficult have even decreed that they interview any dogs themselves.’

176 ‘There seems to be no good reason to disturb flat- and office-owning companies already in existence. Some people owning flats by this particular method are attracted by the power that can be conferred by the provisions of the constitution of a company to give other flat-owners absolute control
Those RMCs with leases requiring licence to assign seem to require financial and personal references. Clearly, in blocks with a high service charge, the RMC may reasonably require some assurance that those charges can be met. How far the RMC need be too concerned about this is perhaps arguable, as it will ultimately be secured by its right of re-entry, though if forfeiture comes into conflict with the bankruptcy of the leaseholder, there can be difficulties. In any event, *Ashworth Frazer Ltd v Gloucester City Council*\(^{177}\) would suggest by analogy that, if the RMC reasonably concludes that a proposed assignee could not afford the service charge, it would be entitled to refuse consent, rather than being obliged to give consent, on the basis that it can protect its position subsequently by resorting to legal proceedings.

Licence to assign could clearly be refused on the basis of the personal qualities of the proposed assignee, though here one is treading in a potential legal minefield. Consent clearly cannot be withheld on the basis of the assignee’s sex, race, disability,\(^ {178}\) religion or belief\(^ {179}\) or sexual orientation.\(^ {180}\) There is as yet no statutory prohibition of discrimination in the provision of goods and services on other grounds.\(^ {181}\) An RMC might well be able to refuse licence to assign to a

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as to who is to be permitted to buy or lease flats. Flat-holders are in this way able to exclude a new occupant whom they regard as unsuitable.’ (Law Commission Report No 59 *Shared Ownership of Land* (Wellington (NZ), Law Commission, 1999) at 1-2). It would seem that where such flat-owning companies own the freehold of a block, sometimes the individual flats are owned on licences (as in the US), and sometimes on leases (as in England and Wales). ‘Despite the provision for registration such licences tend not to be regarded by lenders as attractive securities’ (ibid 1). No reason is given as to why ownership is controlled via the constitution of the company rather than via provisions regulating assignment. The desire to control who could purchase would seem to have been a factor motivating the objectors in *Geddes v Devon Park Town Houses* [1977] 1 NZLR 53.

\(^{177}\) Above n 170.

\(^{178}\) Sex Discrimination Act 1975, s 31(1); *Race Relations Act* 1976, s 24(1); *Disability Discrimination Act* 1995, s 22(4). ‘Disability’ can include mental illness and mental impairment (s 1).

\(^{179}\) Equality Act 2006, s 47(3).


\(^{181}\) It might be possible for other groups who would not be covered by Regulations under the Equality Act 2006, but who might suffer discrimination, e.g. students, or parents with young children, to put forward an argument based partly on Article 14 of the European Convention on Human Rights, but this would additionally depend on the horizontal applicability of the Convention in a private law context.
prospective assignee on financial grounds (financial references could be required), or 
on the basis that he had criminal convictions for certain offences, or a history of 
cauing a noise nuisance, but it seems unlikely that these matters would usually come 
to its attention in time for it to refuse consent.

Assuming a lease required licence to assign, some RMCs might wish to 
refuse consent if the proposed assignee were buying the property to let it out rather 
than for owner-occupation. Rayburn v Wolf\textsuperscript{182} would suggest that they could not do 
so, unless the lease itself prohibited sub-letting, or at least restricted it to 
circumstances which did not apply to the proposed assignee. On the other hand, if a 
lease did prohibit sub-letting, and the proposed assignee seemed likely to intend to 
breach the covenant, Ashworth Frazer Ltd v Gloucester City Council\textsuperscript{183} would 
suggest that the RMC would be entitled to refuse consent, rather than having to take 
enforcement proceedings if and when the covenant was breached.

3.6.4 Consent to sub-letting within RMC Leasehold

Outright bans on sub-letting are occasionally encountered, but are unusual, and 
would, it seems, tend to date from the period when buying to let was comparatively 
unusual. A significant proportion\textsuperscript{184} of the sales of new flats, particularly in the 
London area, are to ‘buy to let’ investors\textsuperscript{185} and, so long as this is the case, 
developers are unlikely to wish to restrict sub-lettings. Even those who intend to 
occupy a flat personally, and would prefer to live in an owner-occupied block, may 
feel it unduly restrictive if they cannot sub-let if work or family commitments require 
their absence for a short period. If a lease in a RMC Leasehold block prohibits sub-

\textsuperscript{182} Above n 171.
\textsuperscript{183} Above n 170.
\textsuperscript{184} The writer has seen reports in the Press suggesting that it is as high as 50%.
\textsuperscript{185} HL Deb vol 627 col 516-7 (16 October 2001) (Lord McIntosh of Haringey): ‘Our original intention 
was to impose very tight controls on the letting of residential [col 517] units. Much pressure was put 
on us in that regard. It was pointed out that tight regulation would tend to make commonhold 
developments unpopular because buy-to-let would be next to impossible. The noble Lord, Lord 
Selsdon, reiterated that point. We were told that a significant part of the market in flatted properties, 
particularly in London, was for investment and that that was a legitimate use of commonhold 
procedures. We considered that advice and decided to take it. Amendment No. 26 sets out the terms at 
which we have arrived.’
letting without the consent of the RMC, such consent not to be unreasonably withheld, then the RMC would seem to be in very much the same position as the CHA in a commonhold \(^{186}\) with a CCS with similar provisions, mutatis mutandis. This is discussed later. \(^{187}\)

3.6.5 Possible expedients to discourage sub-letting within RMC Leasehold

There may be some expedients which an RMC could use to attempt to discourage ‘buy-to-let’ investors, if this is thought desirable. Merely requiring consent to sub-letting is unlikely to be seen as particularly onerous by the owner-occupier who needs to sub-let whilst working abroad for a period, but, rigorously enforcing the requirement may discourage the investor, as it would tend to extend the periods when the flat is empty, and not producing income. Further, if consent is required, it must surely be reasonable to require that any sub-tenancy agreement be approved by the landlord’s solicitor, to ensure, for example, that it includes the restrictions imposed in the head lease, so that the sub-tenant is aware of those obligations. \(^{188}\) The buy-to-let leaseholder would thus incur the additional expense of the RMC’s legal costs. Investors - if properly advised - may simply decide that blocks where sub-lettings are unrestricted are likely to give better returns.

An RMC might also seek to impose a condition that sub-lettings be arranged through a designated letting agent. Making this the agent who was also the managing agent, would have certain advantages: an agent who would have to deal with any complaints from existing residents might take more care in choosing a sub-tenant.

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\(^{186}\) Assuming that such a restriction may validly be inserted in a CCS: below, text to n 220.

\(^{187}\) Below n 256.

\(^{188}\) Though the restrictions remain enforceable against a sub-tenant regardless of this: Hall v Ewin (1887) 37 Ch D 74 (CA)); and LPA 1925, s 79(2) (see ch 3, nn 78-79 and text thereto for ‘old tenancies’) or L&T(C)A, s 3(5) (see ch 3, n 81-82 and text thereto for ‘new tenancies’). The fact that letting agreements are drawn up by the agent of the flat-owner, rather than the agent of the company with responsibility for the management of the block as a whole, is another aspect of the division of responsibility referred to (below, text to n 189).
This may, however, be difficult to achieve, as nowadays agents seem increasingly to be either managing or letting agents, but not both.

3.6.6 The legislative history of control of lettings under commonhold

The Aldridge Report, and the 1990 and 1996 draft Bills, would have prevented any restrictions on dispositions, save that the 1996 Bill would have prohibited leases of over 25 years. The Aldridge Report arguably had an inconsistent attitude to the letting of units. Any restriction on a unit-holder’s powers of disposition was seen as inconsistent with full freehold ownership; even long leases were not prohibited, and provision was made throughout for leaseholders of units. On the other hand, although the Report does not directly address the issue of whether owners should be resident, its general tenor is that commonhold would be a democratic, self-governing group of owners, serving as required on the management committee, and generally working together for the common good. Nowhere is it recognised that the interests of unit-holders who are residents and unit-holders who are investors may not always coincide. To be fair, when Aldridge was written, the private rental sector was still declining – the shorthold tenancy introduced by the Housing Act 1980 had conspicuously failed to take off, and it was not until the introduction of assured shorthold tenancies by the Housing Act 1988 that the sector began to revive. It would have been difficult for the Aldridge Committee in 1984 to foresee the extent to which the private rental sector would grow, and so probably they assumed that

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189 It may be noted that in recent years two new and separate organisations have come to the fore: The Association of Residential Letting Agents (ARLA) and The Association of Residential Managing Agents (ARMA), though some agents are members of both.

190 Above n 147 and text thereto.

191 Above n 138 and text thereto.

192 Aldridge 6.6, 10.13 - 10.16.

193 Aldridge 4.12, 7.25, 10.6 - 10.9 and elsewhere.

194 Aldridge 1.21, 8.17. Assertions such as ‘In a commonhold, the management of the property will be in the hands of a democratically run commonhold association, composed of the unit owners themselves’ (1.21), or ‘We see the democratic involvement of all unit owners in the management of the commonhold as an important part of the scheme.’ (8.17) seem more consistent with the idea as a community of owner-occupiers, though it must be conceded that it is not inconsistent with the idea that buy-to-let investors may demonstrate equal involvement.

195 Aldridge 8.47 - 8.50.
commonholds would consist predominantly of owner-occupiers, apart from occasional short-term lettings.

The proposals in the Government’s 2000 Consultation Paper\(^{196}\) were inconsistent, and did not properly address this issue. Paragraph 2.4.1\(^{197}\) suggested that only short-term lettings would be allowed: temporary lettings by owner-occupiers, or successive lettings by investors. Only lettings at a premium would have been prohibited, so as not to recreate the problems of long-leasehold. The question asked in the consultation, however, implied that the aim of the restriction was to allow only lettings by owner-occupiers.\(^{198}\) Clarke argues\(^{199}\) that this represented a new justification for leasing restrictions,

namely the idea that the unit holder, who is the member of the commonhold association, should normally reside in the unit and have an interest in the commonhold community as a resident.

But only the consultation question assumes this: the paragraphs that precede it state only that ‘the unit-holder should continue to have the greatest \[sc. economic\] interest

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\(^{196}\) Commonhold and Leasehold Reform: Draft Bill and Consultation Paper (Cm 4843) (August 2000).

\(^{197}\) Consultation Paper 2.4, (p86) reads:

‘1. It is intended to restrict the letting of commonhold units to short term lets. It will not be possible to sell a lease at a premium but it will be possible to let for a limited period at a rack rent.’

2. This is to avoid the possibility that any significant part of the development should turn itself into what amounts to a long leasehold development. The intention in commonhold is that the unit-holder should continue to have the greatest interest in the unit. They should continue to have an incentive to take an interest in the doings of the association and to take part in the setting of budgets and to pay for the good of their own unit and the development in general. Rather, as mentioned above, there should be no long-term occupants of the development whose interest differs from that of a unit-holder.

3. If the intention is to sell a lease at a premium, a unit-holder would, instead, have to sell the unit and their interest in the commonhold association.’

\(^{198}\) ‘Consultees are invited to consider….the appropriate period for the maximum length of a let, balancing the proper expectations of a unit-holder to be able, for instance, to take a foreign posting for their job and to return to their unit in due course, with the need to ensure the policy aim of the restriction. (2.4.4 on p 86).

\(^{199}\) In Commonhold: the New Law at 6.19; there is also a detailed analysis of the evolution of the restrictions on letting of residential units in Clarke on Commonhold at 15[32]-[36]. The current discussion follows that, but with some divergences.
in the unit’ which is also consistent with the unit-holder being an investor. His interests, however, would not always coincide with those of the owner-occupiers. The consultation question muddied the issues.

The debates, both inside and outside Parliament, on these issues are not marked by clear analysis. The original Consultation Paper seemed to assume that imposing a limit on the permitted length of the tenancies would exclude the investor while allowing an owner-occupier to let temporarily. This is wholly unrealistic, given that the vast majority of residential lettings will be on assured shorthold tenancies, and however short the maximum permitted term, an investor can still grant successive tenancies to different tenants or to the same tenant. The average length of assured shorthold tenancies is understood to be about 15 months.

Whatever the ambiguity in the Consultation Paper, the Government assumed that a restrictive policy on lettings was being proposed. Speaking for the Government in the House of Lords debate on the 2001 Bill, Lord McIntosh of Haringey stated that it had originally intended to adopt a highly restrictive policy on lettings, but had moved to a more liberal position in response to pressure from those who said that if ‘buy to let’ were made difficult, commonhold developments would be unpopular. This seems correct, both then and now. But the arguments respectively put forward on both sides of the House simply do not stack up. Lord McIntosh did not make clear how the Government had originally intended to have restricted lettings: restricting

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200 Which is implicit in the first consultation question at 2.4.4 (above n 198).
201 Table 731 on the Website of the Office of the Deputy Prime Minister (updated 28 September 2004) <http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_604123.xls> (accessed 8 November 2004) suggests that 1,470,000 (63%) out of a total of 2,350,000 private sector tenancies were then assured shorthold tenancies, compared with 219,000 (9%) assured tenancies and 138,000 (6%) remaining regulated tenancies. The balance of the ‘tenancies’ seem to be mainly service occupancies, some rent-free, some at a rent. (The reliability of these statistics seems questionable, given that, regulated tenancies decreased - as one would expect - from 272,000 in 1995/96 to 116,000 in 2001/02, but in each year since then there has been an apparent increase in their number!)
202 This is recognised by Clarke on Commonhold 15[33], n 4.
203 P F Smith, Evans and Smith, The Law of Landlord and Tenant (6th edn, London, Sweet and Maxwell, 2002) 315. As this relates to all lettings, the average length of lettings of flats may even be shorter than those of houses.
204 His comments are quoted above n 185.
their length would, for the reasons given, have been largely irrelevant. Lord Goodhart, for the Liberal Democrats, clearly had in mind that his amendment should make owner-occupation the norm within commonhold, with some limited exceptions, though the restrictions to achieve this would have been contained in regulations rather than in the statute. He clearly saw that allowing only short-term lettings would not prevent the acquisition of commonhold units as long-term investments.

205 HL Deb vol 627 col 513 (16 October 2001). Amendment 26 there reads: ‘( ) No term of years absolute may be created in a residential commonhold unit——
(a) for a term exceeding 7 years;
(b) in consideration of the payment of a premium or other lump sum;
(c) which does not comply with such other considerations as may be prescribed.’

206 Ibid: ‘The amendment raises the question of the philosophy behind commonhold. We believe in principle that commonhold should be a form of collective or co-operative ownership, whichever term one wishes to use, for those who live in the property. We all know about the problems which have led to the proposals for commonhold, but those problems apply only to the people who live in the property. From the point of view of investors, it simply represents a different form of investment, and there is no difference in principle between buying leasehold and freehold properties as an investor. They may involve different rates of return and there may be different tax advantages one way or the other, but there is no question of any hardship. Therefore, in the creation of commonhold one is considering the interests of the people who live in the property and who suffer from problems facing those who live in leasehold properties. We accept that unit-holders cannot always be resident in the property. Some people may want to buy a commonhold unit for their retirement, which is not due for a while. Unit-holders may be posted abroad and may wish to retain their property as a place to which they can return when their posting ends. Of course, there may be other reasons why people want to let their units rather than live in them themselves. Therefore, there can be no question of banning a letting. However, we believe that it is important that we do not recreate the existing problems by allowing unit-holders to grant long leases of units, thereby making unit-holders long-term investors rather than occupiers of a property who may have to be away for limited periods of time.’ (Although the present writer would largely concur with this analysis and indeed his sentiments, it is simply not correct to say that an investor in leasehold property may not suffer from hardship as a result of bad management. It is true that the consequences may be to the value of his investment, rather than to the quality of his life, but the investor in a leasehold flat with an OGL may suffer as a result of it).

207 Ibid col 518: ‘There is nothing to stop unit-holders buying a unit in order to rent. They would be perfectly entitled to rent at a rack-rent for seven years and at the end of the seven years re-let again. I believe that that is even potentially a problem [sic]. This issue is important and I would prefer to see
The difference between the Government and Lord Goodhart on this - which was not pressed to a vote - was apparently over whether restrictions on letting should be contained in the Bill or in delegated legislation.²⁰⁸ But Lord Goodhart's amendment would clearly not have achieved his aim. More seriously, with Lord McIntosh of Haringey wishing to allow 'buy to let', whilst Lord Goodhart saw owner-occupation as the norm, it is difficult to accept that they were truly ad idem on this, even when Lord Goodhart insisted that they were.²⁰⁹

It is difficult to suggest just how one would regulate lettings along the lines intended by Lord Goodhart. A requirement that a unit-holder should have resided in a unit before it could be let it would be workable,²¹⁰ but Lord Goodhart acknowledged that some people might wish to buy a unit to occupy on retirement, and need to let it until then.²¹¹ But attempting to legislate on this might have reintroduced some of the difficult and technical distinctions which became crucial when deciding whether lettings fell within the mandatory grounds for possession set out in Part II of Schedule 15 to the Rent Act 1977. Imposing a maximum number of years for which a unit could be let consecutively might discourage investors from 'buying to let,' but even this would exclude owners who wished to retain a property whilst working elsewhere for a long period, or who bought or inherited a property, and did not wish to reside in it until many years hence. In practice it would not be easy to enforce.

Other contributions to the debates were even more difficult to follow. Baroness Gardner of Parkes, in the original Second Reading debate on the 2000

the restrictions on the face of the Bill. Nevertheless, our intention and that of the Government are the same.’

²⁰⁸ Ibid.
²⁰⁹ Ibid.
²¹⁰ Though with some potential for abuse. Under Case 11 in Sch 15 to the Rent Act 1977 ('RA 1977') an owner-occupier could let in the expectation of having a right to recover possession, even though he had not occupied it immediately before the letting in question. Although the owner has genuinely to intend to occupy the property as a residence, it is not necessary for it to be the owner's only or principal residence.
²¹¹ E.g. Rayburn v Wolf (above n 171 and text thereto and follg). Case 12 in Schedule 15 to the RA 1977 made provision for circumstances such as these.
Bill vigorously opposed both any continuation of the leasehold system, and any restrictions on lettings. It is difficult to avoid the conclusion that she failed to appreciate that a short-term tenancy is still a lease, and that having no restriction on leasing would inevitably allow some of the abuses of the leasehold system to be recreated within commonhold.

Under the CLRA, a lease in a residential commonhold unit cannot be created unless the term satisfies prescribed conditions, the detail of which is prescribed by regulation.

### 3.6.7 Restrictions on letting in commonhold as enacted

Under the CLRA, a lease of a non-residential commonhold unit has effect subject to any provision in the CCS. With a residential commonhold unit, a lease cannot be created in it unless the term satisfies prescribed conditions, the detail of which is

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212 Which was lost on the dissolution of Parliament before the 2001 General Election.
213 HL Deb vol 621 col 476 (29 January 2001):
'I strongly oppose the proposed restriction on lettings. It is extraordinary that there should be discussion about the danger of creating a new leasehold system when the failure of the Bill to state that all new constructions should now be commonhold is tantamount to continuing the leasehold system. The Government should be aiming for a position whereby all new constructions of residential unit accommodation are commonhold from now on. I realise that big property interests will be opposed to that proposal. They wish to hold on to the land and to have the right to harvest further profit from it. That is the real strength behind leasehold, if you happen to be the owner. There is no strength behind leasehold if you are the owner of a unit or a flat in a leasehold property.
It is absolutely plain that owners want a completely unrestricted strata title. If someone is going abroad, why should they not be allowed to let their property long-term? The restriction that one can only let for seven years is complicated and nonsensical. I asked for a legal person's view as to what that meant, and that person said, "It looks as though you could then let it again for a further seven years to the same person." There does not seem to be any merit in that restriction.'
214 CLRA, s 17(1).
215 These are prescribed by reg 11 of the Commonhold Regulations, quoted below n 218.
216 CLRA, s 18.
217 CLRA, s 17:

(1) It shall not be possible to create a term of years absolute in a residential commonhold unit unless the term satisfies prescribed conditions.

(2) The conditions may relate to -

(a) length;

(b) the circumstances in which the term is granted;
prescribed by regulation. Although a restriction on letting prescribed by regulation could, alternatively, have simply been included *ad hoc* in the CCS, the latter would have been alterable if the CCS should be amended, whereas the former will be unalterable.

The prescribed conditions provide in effect that a lease in a residential unit may not be granted for a term longer than seven years, or at a premium. These restrictions seem reasonable to achieve the primary purpose of preventing the creation of long leaseholds within commonholds, but they have had the unfortunate effect of that commonhold cannot accommodate the sale of units under the most common arrangements for shared ownership, or the use of ‘Islamic mortgages’. Bearing in mind the drive for large developments to include an element of social housing, the former is a significant disincentive to using commonhold.

Those considerations apart, the question still remains of whether a CCS may impose additional conditions - including an outright ban on the letting of units - or

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(c) any other matter.

218 Regulation 11(1) of the Commonhold Regulations:

'(1) A term of years absolute in a residential commonhold unit or part only of a residential commonhold unit must not—

(a) be granted for a premium;
(b) subject to paragraph (2), be granted for a term longer than 7 years;
(c) be granted under an option or agreement if—

(i) the person to take the new term of years absolute has an existing terms of years absolute of the premises to be let;
(ii) the new term when added to the existing term will be more than 7 years; and
(iii) the option or agreement was entered into before or at the same time as the existing term of years absolute;'

[(d)-(f) not quoted].

Different rules apply if a ‘compensatory’ lease is granted: see CLRA, s 7(3)(d) and s 9(3)(f), and reg 11(2); in particular, the term may be up to 21 years. The provisions in reg 11(1) are included in the model CCS at 4.7.11.

219 See ch 5.

220 Above n 218.

221 See F Larcombe, ‘Commonhold – a quiet revolution’ [2006] NLJ 226 at 227. Such shared ownership arrangements most commonly involve a lease, though this is not the only possible method: see J Driscoll and L Target, ‘A stairway to home ownership’ [2006] EG 175.
may no further conditions be imposed? The fact that section 18 refers to the CCS containing restrictions on letting, but that section 17 does not, could imply that no further restrictions on residential lettings are permissible. Section 17(3) reinforces this impression, by stating that an agreement shall be ‘of no effect to the extent that it purports to create a term of years in contravention of subsection (1)’, without prescribing the effect of an agreement contravening the CCS. On the other hand, section 15(2) states only that a CCS may not prevent or restrict the transfer of a unit, and if it had been intended to bar further restrictions on the leasing of units, this could have been made explicit. Further, section 31(5)(e) provides that a duty imposed by a CCS may include a duty ‘to refrain from entering into transactions of a specified kind in relation to a commonhold unit’. If section 17(1) bars the imposition of further restrictions on the letting of residential units, then section 31(5)(e) would apply only in respect of non-residential units; also, it would be impossible to impose restrictions on lettings of part of a unit which are any more stringent than those on the letting of the whole, a result which it seems unlikely could have been intended. It must, however, be conceded that whether the CCS may contain restrictions on lettings in addition to those prescribed by the Regulations can be argued either way.

If no further restrictions are possible, then a CHA, unlike an RMC, will be unable to exercise any control over the identity of prospective tenants. If, on the other hand, the CCS may impose further restrictions on letting, the scope for controlling lettings under commonhold would seem broadly comparable with that permissible under RMC Leasehold. For example, a provision in a CCS that lettings should not be allowed without the consent of the CHA, such consent not to be

222 These are essentially the arguments for and against put forward in Clarke on Commonhold 15[39], where the authors reach the conclusion that further restrictions on letting are permissible in the CCS. It is suggested in G Fetherstonhaugh, QC, M Sefton, and E Peters Commonhold (Oxford, OUP, 2004) (‘Fetherstonhaugh’), that the CCS could impose further instructions, but the view is based on an earlier (August 2003) draft of the CCS and the point is not considered in detail. T M Aldridge in Commonhold Law (looseleaf edn, London, Sweet and Maxwell, 2002 - ) (‘Aldridge, Commonhold Law’) expresses no view on the point. (C17.1, and 3.2.16 - 3.2.18).

223 As to lettings of part, see below, text to nn 254-257.

224 It should be acknowledged, however, that most long residential leases do not attempt to give the ground landlord any power to control sub-lettings: above, text to nn 163.
unreasonably withheld[^225] would seem identical in its scope to the equivalent provision in a lease. With commonhold, as with RMC Leasehold, it might be desirable to include a term requiring that lettings be arranged through a designated lettings agent, who might be the managing agent of the block. With commonhold the idea of including further restrictions in the CCS may be more attractive than it would be under leasehold, not least because of the comparative ease in updating any restrictions should circumstances change.[^226] The Consultation Paper on the Regulations[^227] floated the possibility that the Regulations might, for example, require that a letting should not be a holiday let or a student let, a suggestion which drew little support in the responses.[^228] This is hardly surprising, as clearly such blanket restrictions in all commonholds would have been inappropriate.[^229] A more useful question would have been whether it should be possible for a CCS[^230] further to restrict lettings. There seems to be no reason why, for example, the developers of a block of flats in a seaside town should not set up a commonhold with a CCS which permitted or forbade holiday lettings, as best they judged the market.

[^225]: As the position would not be governed by the Landlord and Tenant Act 1927, s 19, a proviso that consent should not be unreasonably withheld would not be implied.
[^226]: See ch 5, text follg n 152.
[^227]: LCD Consultation Paper Proposals for Commonhold Regulations (October 2002) para 140.
[^228]: From only 4 out of 22 respondents who answered this particular question: Analysis of the responses to an LCD consultation paper 'Proposals for Commonhold Regulations' issued October 2002, (Department for Constitutional Affairs ('DCA'), August 2003).
[^229]: Both of these suggested restrictions would have been difficult to enforce, because of the difficulty in defining what was meant by the terms. Would 'student' for example, have included postgraduate, part-time and mature students? What would be the position where a student was married or living with someone who was employed? The difficulties surrounding whether a tenancy is or is not a 'holiday let' for the purposes of the RA 1977, s 9 were explored in cases such as Buchmann v May [1978] 2 All ER 993 (CA), McHale v Daneham (1979) 249 EG 969 (Cty Ct) and R v Rent Officer for London Borough of Camden, ex p Plant [1981] 1 EGLR 73 (QBD) (see e.g. discussion in Hill and Redman C[379] - C[380]). A prohibition of 'holiday lets' may be otiose, if the permitted use is as a 'private dwellinghouse': Caradon DC v Paton and Bussell [2000] 3 EGLR 57 (CA); but quaere would 'residential' use exclude holiday lettings? Possibly not.
[^230]: This, of course, assumes that s 17(1) permits this; if it does not, then any restrictive provision in a CCS would be void.
3.6.7.1 Distinguishing residential and non-residential units

Notwithstanding the uncertainty of the law on the letting of residential units, the law relating to the letting of non-residential units is clearly different. The line demarcating the two should be carefully noted. If a commonhold consists of a mixture of residential and non-residential units, section 17 will apply to the former, and section 18 to the latter. Which a unit is may not always be easy to determine. Section 17(5) defines the distinction in terms of the use permitted by the CCS, a unit being ‘residential’ if it is required to be used only for residential purposes, or for residential and other incidental purposes: though a reasonable definition, its implications may not have been fully thought through. The typical flat will clearly be ‘residential’, even if the unit also includes a garage, as that use would be ‘incidental’ to the residential use of the flat. If, on the other hand, garages or parking spaces are treated as separate units, they would apparently not be ‘residential’, and would therefore be subject only to any letting restrictions contained in the CCS, and not those prescribed by regulation.

It will not always be straightforward to assess what ‘residential and other incidental purposes’ may be. They will clearly include the unit which comprises both a flat and a garage (or parking space), and the flat which a unit-holder is permitted occasionally to use for business or professional purposes: for example, the medical practitioner who sees the occasional patient at home, or the business person meeting an occasional client. The use of the word ‘incidental’, however, would seem to take outside the definition a unit which may be used for residential and business purposes. The current vogue for local authorities to grant planning permission for

\[\text{At least so long as the garage was used for a private car kept by the unit-holder or a member of his household.}\]

\[\text{Compare the position of the medical practitioner tenant in } \text{Royal Life Saving Society v Page [1978] 1 WLR 1329 (CA), who was permitted to use his flat for occasional consultations, but very rarely did so. In view of the difficulty in determining what is occasional use, leases often contain an outright ban on using a flat for business purposes.}\]

\[\text{It would appear that developers can more easily obtain planning permission to convert disused commercial properties to ‘live-work’ units than to purely residential units, on the assumption that this is encouraging employment as well as providing homes. Whether this is in fact the case seems doubtful.}\]
former commercial buildings to be converted into ‘loft-style’ apartments, which may be described as ‘live-work units’, means that such units will be governed by section 18 rather than section 17. As in such cases there is nothing in the CLRA itself to restrict leasing, it will be necessary for restrictions to be included in the CCS, otherwise it would be possible for a lease of any length to be granted, or even a lease at a premium at a ground rent, or at a nil or peppercorn rent. It is understandable that the length of non-residential lettings has not been generally restricted, but there seems no good reason why the taking of premiums should not have been prohibited on the letting of all commonhold units, especially when units may in practice be residential, but not be treated as such because of a wide potential user clause.

3.6.8 Ensuring tenants are aware of restrictions

It has been noted that a provision in a lease requiring consent to sub-letting could be used to ensure that sub-tenancy agreements include relevant terms of the lease, so that they are brought to the attention of sub-tenants. This desirable objective should be covered when a tenancy is granted of a commonhold unit, as the model CCS requires a unit-holder, before granting a tenancy, to give to the prospective tenant a copy of the CCS, and a notice informing him that, if he takes the tenancy, he will be required to comply with the paragraphs in the CCS that impose duties on him. If tenants are not given the notice, they will still be bound by such provisions of the CCS as affect them, but, if they suffer loss as a result, they will have a claim in damages against their landlord, the unit-holder. With a leasehold development,

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235 Above, text to n 188.

236 They will of course be bound by restrictive covenants in any event, under the principle in Hall v Ewin (1888) 37 Ch D 74 (CA).

237 CCS, 4.7.12(a).

238 Form 13 Notice to a prospective tenant must be used: CCS, 4.7.12(b). Similar provisions apply in the event of the assignment of a lease of a unit: CCS, 4.7.16.

239 CCS, 4.7.13 - 4.7.14; for the corresponding position where a tenant assigns without giving notice to the assignee, see 4.7.17 - 4.7.18.
covenants which are restrictive will be binding on occupiers, even without notice, but this will not be the case with commonhold, which can be seen as a shortcoming of the CLRA.

3.6.9 Enforcing controls on lettings

Assuming that the CCS can include further restrictions on residential lettings, when it comes to their enforcement the CHA is in a weaker position than an RMC in two respects.

First, if a leaseholder sub-lets in breach of a restriction, the lease becomes liable to forfeiture. The breach would be irremediable, and, if flagrant, relief might in theory be refused; but, as forfeiture is likely to be a disproportionate remedy, refusal of relief seems unlikely. If relief were granted, it would in all probability be granted on condition that the leaseholder undertook not to sub-let again, so as to serve as a warning to the leaseholder. If a unit-holder in a commonhold lets in breach of a provision of the CCS, however, the only remedy open to the CHA - after going through the protracted dispute resolution procedure of the CCS - would be to seek an injunction against the unit-holder.

Second, although the CCS may be able to control lettings, it cannot control dispositions. If the consent of an RMC is required for an assignment, and the leases also prohibited sub-letting, it would, it seems, be entitled to refuse consent to an assignment to a purchaser who was clearly proposing to 'buy to let'.

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240 Mander v Falcke [1891] 2 Ch 554 (CA); LPA 1925, s 79 (old tenancies); L&T(C)A, s 3(5) (new tenancies) (see ch 3 - text to nn 86-87).
241 An undertaking by the lessee not to underlet or assign without consent in the future was required as a condition of relief in the rather different circumstances of Mount Cook Land Ltd v Hartley [2000] EGCS 08 (and Lexis, 11 February 2000) (Ch).
242 See CCS, 4.11.10 - 4.11.16.
243 CLRA, s 15(2).
244 Or possibly if it allowed sub-letting only subject to narrowly circumscribed conditions which would clearly not be satisfied e.g. temporary sub-lettings by those who had previously been in occupation.
245 Such a case would be distinguishable from the situation in Rayburn v Wolf, (above n 171), in that there the leases envisaged and allowed sub-letting, subject to the landlord giving consent. Ashworth Frazer Ltd v Gloucester City Council (above n 177) confirms that consent to assignment could be refused where the proposed assignee would be likely to breach the terms of the lease.
other hand, in a commonhold which prohibited or restricted lettings,\(^{246}\) the CHA would be powerless to stop the transfer of a unit to a purchaser who was highly likely to flout the restrictions, even though after transfer it might have to go to considerable trouble and expense to ensure compliance with them.

3.6.10 Should controls over lettings have any place in commonhold?

No commentator has argued that it should be possible to grant long residential leases within a commonhold. With short lettings opinions differ. Some would no doubt question whether being able to control lettings is desirable. Clarke considers that:

the idea of commonholds being less viable when primarily occupied by tenants of unit-holders involves a failure to see this new form of landholding being used other than as a simple replacement for owner-occupiers who currently reside, often unhappily, in flats with long-leasehold tenure. In other jurisdictions, it is quite common for strata title units to be developed primarily for purchase by investors who then rent out the units. The management of such units is undertaken not by the members themselves (on an unpaid basis) but by professional agents who market their expertise in running such developments.\(^{247} 248\)

It is unclear from this whether the ‘professional agents’ are managing the block or the units, or both. It is widely recognised that in England and Wales, as a result of the growth of RMC Leasehold blocks, blocks where leaseholders have exercised the Right To Manage, and perhaps, in future, commonholds, managing agents have to adjust to the likelihood that their principals, who will be hiring and firing them, will be the residents - or perhaps more accurately, the owners - rather than a property company as ground landlord. But the discussion both of RMC Leaseholds and any future commonholds seems to overlook that the block is likely to run more smoothly if the managing agent is also responsible for arranging lettings.

The author has reservations about whether commonhold is to be encouraged in the circumstances envisaged by Clarke: when it is not a community of owner-occupiers, but a vehicle for investment. It does not seem to be what Aldridge

\(^{246}\) Assuming this is possible: above, text to n 220.

\(^{247}\) Clarke on Commonhold 15[33].

\(^{248}\) One may note, however, that the presence of a majority of investors among the unit-holders was seen as significant contribution to the problems experienced by the Strata Plan in the case study in Sze Ping-fat, ‘Strata Title Management in New South Wales’ (1998) 17 Trading Law 306 at 320.
originally envisaged. One may ask whether it matters. In the author’s view it does. Those who have purchased a flat, and are likely to stay, are likely to have a greater incentive to get on with their neighbours than do tenants. Many investors will wish to maximise their short-term profits at the expense of the long-term interests of the block. It must be conceded that commonhold avoids one of the difficulties inherent in sub-lettings of within leasehold, where the obligations that ought to be implied over maintenance of the common parts - and would be implied if they were vested in the lessor of the flat - cannot be implied where the common parts are not vested in the actual lessor of the flat. Under commonhold, a tenant can enforce obligations contained in the CCS. Furthermore, letting by individual investors almost invariably entails having an undesirable separation of the functions of the letting agent from those of the managing agent. The agent who is managing a block and also has to find and vet tenants, is more likely to chose tenants who will live in harmony with their neighbours and not make management more difficult. The letting agent at present has no concern except to maximise the return for his principal.

To facilitate private investment by individuals in residential property and promote coherent management, it would be better for a block to be owned by an investment company, for the company to manage it and let it (or arrange for a single agent to undertake both tasks), and for each investor to own shares in the company. The taxation implications of such an arrangement would, however, be very different, and in the present market it seems unlikely either that a group of investors would set up such a development either from scratch, or by purchasing the whole of a newly-built block from a property developer. How this could be achieved, perhaps by taxation incentives, is beyond the scope of this study. If it is argued that the rents attainable in an entirely tenanted block would be lower than in a block with some owner-occupiers, then the corollary would seem to be that capital values of flats in an

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249 Above n 194 and text thereto.

250 LTA 1985, s11(1A).


252 The position with regard to both RMC Leasehold and commonholds is discussed further in ch 3 at text folig n 29 and text to n 38 respectively.
entirely owner-occupied development would be higher than in a block where letting was permitted.\textsuperscript{253}

3.6.11 Letting of part units

Although only a minority of long leases of flats attempt to restrict sub-lettings of the whole of the property demised by the lease, most such leases contain a blanket prohibition of sub-letting part of the premises. There are several reasons for this. First, all landlords, including RMCs, will be reluctant to allow the over-intensification of use of flats. When it occurs it can indicate that a block is deteriorating, so other flats in it become less saleable. This is, however, difficult to monitor. Leases will frequently state that the lessee should not ‘share possession’ of the demised property with anyone, but this can be difficult to define. If possession is viewed in its strict legal sense, a lessee will not be treated as having parted with possession if lodgers or ‘flat sharers’ are also in occupation,\textsuperscript{254} nor will such an arrangement usually amount to a formal sub-letting. In commercial leases a provision that the lessee should not share possession may be reinforced with a provision not to share occupation.\textsuperscript{255} Although this wording is sometimes to be found in long residential leases, it is likely to be inappropriate, as on its literal wording it would prevent the lessee from sharing a flat with even a spouse or family member.

If, as has been previously argued, it is possible for a CCS to restrict lettings to a greater extent than as prescribed by the Commonhold Regulations,\textsuperscript{256} then clearly lettings of part of a commonhold unit may be restricted to the same extent as a sub-letting of part of demised premises. Indeed, as there is no other restriction on lettings

\textsuperscript{253} The writer is aware of a block of flats in Birmingham (OGL, not RMC), some of whose owner-occupier leaseholders have resisted moves by other leaseholders to vary the leases in the block so as to allow sub-letting because of the problems this has caused in an identical adjacent block.

\textsuperscript{254} See, for example, Street v Mountford [1985] AC 809 (HL); AG Securities v Vaughan, Antoniades v Villiers [1990] AC 417 (HL); Aslan v Murphy (No 1) and (No 2), Duke v Wynne [1990] 1 WLR 766 (CA); Bruton v London & Quadrant Housing Trust [2000] 1 AC 406 (HL). These are discussed at length in most textbooks on Land Law.

\textsuperscript{255} Considered in Mean Fiddler Holdings Ltd v Islington London Borough Council [2003] EWCA Civ 160, [2003] All ER (D) 218.

\textsuperscript{256} See previous discussion of reg 11: above, text to nn 222-223.
of part, it would seem advisable that further such restrictions should be included in the CCS. If it is not possible to restrict lettings, then it would not be possible to restrict lettings of part.

3.6.12 Particular considerations relating to retirement flats

With leasehold flats in general, restrictions upon assignment of the whole are comparatively rare, though certainly not unknown. They are, however, frequently found with retirement flats, where some control over who should be eligible to live within such developments will be desirable for several reasons. The first is the desire for cohesion within a block. Small units are likely to appeal either to elderly purchasers, or to young people without children. Their lifestyles may not be compatible, and this may cause conflict. It is perhaps unlikely that a person under the relevant age would wish to purchase a retirement flat for his or her own occupation, because although the price of a typical small unit might be low, generally service charges have been much higher than in other blocks. This may, however, not always be so, now that some retirement blocks do not offer the services of a ‘warden’ or ‘resident manager’ but rely instead on outside emergency call services. If no support services are offered, then retirement flats may be seen as a cheap housing option, leading to the need actively to enforce an age restriction.

Another consideration is that of planning requirements. Many local authorities have traditionally been willing to relax the parking facilities required for

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257 Transfers of part will require the consent of the CHA, given by special resolution: CLRA, s 21(2)(c), and s 21(8), applying s 20(4).
258 Above, text to nn 163-183.
259 I.e. flats intended for occupation by persons over retirement age – often 55 – and usually having a ‘resident manager’, and often also facilities such as a communal lounge, guest-rooms, and laundry facilities.
260 To some extent this can be a problem in any block of flats, as purchasers tend to be at either end of the age spectrum.
261 The charges will usually be higher, to cover the cost of communal facilities, and will be substantially higher if a resident manager and relief staff are to be employed.
262 These emergency call services may be run by the local authority, or by a private agency, and may even be available to the population, or elderly population, at large.
263 And emergency support services are optional and billed separately.
retirement flats, and thus have an interest in ensuring that such flats are not occupied by younger people who are likely to put undue demand on parking facilities.

The difficulty is that, although it has for many years been accepted that different parking standards can be applied when granting planning permission for retirement developments, such distinctions would seem to run counter to more general principles of planning policy. For example, the Department of Environment Circular 11/95 contains guidance which, at face value, would suggest that planning permission ought not to be granted when it is granted only because the permission contains conditions restricting occupation to persons over a certain age. More recent guidance, however, seems more permissive on the issue. More recent guidance issued in March 2000 allows for and enjoins relaxation of the requirement to provide car-parking - though this still seems in conflict with Circular 11/95.

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264 Usually, but not always, blocks of flats.

265 Para 26: 'A condition should not be imposed if it cannot be enforced.'

Para 27: 'Sometimes a condition will be unenforceable because it is in practice impossible to detect a contravention. More commonly it will merely be difficult to prove a breach of its requirements. For example, a condition imposed for traffic reasons restricting the number of persons resident at any one time in a block of flats would be impracticable to monitor, and pose severe difficulties in proving contravention.'

Para 32: 'Similarly, conditions restricting the occupation of a building should not set up a vetting procedure for prospective occupants.'

Para 92: 'Since planning controls are concerned with the use of land rather than the identity of the user, the question of who is to occupy premises for which permission is to be granted will normally be irrelevant. Conditions restricting occupancy to a particular occupier or class of occupier should only be used when special planning grounds can be demonstrated, and where the alternative would normally be refusal of permission.' (Circular 11/95 (Department of the Environment, 1995)).

It is difficult to see that a condition restricting occupancy to those over a certain age complies with this guidance.

266 Planning Policy Guidance PPG3, (Department of Environment, Transport and the Regions, March 2000) states:

Para 59: 'Local authority requirements for car parking, especially off-street car parking, are also a significant determinant of the amount of land required for new housing.'

Para 60: 'Car parking standards for housing have become increasingly demanding and have been applied too rigidly, often as minimum standards. Developers should not be required to provide more off-street car parking than they or potential occupiers might want, nor to provide off-street car parking
Developers and managers of retirement flats do usually impose some restriction on assignment, and this *ex ante* restriction helps to mitigate any shortcomings in *ex post facto* regulation by the local authority under planning law. As a condition of giving licence to assign, managers\(^{267}\) may require the production of a birth certificate, and even need to be satisfied by interview and/or medical report that the intended occupier is capable of living independently\(^{268}\) and ‘fitting in’ with the community. This is inevitably a somewhat imperfect safeguard, as to insist that the lease be *owned* by someone who fulfils the age criteria would exclude cases where a flat is purchased on behalf of an elderly person by a son or daughter, or a family trust; it is nevertheless more than would be possible under commonhold, where there is nothing to prevent a unit from being transferred to someone who neither satisfies the criteria to occupy it personally, nor is purchasing it for occupation by someone who does. The CHA would therefore have to enforce any relevant use restrictions *ex post facto* by the internal dispute procedure, or ultimately by taking court proceedings – a process which may be as difficult as would be enforcement of planning conditions by the local authority. Leasehold rather than

\[\text{where there is no need, particularly in urban areas where public transport is available or there is a demand for car-free housing...}^3\]

Para 61: ‘Local authorities should revise their parking standards to allow for significantly lower levels of off-street parking provision, particularly for developments:

- in locations, such as town centres, where services are readily accessible by walking, cycling or public transport;
- which provide housing for elderly people, students and single people where the demand for car parking is likely to be less than for family housing’

\(^{267}\) Freehold houses intended to be occupied by persons of retirement age would have to rely on planning controls, or restrictive covenants. *Clarke on Commonhold* 3[5] suggests ‘such [sc. age] restrictions can be found in the form of restrictive covenants in ordinary freeholds.’

\(^{268}\) This criterion is of decreasing importance, and may not now be insisted upon, as the policy of providing ‘Care in the Community’ means that many residents of retirement housing complexes may be in receipt of visits from carers provided by Social Services, community nurses, and so on. Nevertheless the approval procedure may still be used to ensure (a) that prospective residents appreciate that services such as those mentioned have to be obtained from outside agencies, not from the resident manager and any staff and (b) that leases are not assigned to those who really need full-time residential or nursing care, and not sheltered accommodation.
commonhold may thus be a more workable method of enforcing the restrictions applicable to retirement developments.

Leasehold tenure may also retain an advantage for the funding of retirement developments. Most fund their overheads by a service charge exactly as in any other block of flats. A few, however, moderate their service charges by charging a flat-rate levy - usually 1% - on the sale of a flat. This is then put into a sinking or reserve fund, so reducing the amount required from the annual service charge. This method of funding - which bears heavily on the owner who stays only a little while, and then wishes to move on - can nevertheless be popular, on the basis that it will be payable only when the leaseholder either dies or moves into a residential home, and so suit those elderly people who are 'asset rich, income poor'. If commonhold were adopted, it would not seem possible to supplement the commonhold contributions in a similar way.

Although it is suggested by Clarke that commonhold is suitable for retirement complexes, and will become the common tenure for them, the present writer is less convinced. Prospective purchasers who have been used to owning freeholds may, as Clarke says, prefer not to have leasehold tenure; but it remains to be seen whether it will prove practicable to 'buy in' appropriate management. Most retirement blocks seem to be managed by one of a limited number of specialist companies, managing blocks owned by associated companies, which may not be prepared to undertake the management of a retirement block on behalf of an RMC or

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269 Above n 261.

270 The writer has heard of one retirement development where the levy on sale is 12½% (personal information).

271 It should be noted that the levy, if of a fixed amount, or a fixed proportion, such as 1%, does not fall within the definition either of a 'service charge' (as defined by LTA 1985, s 18) or a 'variable administration charge' (as defined by CLRA, sch 11, para 1(3)(a) and (b), and given effect by CLRA, s 158) and will not therefore be subject to the requirement of reasonableness, and review by the LVT. The writer is also aware of a leaseholder who felt the injustice of having to pay this levy when moving from one flat to another flat in the same development!

272 See Clarke on Commonhold 3[5]. There is some discussion there of the issues involved. It is suggested there that a restriction on use to occupation by those over a certain age would be possible, and would not amount to a fetter on disposition, or conflict with the Human Rights Act 1998.

273 Peverel Management Ltd seems one of the best-known.
a CHA. Non-specialist managing agents may have difficulty coping with the management of retirement blocks, which are more likely than ordinary blocks to involve the employment of resident managers and the management of communal facilities. But presumably if the demand is there, some companies will be willing to fulfil it.

There also remains the question of how far elderly homeowners will be able or willing to become directors of a CHA. Although younger retired people are often the mainstays of the boards of RMCs, few retirement blocks as such seem to have enfranchised. If this is merely because they see less point than ordinary blocks in undertaking that trouble and expense, commonhold may be used for the future. If, on the other hand, they do not enfranchise because of fears that insufficient leaseholders will be willing to become directors, this would not augur well for the use of commonhold for retirement communities.

These final points of comparison - whether one can buy in appropriate outside management, and whether residents would be willing to serve as directors - may not strictly be relevant to this study: they are arguments in favour of OGL Leasehold, and as such apply as much against RMC Leasehold as against commonhold.

Comparisons with overseas jurisdictions may be misleading: a subjective impression would lead one to believe that in, for example, Florida or California, very active retired people may choose to live in a 'retirement community' which offers extensive facilities for leisure activities and socialising. Most blocks of retirement

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274 And indeed sometimes undertake the management of blocks without engaging managing agents.
275 Even on the basis of the directors 'buying in' outside management.
276 Although this reservation would not apply to the earlier discussion of restrictions on dispositions, or funding by capital levies.
277 For example Rossmoor Leisure World, Laguna Hills, California is described in ch 1 of ME Hunt and others, Retirement Communities: An American Original (New York, Haworth Press, 1984). It is a 'retirement new town' which opened in 1964 and includes 13,000 dwellings. It includes 85 mutuals – some co-operatives, some condominiums – ranging in size from 50 to 650 units. A non-profit corporation owns and operates the community property. There are extensive recreational facilities, places of worship, and medical facilities. It seems inconceivable that such a community could be established within the parameters of the CLRA, or that planning permissions would be granted for such a community within current guidelines in the United Kingdom.
flats in the United Kingdom, on the other hand, are in individual blocks or small complexes, usually with between 25 and 50 units, and offer little in the way of communal facilities apart from a common room, laundry and guest rooms. As such they are a 'half-way house' between elderly people being able to live completely independently in the community, possibly with some help from Social Services and community nurses, and living in a residential or nursing home. For commonhold to work for a retirement block would seem to depend on sufficient residents being drawn from the ‘active retired’ who are prepared to become directors of the CHA and undertake the responsibility for at least engaging and ultimately supervising the managers. There is little to indicate that this is the case in the United Kingdom. The experience of overseas jurisdictions may not therefore be directly relevant.

4. CONCLUSIONS
This chapter began by reviewing the origins of commonhold, and argued that the Aldridge Committee wrongly focused on the wasting nature of the lease as the fundamental defect in OGL Leasehold, when in fact the ‘mismatch’ between the financial stake of the ground landlord in a building and the ground landlord’s powers is more fundamental. It suggested that the existence of RMC Leasehold was not within the sights of Aldridge. In both commonhold and RMC leasehold all the ‘sticks in the bundle’ of ownership to the building must be held either by the flat-owner individually or by the owners collectively. Acknowledging the existence of RMC Leasehold would have drawn out more clearly that how those sticks are allocated is and was of crucial importance. The imbalance in leasehold between the powers of the leaseholder and those of the landlord could become an advantage when the landlord is an RMC.

Neither leasehold nor commonhold is intrinsically more suitable per se for horizontally divided buildings, as a ‘flying leasehold’ could be as unacceptable as a ‘flying freehold’: it is only by ensuring that the burden of positive obligations runs with the land that either becomes acceptable. The designation of a tenure carries

274 ‘Housing for sale’ gets only a brief mention in A Butler, C Oldman and J Greve, Sheltered Housing for the Elderly (London, George Allen & Unwin, 1983) 146-8: ‘A number of private developers have begun to explore the possibility of providing sheltered housing.’ The market has clearly considerably expanded since this book was published.
considerable emotional import. A flat which can be described as freehold - albeit a specialised kind of freehold - is likely to be more attractive to a prospective purchaser than one which is leasehold, which has, over the years, become popularly associated with various disadvantages. In the case of RMC Leasehold, however, the theoretical limitation by time ought not to be seen as a particular disadvantage: the RMC will always be able to extend the leases without requiring a premium, and ownership is practically limited by the life of the building. The association of leasehold with financial obligations is largely irrelevant to our comparison: ground rents are usually nominal, and, just as the lease will involve a service charge, so will a commonhold involve commonhold contributions.

The possibility of forfeiture is likely to be viewed as a substantial disadvantage of leasehold. So long as forfeiture continues in its present confiscatory form, or as was proposed in CP No 174, leasehold may well be seen as unacceptable. On the other hand, if forfeiture of long leaseholds were replaced by an order for sale, as proposed in Law Com No 303, the pans of the scale would become more evenly balanced - a flat-owner might be prepared to accept the lesser risk in the knowledge that the remedy would also be available if a neighbour flagrantly disregarded the terms upon which he or she had agreed to occupy their home. This distinction is, as commonhold is currently enacted, intrinsic to the difference between commonhold and RMC Leasehold; the existence of provisions for forced sale in other legal systems would suggest that need not be seen as incompatible with commonhold, but the primary legislation would need amendment.

Although a matter of practice rather than of law, the way that the Land Registry treats commonhold can be seen as illustrative of the point that, although in legal theory the estate that a unit-holder holds in a commonhold is a freehold estate, it is in many respects a subsidiary or dependent estate, lacking the independence characteristic of an ordinary freehold.

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270 They may be nil, and will be nil if a lease is extended under the LRHUDA, s 56(1).
280 Whether this is to make financial contributions or to observe the other terms of the CCS.
281 Because of CLRA, s 31(8).
282 See ch 3, n 281.
The distinction between commonhold and RMC Leasehold becomes most marked when considering the ability to restrict dispositions. Discussion of this is complicated, because, with RMC Leasehold, requiring licence to assign is possible, but not common; with RMC Leasehold, requiring licence to sub-let is more common; and, in commonhold, restraints upon transfers and restraints upon letting need to be separately considered. Restraints upon transfer are prohibited by primary legislation, although the commonhold scheme could have not included this, to have provided otherwise would go to the root of the concept of freehold ownership. Restraint upon transfer therefore sits more easily in RMC Leasehold. To need the consent of one’s neighbours on the acquisition or disposal of a flat, may not appeal to everyone, but it is a concept that has a continuing attraction in housing co-operatives in the United States, and, it seems, for some flat-owning companies in New Zealand. It may have an appeal, at least to a minority in England and Wales, as a way of providing for more cohesive and regulated communities of flat-owners.

In view of the uncertainty as to whether a requirement for consent to letting may be included in the CCS, it is difficult to compare the respective positions of commonhold and RMC Leasehold; but on the assumption that restrictions on letting are permitted, there would seem little to differentiate the controls on letting that would be permitted under commonhold from those under RMC Leasehold. Controls on letting may nevertheless be more effective in RMC Leasehold than in commonhold: first, because of the existence of the sanction of forfeiture; second, because, if combined with a requirement of licence to assign, one can then ensure that the lease is not assigned to someone who is likely to sub-let in breach. If it is not possible to include restrictions on letting in a CCS, including lettings of part, this is a substantial difference between commonhold and RMC Leasehold, and can be seen as a significant disadvantage of commonhold.

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283 CLRA, s 15(2).
284 Future neighbours, in this case.
285 Above, text to n 225.
286 Contrary to the view taken above, text to nn 220-223.
Finally, for the various reasons given, leasehold - and quite probably OGL Leasehold, rather than RMC Leasehold - is likely to remain a more appropriate form of tenure than commonhold for retirement flats.
Chapter 3: The Enforcement of Obligations

1. THE IMPORTANCE OF ENFORCING OBLIGATIONS

As was outlined in Chapter 1, the enforcement of covenants, especially positive covenants, is the reason for the use of the leasehold system for the sale of flats. The modern restrictive covenant can be traced back to *Tulk v Moxhay* in the middle of the nineteenth century. For a time there was a period of uncertainty as to whether *Tulk v Moxhay* might be extended to allow the burden of positive covenants to run, but *Haywood v Brunswick Permanent Building Society*, and *Austerberry v Oldham Corporation* respectively established that the burden of a positive covenant could not run with freehold land in equity and at law. The belated attempt in *Rhone v Stephens* to persuade the House of Lords to overrule the latter decision was unsuccessful. It was to overcome this lacuna that leasehold became the near-universal tenure for flats. Although Clarke does not identify the ability to enforce positive obligations as a defining characteristic of commonhold, the present writer has suggested that it is.

In any form of communal ownership there will be a greater degree of interdependency between owners (and occupiers) than in a development of freehold.
houses. Horizontal division inevitably requires positive obligations to maintain and to rebuild – the latter in practice undergirded by an obligation to insure – if legal estates which are not ‘grounded’ are going to exist as meaningful long-term interests. The ‘internal box’ model usually adopted within RMC Leasehold, and compulsory for flats within commonholds casts the obligation to maintain the main structure – foundations, load-bearing walls, and roof – upon the body corporate. Additionally, if the flat-owners are to enjoy the environment and amenities that they expect, the body corporate will have generally to maintain the common parts: in a modest block this may require little more than that the interior of the common parts be decorated, cleaned and lit, but, in a more elaborate development, the communal obligations may include the upkeep of roadways, parking areas and gardens, the provision of leisure facilities, and the employment of porters and other staff. Some mechanism will be necessary to ensure that the body corporate will provide these, and that the flat-owners contribute their due proportion of the expenses that are incurred.

In any flat development, positive and negative obligations will be imposed on flat-owners beyond the obligation to make financial contributions. Generally the negative are the most numerous: not to cause undue noise or other nuisance, not to keep pets, not to obstruct the common parts, etc. They may also forbid the subdivision of the unit, and restrict the letting or even the transfer of the unit. Positive obligations may typically require a flat-owner to keep the interior of a flat in repair, to keep the main door of the block closed and locked, and to keep all floors carpeted. One then has to consider whether only the body corporate, or additionally any flat-owner, should be able to enforce all or some of these obligations. If obligations may be enforced by a flat-owner, then one will also have to consider whether all or some should be enforceable by renting tenants and by licensees; and similarly whether renting tenants and licensees should be able to enforce obligations.

Although flat developments are treated as the archetype here, there is not necessarily a bright line to be drawn between flat developments, and developments of other types of buildings. Even a development of detached houses may be dependent upon the provision of facilities such as a common driveway, or a combined private sewerage system. Prior to the Leasehold Reform Act 1967, such

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9 See ch 2, text to nn 76-84.
developments would have tended to be leasehold, a device which has proved unsatisfactory since that Act. Since then, the estate rentcharge has been the preferred model, but because of its shortcomings, the promoters of such developments now have the option of using commonhold. If commonhold becomes more widespread for flats, it may eventually be adopted as well for developments of houses with communal facilities, which may indeed become increasingly elaborate, with communal leisure facilities and perhaps security measures, so that they resemble the ‘gated communities’ in the United States. But a comparison of commonhold with the estate rentcharge model is largely beyond the scope of this study, as it is unlikely that a developer would choose RMC Leasehold for a development including houses.

This chapter of this study falls into two unequal parts. It examines first how obligations are enforced within a RMC Leasehold development, and within a commonhold, and compares the two. Thus the first part of the chapter will consider the legal nexuses – whether party A has a right to enforce against party B. It then goes on to consider the subsidiary issue of why the model CCS made as Schedule 3 to the Commonhold Regulations has encouraged what will be termed ‘indirect enforcement’. The second part of the chapter then considers the possible remedies available, and in particular will consider whether forfeiture is an important weapon to have in the armoury when enforcing obligations within an RMC Leasehold development, and whether some equivalent procedure should have been included within commonhold.

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10 Commonhold Regulations, reg 9(1)(b).
12 See S Bright ‘Rentcharges and the Enforcement of Positive Covenants’ [1988] Conv 99 at 103 which makes the point that it is not clear that contributions towards sinking funds, or even advance payments, can validly be collected via an estate rentcharge. Orchard Estate Management Ltd v Johnson Security Ltd [2002] EWCA Civ 406, [2002] All ER (D) 413 (CA) (see S Bright ‘Estate Rentcharges and Reasonableness’ [2002] Conv 507) is believed to be the first reported case on the estate rentcharge provisions of the Rentcharges Act 1977 but does not answer either point.
In considering the legal nexuses the possible permutations become quite complex, as one needs to consider in turn whether positive obligations can be enforced by the body corporate against owners, and then against renting tenants and other occupiers of the flat; and then to do the same for the enforcement of negative obligations. The entire process then needs to be repeated, for both positive and negative obligations, on the assumption that enforcement is not by the body corporate, but by another owner, or even the renting tenant or occupier of another flat. A summary of who it is concluded may enforce negative and positive obligations against whom, under leasehold (including RMC Leasehold) and commonhold, is to be found in the Table at the end of this chapter on page 124.

1.1 A note about terminology
In comparing who is bound by and able to enforce obligations in RMC Leasehold and commonhold schemes, it should be borne in mind that in RMC Leasehold schemes the owners of units will be ‘leaseholders’, and their tenants will be ‘sub-tenants’; in commonhold schemes the owners of units will be ‘unit-holders’ and their tenants will be ‘tenants’. ‘Owners’ will therefore include both leaseholders and unit-holders. ‘Renting tenants’ will therefore be tenants in a commonhold, but sub-tenants in an RMC Leasehold scheme. Although arguably tautologous, the term ‘renting tenant’ will be used where clarity requires it. In both types of scheme there may additionally be ‘occupiers’ who do not have an estate in the unit. These will be licensees, commonly family members, or flat ‘sharers’, or lodgers, but including also service occupiers. The term ‘body corporate’ can refer either to the RMC or to the CHA.

Whilst leases contain ‘covenants’, the CCS does not; although it has to be in a prescribed form, it does not have to be a deed, so the obligations that it contains cannot therefore be ‘covenants’. The CCS itself refers to its making provision for ‘duties’. Where an expression needs to encompass both it seems best to refer to such covenants and duties as ‘obligations’.

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13 Referred to as ‘unit owners’ in Aldridge, and the 1990 and 1996 draft Bills.
14 CLRA, s 31(2).
15 CLRA, s 31(1).
2. ENFORCEMENT BY BODY CORPORATE OF OBLIGATIONS

2.1 Enforcement by body corporate of positive obligations

2.1.1 against owner (and vice versa)

2.1.1.1 under leasehold

As one cannot ensure that the burden of positive covenants passes to successive owners of freehold land, it has, as previously noted, become the well-nigh universal practice that the ‘sale’ of flats is by long lease. This ensures that because of the privity of estate between the leaseholder and the ground landlord, the former can enforce the covenants on the part of the latter that are crucial to the integrity of the block, in particular, those relating to repair and insurance. Privity of estate also ensures that the ground landlord can see to it that the leaseholder complies with his obligations. For the purposes of our present discussion of the framework of legal obligations, it is irrelevant whether the landlord is an RMC or an OGL.

2.1.1.2 under commonhold

Allowing for the burden of positive obligations to pass, at least within the development, is a defining characteristic of commonhold, strata title and condominium systems. Within a commonhold, by virtue of the CCS, what Clarke terms a form of ‘local law’ will apply, whereby obligations become enforceable simply by the acquisition of freehold title. Nonetheless, the CLRA does not give the impression of a clearly thought out approach to the enforcement of obligations within

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16 The various devices that have been used to circumvent this rule are disregarded for the purpose of the present discussion. They are listed in the Wilberforce Report (see ch 2, n 3), para 8 (vi), and in A Prichard, ‘Making Positive Covenants Run’ (1973) 37 Conv (NS) 194; or see e.g. Elements 13.52 - 13.62; Megarry and Wade 16-019 - 16-026.

17 The basis of the doctrine of privity of estate is now statutory and to be found in L&T(C)A, s 3. As it is assumed, for the purpose of this discussion, that the RMC has a freehold estate in the land, it is not necessary to rely upon the provisions of L&T(C)A, s 12, useful as they are in tripartite leasehold schemes.

18 As noted above, the critical positive obligation on the part of a leaseholder is likely to be to contribute to communal expenses. Other non-pecuniary positive obligations will be cast upon him, though it is unlikely that the integrity of the block will depend upon them.

19 See ch 1, n 19, n 27 and text thereto.

20 Clarke, Commonhold: The New Law 5.2.
a commonhold. It begins\textsuperscript{21} with a restrictive stance, by allowing\textsuperscript{22} a CCS to impose a
duty on a CHA, or upon a unit-holder, \textit{but not upon any other person}; it goes on to
provide\textsuperscript{23} that duties conferred by a CCS ‘shall not require any other formality’; and
offers\textsuperscript{24} examples of the duties which may be specified. The CLRA does not attempt
to distinguish between positive and restrictive obligations, and these examples
include several which would be characterised as positive.\textsuperscript{25} When it comes to
enforcing positive covenants against an owner, the position in commonhold, in terms
of the legal nexus, would seem to be exactly the same as under leasehold.

2.1.2 against renting tenant (and vice versa)

2.1.2.1 under leasehold

With leasehold tenure, privity of estate does not extend beyond the landlord/tenant
relationship: there is no privity of estate between a landlord and a sub-tenant.\textsuperscript{26} A
sub-tenant will not therefore be liable to the landlord on any of the positive\textsuperscript{27}
obligations of the leaseholder.

This should not be a serious omission, as any well-drawn lease should ensure
that these obligations are cast on the leaseholder, whether or not in occupation, so
that, for example, he or she will remain primarily liable to clean windows, and to
keep floors carpeted, and will have to decide whether to undertake these duties, or to
attempt to pass them on to a sub-tenant.\textsuperscript{28} Similarly a duty ‘to ensure that the exterior
doors are kept locked’ will impose an obligation on the leaseholder, which should be

\textsuperscript{21} S 31 follows \textit{Aldridge} in not distinguishing between positive and restrictive obligations, or between
‘passive’ and other obligations. But \textit{Aldridge} (below n 53 and text thereto) would have made unit
owners, tenants and occupiers liable on the obligations, and allowed unit owners, tenants and
occupiers to enforce them.

\textsuperscript{22} CLRA, s 31(3).

\textsuperscript{23} CLRA, s 31(7).

\textsuperscript{24} CLRA, s 31(5).

\textsuperscript{25} E.g. s 31(5)(a)-(d).

\textsuperscript{26} Confirmed in \textit{Amsprop Trading Ltd v Harris Distribution Ltd} [1997] 1 WLR 1025 (Ch).

\textsuperscript{27} Below, text to nn 77-82 for negative obligations.

\textsuperscript{28} This would depend on whether an appropriate covenant had been inserted in the tenancy agreement,
which might in practice depend on the length of any tenancy and whether the flat was let furnished or
unfurnished. As the sub-tenant would have exclusive possession, a leaseholder - whether the flat had
been let furnished or unfurnished - might be in difficulties if the sub-tenancy did not allow entry to
comply with a covenant in the head-lease.
passed on to the sub-tenant, so that if the latter defaulted, and proceedings were taken against the leaseholder, the sub-tenant could be joined in the proceedings. The availability as a last resort of forfeiture\(^{29}\) could also be used to ensure that a leaseholder makes a sub-tenant comply.

Privity of estate will also mean that the sub-tenant of a leasehold flat - and a fortiori, the occupier - will not be able to compel the ground landlord to carry out repairs. The sub-landlord who undertakes repairing responsibilities in the tenancy agreement can rely on the terms of the (head) lease to ensure that the ground landlord fulfils these. Nevertheless, there is a lacuna in the law here, as the statutory repairing obligations which a landlord owes to a tenant under section 11 of the LTA 1985 - and which have been extended\(^{30}\) to tenancies of dwellinghouses forming only part of a building\(^{31}\) - have been restrictively interpreted\(^{32}\) so that they cover only installations in the part of the building in which the lessor has an interest. The decision implies that the same principle would apply to the obligation to repair the structure and exterior.\(^{33}\) The court suggested that statutory intervention could remedy the lacuna by implying a term ‘to ensure that the terms of the sublease secure for him all the rights that the sub-lessor enjoys as against the head-lessee under the headlease.’\(^{34}\) Given the growth in the purchase of flats to let, this would seem a desirable reform. It would not impose any further burden upon ground landlords, as it would only allow sub-tenants to enforce obligations already owed to leaseholders.\(^{35}\)

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\(^{29}\) Forfeiture is considered in detail below, text to nn 250-286.

\(^{30}\) LTA 1985, s 11(1A) and (3A).

\(^{31}\) And which will therefore include flats.

\(^{32}\) *Niazi Services Ltd v Van der Loo* [2004] EWCA Civ 53, [2004] 1 WLR 1254.

\(^{33}\) Sub-s (1A) was inserted in LTA 1985, s 11 to remedy the defect revealed by cases such as *Campden Hill Towers Ltd v Gardner* [1977] QB 823 (CA) i.e. where the landlord of the dwellinghouse also owns the common parts.

\(^{34}\) Per Jacob LJ at [23]. If the same state of affairs were to occur in a commonhold development, then s 11(1A) would still mean that the tenant of a unit would not have any redress against his landlord, the unit-holder. On the other hand the tenant of a unit would have directly enforceable rights against the commonhold association.

\(^{35}\) If any amendment were worded as Jacob LJ suggests, it would not place the leaseholder/sub-landlord in an impossible position in those cases that are occasionally encountered where the ground landlord does not undertake obligations to repair the main structure and/or the common parts, and the (head)lease is therefore defective.
Apart from the lacuna recently shown up by Niazi, the lack of privity of estate between the ground landlord and sub-tenants (and, a fortiori, occupiers) does not generally cause problems in leasehold.

2.1.2.2 under commonhold

As previously noted, section 31(3) of the CLRA allows for a CCS to impose a duty on a CHA, or upon a unit-holder, but not upon any other person. One must therefore look elsewhere for authority to impose duties on tenants, or for that matter, on licensees or other occupiers, and section 19(1) of the CLRA provides that

Regulations may- (a) impose obligations on a tenant of a commonhold unit; [or]
(b) enable a commonhold community statement to impose obligations on a tenant of a commonhold unit.36

So while a CCS may impose a duty generally on a unit-holder, a CCS may impose obligations37 on a tenant only insofar as regulations may permit it to do so. Although the body of the Commonhold Regulations makes no specific reference to allowing duties to be enforced by38 or upon39 tenants, the Model CCS40 makes tenants liable on the CCS.41 Although the Model CCS does not specifically state that tenants may enforce its provisions, the dispute resolution procedure42 is drafted on the basis that they can.43

The combined effect of the CLRA and the Commonhold Regulations is therefore fairly simple: obligations can be imposed on unit holders and tenants, and may be enforced by or against unit holders and tenants. This is therefore more

36 'Tenant' here bears an extended meaning, in that, by virtue of CLRA, s 61, in certain sections, including ss 35 and 37, 'tenant' includes a person who has matrimonial home rights under the Family Law Act 1996. Thus the spouse or civil partner of a tenant may, in certain circumstances, for these purposes deemed to be a tenant, as will the spouse or civil partner of a unit-holder.
37 CLRA, s 37(2)(f) provides for regulations to make provision 'permitting a commonhold association to enforce a duty imposed on a unit-holder or a tenant' but does not enable it to impose such duties.
38 Permitted by CLRA, s 37(2)(g).
39 Permitted by CLRA, s 37(2)(f).
40 Appended as sch 3 to the Commonhold Regulations.
41 See, e.g. 4.1.2; but note it does not state that rules are for the benefit of tenants.
42 4.1.12 - 4.11.9, and 4.11.17 - 4.11.30.
43 Under CLRA, s 37(2)(g) these provisions must be intra vires the Act.
extensive than the position with positive covenants within an RMC Leasehold development.

Whilst it may sometimes be desirable for positive obligations to be enforceable against the renting tenants of units, it is arguable that the CLRA goes slightly too far in allowing all positive obligations to be enforced against tenants. Clearly if a CCS allows the CHA, or other unit-holders, to have access to a flat in case of emergency, or it requires the unit-holder to ensure that the outer doors of the block are kept locked, it seems right that a tenant should also be bound. But when the CCS imposes duties which require expenditure, it seems more questionable that these should be enforceable against the tenant. If a CCS required that all floors in a flat be fully carpeted, then it would mean that a tenant under an assured shorthold tenancy of only six-months’ duration could be required by the CHA to comply. In practice such a short tenancy would probably have expired before the conclusion of any proceedings, but it might also be unjust to expect a tenant for a term of, say, two years, to go this expense.

2.1.3 against occupier (and vice versa)
‘Occupiers’ in this context may include a wide variety of persons: enforcement of certain positive obligations against some would seem desirable, but to be able to enforce all against every occupier would seem inappropriate.

2.1.3.1 should occupiers ever be liable?
At first sight the idea of enforcing positive obligations against occupiers at all may appear strange, but it was considered by Aldridge, and had been considered previously by the two reports on reforming the law on positive covenants: the Wilberforce Report in 1965; and Law Com No 127 in 1984.

2.1.3.1.1 The Wilberforce Report
The Wilberforce Report recommended, inter alia, the establishment of ‘covenants in rem’ which would have had similarities to the ‘land obligations’ later recommended

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44 This would also apply if another unit-holder or tenant was enforcing the obligation (below n 104 and text thereto).
45 One would expect the unit-holder ultimately to bear such expenditure, especially if the flat had been let furnished.
46 See ch 2, n 3.
47 See ch 2, n 12.
by Law Com No 127. The Report recognised, without detailed discussion, that liability to perform a positive covenant could not rest on all those who were interested in the burdened land, but only upon those who had a sufficient financial stake in it.

2.1.3.1.2 Law Commission Report No 127

Law Com No 127 did examine closely the issues involved in burdening land with positive obligations. It divided land obligations into ‘positive’ ‘restrictive’ and ‘access’ obligations, and recommended that ‘restrictive’ and ‘access’ obligations should be enforceable not only against owners and lessees but also against all occupiers. Positive obligations, on the other hand, should be enforceable only against freehold owners and long leaseholders, who could reasonably be expected to shoulder such financial burdens. Although the Law Commission was in favour of allowing the burden of positive covenants to run, there were - and still are - reasons of principle why positive and negative covenants should be treated differently.

2.1.3.1.3 The Aldridge proposals

Against this background, the Aldridge Committee in 1987 first proposed commonhold as a statute-based regime for the ownership of flats, modelled on Australasian strata title schemes, which moved away from the idea of the ‘Development Scheme’ floated by Law Com No 127. The Aldridge Report overlooked the distinctions made in Law Com No 127, in proposing that positive as

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48 Para 19-21.
49 Law Com No 127, 11.6.
50 Ibid 11.8: ‘For the reasons already given, the class of those bound by other land obligations must be much smaller. It must comprise a sufficient range of substantial “targets” to make the obligations real and valuable from the point of dominant owners; but it must not include anyone whom it would be unfair to burden with their performance.’ Long leaseholders were those whose leases had been granted for 21 years or more.
51 The ‘development scheme’ proposal would have involved the ad hoc drafting of appropriate documentation for flat schemes. The role of the influential report Leaseholds - Time for a Change? (see ch 2, n 7), in helping to change direction has already been noted (see ch 2, nn 13-15 and text thereto).
52 It may be significant that Trevor Aldridge was not a Law Commissioner when Law Com No 127 was published in 1984.
well as restrictive covenants should be enforceable not only against any other unit-holder, but also against any tenant or occupier.\(^{53}\)

When, therefore, may it be appropriate to require a mere occupier to comply with positive obligations? First, there are what one may call ‘minor positive obligations,’ those which can only meaningfully be performed by someone in actual occupation: for example, to ensure that the main entrance door is kept locked.\(^{54}\) It would also include an obligation to allow the agents of the body corporate access to the flat.\(^{55}\)

Second, other obligations – what one may think of as ‘neighbourly obligations’\(^{56}\) - may require expenditure, and clearly be positive obligations.\(^{57}\) Some may be largely aesthetic - such as an obligation to clean windows, or to dress them

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\(^{53}\) Aldridge 7.25: quoted below, text to n 90.

\(^{54}\) This is the sort of covenant which could well be put into negative form e.g. ‘not to leave the principal entrance door unlocked’ and, although it does not require expenditure on the part of anyone, it does seem to be a positive covenant (below n 57). The lay person may with some justification wonder why the law should treat differently a covenant ‘not to leave the principal entrance door unlocked’ and another ‘not to obstruct or leave furniture in the common parts’ but it would appear that a line is drawn between them. (Although covenants such as the latter are common, one may even query whether they are necessary: the common parts will be vested in the RMC, and leaving chattels there will amount to trespass to land).

\(^{55}\) With leasehold such difficulties would be sidestepped if one considers such rights of access as easements, which would thus be binding on tenants and occupiers, but this cannot be the case in commonhold since the CCS creates sui generis obligations rather than easements or covenants (see Clarke on Commonhold 7[4], n 2).

\(^{56}\) The term is not used here in the technical sense of ‘neighbour obligations’ used in Law Com No 127 (see 6.3 - 6.6).

\(^{57}\) The test has traditionally been whether the covenantor needs ‘to put his hand into his pocket’ (Haywood v Brunswick Permanent Benefit BS (1881) 8 QBD 403 (CA), 409 per Cotton LJ) but Megarry and Wade 16-041 goes further and accepts that ‘a covenant that can be performed without expense may still require some positive act and so not be restrictive.’ The writer has not found any reported case where a requirement to do a trivial act which does not involve expenditure (e.g. to ensure that an outer door is kept locked) has been held to be a positive covenant. Both Cotton and Lindley LJ (the latter at 410) distinguish Haywood from Tulk v Moxhay (above n 1) on the basis that the covenant in the former would require the covenantor to incur expenditure, so it could perhaps have been argued that a covenant to perform an act which could be carried out without expenditure was within the scope of Tulk v Moxhay; but the consensus is now clearly against this.
with suitable curtains\textsuperscript{58} - but others may support negative covenants. Thus a covenant to cover all floors\textsuperscript{59} with suitable fitted carpets can supplement a restrictive covenant against the making of noise.\textsuperscript{60} Obligations such as these would more naturally fall upon the owner of the flat, but there may be good reasons for having tenants and occupiers liable as well, because it is sometimes difficult to enforce against an owner whilst a flat is occupied by licensees. The problem is not so much with flat \textit{sharers} as generally understood,\textsuperscript{61} as it is likely that the unit-owner will be either the landlord, or one of the residents, but the situation which arises where someone who is resident abroad purchases a flat and allows others to reside there. Anecdotally, this seems to be largely a phenomenon confined to central London, with a bewildering succession of occupiers who claim to be relatives occupying the flat in turn. In such cases it might prove impossible to enforce an obligation to ensure that floors are carpeted against an owner who is resident outside the jurisdiction. It is submitted, therefore, that in certain limited circumstances it should be possible to enforce certain positive obligations against occupiers (including tenants).

\textit{2.1.3.2 under leasehold}

With leasehold, positive covenants are not enforceable by the RMC against a sub-tenant because of the lack of privity of tenure, nor, \textit{a fortiori}, against an occupier. As with enforcement against a sub-tenant, however, it may be possible to ensure that an obligation to clean windows appears to be contained in most residential leases. The latter obligation tends to be found more frequently in more traditional 'up-market' developments. Obligations such as these, which affect a block's external appearance, arguably do affect other leaseholders - unlike covenants for internal repair and decoration.

\textsuperscript{58} Except usually in kitchens and bathrooms. The writer is aware of several cases where, due to the current vogue for wood-laminate floors, this has been ignored and the owners of flats below experience a substantial increase in noise transmission. It may be difficult to show that the noise that results therewith is a \textit{nuisance}, as it arises from the ordinary activities of daily living.

\textsuperscript{59} Although the covenant is often expressed in positive form, i.e. 'to keep the floors close-covered with suitable carpets', the writer has also seen this put in a negative form e.g. 'not to reside or use or permit any other person to reside in or use the Flat unless the floors thereof ... are close covered with carpet and underfelt... except while the same shall be removed for cleaning repairing or decorating the Flat or for some temporary purpose'. Such wording raises an interesting issue as to whether it is a restrictive covenant. On balance it would seem that it is still in substance positive.

\textsuperscript{60} As, for example, with the groups of young people in \textit{AG Securities v Vaughan} [1990] 1 AC 417 (HL) or \textit{Savage v Dunningham} [1974] 1 Ch 181(Ch).
occupier complies with certain positive obligations by phrasing the covenant in such a way that the leaseholder must either comply personally or ensure that it is complied with. A licensee’s failure to comply would, therefore, place the leaseholder in breach, and so the RMC could then take proceedings against the leaseholder, who would be bound to join the licensee in any proceedings. Again, the ultimate threat of forfeiture may help secure enforcement in intractable cases, especially where a leaseholder resides outside the jurisdiction.

2.1.3.3 under commonhold

Under commonhold it is simply not possible to require those who are neither unit-holders nor tenants to comply with the CCS. This is because the provisions of the CLRA and the Commonhold Regulations allow duties in the CCS to bind tenants, but no other occupants. A CCS, like a lease, could be worded in such a way that an owner is responsible for ensuring that occupants comply with positive obligations. The non-statutory guidance on the drafting of a CCS recognises that it may be necessary to make unit-holders and tenants liable for the defaults of their visitors but does not acknowledge that it may be licensees, rather than unit-holder or tenants, who are in occupation. This could partly be remedied by more careful drafting, to ensure that responsibility for compliance is laid clearly on the unit-holder (or tenant), but without the ultimate threat of forfeiture, it may still be difficult to force a unit-holder who resides out of the jurisdiction to ensure that occupants comply.

It is submitted that neither leasehold nor commonhold strikes quite the right balance when it comes to enforcing positive obligations against tenants and other occupants. Leasehold does not go far enough, in that it allows for enforcement only against leaseholders, although if lessees’ covenants are sufficiently broadly worded,

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62 Except for the limited exception for those holding matrimonial home rights contained in CLRA, s 61: above n 36.
63 Above nn 37-43 and text thereto.
64 Commonhold: Guidance on the drafting of a Commonhold Community Statement including Specimen Local Rules (DCA, December 2004) (reproduced in Clarke on Commonhold at 25[9]).
65 E.g. ibid para 94: ‘A unit-holder or tenant must co-operate in the use of the security arrangements controlling entry to the commonhold and must require all visitors to comply.’
66 E.g. ibid para 86: ‘A unit-holder or tenant must not obstruct the common parts or leave any goods there.’
proceedings could be taken against lessees if their renting tenants or occupiers default, thus forcing tenants and occupiers to comply with the terms of the lease.\textsuperscript{67}

Commonhold, on the other hand goes both too far and not far enough in enforcing positive obligations contained in the CCS. It rightly makes tenants comply with minor positive obligations,\textsuperscript{68} but arguably goes too far in requiring them to comply with obligations requiring substantial expenditure.\textsuperscript{69} As regards occupiers, the CCS cannot impose duties on them at all, but it is submitted that they should be in precisely the same position as tenants.

It would appear that the Government may have been unaware of the scope of what the CLRA had enacted. A draft CCS issued on 24 July 2003 contained the provision, ‘A tenant of a commonhold unit is bound by the rules of the commonhold community statement which affect his occupancy’,\textsuperscript{70} which on its face is quite acceptable. However, it then went on to define ‘tenant’ as: ‘A person, other than a unit-holder, who has a right to occupy the commonhold unit.’\textsuperscript{71} This would clearly have been \textit{ultra vires} the CLRA, and it is not repeated in the Model CCS,\textsuperscript{72} thus apparently conceding that the duties in a CCS cannot be imposed on or enforced by licensees, and that the primary legislation would require amendment to allow this; if this were done, secondary legislation should ensure that only ‘minor positive

\begin{flushright}
\textsuperscript{67}If, because the leaseholder is outside the jurisdiction, it is difficult to obtain an injunction against him, so as to force him to comply with the terms of the lease, the availability of the threat of forfeiture may prove useful — below, text to nn 250-286.
\textsuperscript{68}E.g. to ensure that the outer door is kept locked.
\textsuperscript{69}E.g. to ensure that a flat is fully carpeted.
\textsuperscript{70}Rule 8.
\textsuperscript{71}Annex A: Glossary.
\textsuperscript{72}There seems to have been some awareness of a potential problem here even before those draft Regulations were published. Q 41 of the Lord Chancellor’s Department Commonhold Consultation Paper \textit{Commonhold: Proposals for Commonhold Regulations} (LCD, October 2002) asked: ‘Are there any specific issues relating to the treatment of tenants, licensees and other derivative interest owners that you wish to draw to our attention?’ According to the Analysis of the responses to an LCD consultation paper ‘Proposals for Commonhold Regulations’ (DCA, August 2003), only a small number of respondents (11) answered the question and none appears specifically to have referred to the \textit{vires} point, though the Law Society must have been aware of the difficulty when it responded: ‘Subject to establishing that there is a statutory authority to do so, to extend negative obligations to licensees and statutory tenants.’
\end{flushright}
obligations' should be enforceable against licensees; enforcement of positive obligations against tenants should also be similarly restricted. 73

2.2 Enforcement by body corporate of negative obligations

The law on enforcement of negative obligations in leasehold developments is complicated because it merges into the broader corpus of law on the enforcement of restrictive covenants generally. The stance taken by the law can be broadly summarised that, if a restrictive covenant can be enforced over freehold land, it can also be enforced over leasehold land.

2.2.1 against owner

2.2.1.1 under leasehold

Considering first where a landlord, including an RMC, is attempting to enforce against a leaseholder, the position is clear, and enforcement is possible because there exists privity of estate between landlord and leaseholder. In the case of tenancies granted before 1 January 1996 ('old tenancies')74, when the reformed privity regime of the L&T(C)A came into force, the law goes back to Spencer’s Case.75 In the case of tenancies granted after 31 December 1995 ('new tenancies'), privity of estate will depend upon section 3 of the L&T(C)A.

2.2.1.2 under commonhold

In the case of obligations imposed in a commonhold, these will be enforceable by the CHA against the unit-holder.76 Indeed, under commonhold the enforcement of negative and positive obligations will be identical, as the CLRA, and the Commonhold Regulations, do not distinguish between negative and positive obligations of the CCS.

Negative obligations can therefore be enforced against an owner under both commonhold and leasehold.

2.2.2 against renting tenant

We next consider how far restrictive obligations may be enforced against tenants.

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73 See below text to nn 230-235.
74 The Act uses 'new tenancy' as a defined term of art (ss 1 and 28(1)), but not 'old tenancy.'
75 (1583) 5 Co Rep 16a, 77 ER 72.
76 CLRA, s 31(3).
2.2.2.1 under leasehold

Restrictive covenants will be enforceable against sub-lessees i.e. renting tenants: the authority for this will depend upon whether the tenancy is an old or a new tenancy.

With an old tenancy, the landlord will be able to enforce restrictive covenants against a sub-tenant by virtue of section 79(1) of the LPA 1925. Although most text books cite Hall v Ewin as authority for this, it is submitted that section 79 of the LPA 1925 additionally provides clear statutory authority. (The section continues to apply to restrictive covenants relating to freehold land, subject to compliance with the relevant requirements as to notice, and to annexation of the benefit, but, by virtue of section 30(4) of the L&T(C)A, it no longer applies to new tenancies).

In the case of new tenancies, although section 79 no longer applies, section 3(5) of the L&T(C)A will have an identical effect to permit enforcement by an RMC landlord against a sub-tenant.

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77 Above, text to nn 74-75.
78 (1888) 37 Ch D 74 (CA). Megarry and Wade makes the point (16-054, n 29) that what is usually taken as the ratio of this case was in fact obiter as (according to the authors) the injunction was sought against the tenant. This is a simplified version of the scenario, as an injunction had been granted by the Chancery Division against a sub-sub-tenant, which was not the subject of an appeal, and the Court of Appeal discharged the injunction against the sub-tenant, who had in no way facilitated the breach.
79 LPA 1925, s 79: (1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed.
(2) For the purposes of this section in connexion with covenants restrictive of the user of land 'successors in title' shall be deemed to include the owners and occupiers for the time being of such land.' Unlike s 78 (below nn 143-146 and text thereto), the first sentence of which can be traced back to the Conveyancing Act 1881, s 58, LPA 1925, s 79 was newly introduced in its entirety by the Law of Property (Amendment) Act 1924 ('LP(A)A 1924'): sch 3, pt 1, para 12, inserted a new s 108A in the Conveyancing Act 1881. The section then became s 79 in the LPA 1925. GL Newsom, Preston and Newsom's Restrictive Covenants Affecting Freehold Land (9th edn, London, Sweet and Maxwell, 1998) ('Preston and Newsom') (8-02) takes the view that this is a statutory re-enactment of the pre-existing equitable rule.
80 At least as between the landlord and a sub-tenant. As to the position where someone other than the landlord is attempting to enforce a restrictive covenant, see below, text to nn 151-186.
81 'Any landlord or tenant covenant of a tenancy which is restrictive of the user of land shall, as well as being capable of enforcement against an assignee, be capable of being enforced against any other
2.2.2.2 under commonhold

Under commonhold the CHA will be able to enforce duties of a restrictive nature contained in the CCS against tenants under provisions in the CLRA.\textsuperscript{83} Negative duties are treated in exactly the same way as positive duties, which have already been discussed.\textsuperscript{84}

Restrictive obligations therefore may be as easily enforced by a CHA against a tenant under commonhold as they are by an RMC against a sub-tenant under leasehold.

2.2.3 against occupier

2.2.3.1 under leasehold

In principle it would seem that, under leasehold, negative obligations can be enforced against occupiers as well as against sub-tenants. \textit{Mander v Falcke}\textsuperscript{85} is commonly cited in textbooks as authority for this,\textsuperscript{86} but it is submitted that statutory authority is additionally provided for this by section 79 of the LPA 1925\textsuperscript{87} in respect of old tenancies and, and by section 3(5) of the L&T(C)A for new tenancies. Thus the statutory basis for enforcement against sub-tenants and against occupiers is identical.

2.2.3.2 under commonhold

As commonhold does not distinguish between negative and positive obligations, there is no need to consider the statutory provisions any further: the account of the law given for the enforcement of positive duties applies equally to the enforcement of negative duties. It is submitted, however, that, regardless of the scope for

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person who is the owner or occupier of any demised premises to which the covenant relates, even though there is no express provision in the tenancy to that effect.'

\textsuperscript{82} As to enforcement by others, again, see below, text to nn 151-186.

\textsuperscript{83} Ss 19(1), 31(3) and 37(2)(f).

\textsuperscript{84} Above, nn 36-43 and text thereto.

\textsuperscript{85} [1891] 2 Ch 554 (CA).

\textsuperscript{86} As the appeal was by the father, and it proceeded on the assumption that he did not have an estate in the land, it is submitted that this is authority for enforcement against an occupier. Lindley LJ expressly decided the appeal on the assumption that the father was an occupier (at 557), and although Bowen LJ refers to a ‘person who enters into possession’ he goes on to add ‘and by the permission of a person bound by a restrictive covenant’ (at 558), so clearly he too has in mind what would be termed in modern parlance an occupier and not someone in possession in the strict sense. (Fry LJ agreed with both).
discussion of whether, and if so in what circumstances, *positive* obligations should bind occupiers, the case for them to be bound by *negative* obligations is overwhelming. *Aldridge* would have made *all* obligations contained in the Commonhold Declaration, both negative and positive, enforceable against all occupiers.\(^8\) Law Com No 127 had taken a rather more guarded approach, and would not have imposed the burden of all positive obligations on occupiers, but nevertheless all *negative* obligations would have been binding on owners, tenants and occupiers.

If regulations contained in the CCS are to be meaningful, it would seem self-evident that all those living within the commonhold should be bound by them, and clearly it is going to be more convenient to take enforcement proceedings directly against an occupier who is in breach. As it is in fact possible to enforce only against the unit-holder and the tenant, then it may be desirable to word all negative regulations in a roundabout way\(^9\) e.g. ‘not to run any business on the premises, or to suffer or permit any business to be run therefrom,’ so as to ensure that, if an occupier is in breach, so will the unit-holder or tenant, so that he or she could if necessary be required to take proceedings against an occupier. This is not, however, an ideal solution: the unit-holder may be outside the jurisdiction; the occupier may be a contractual licensee for a fixed period whose licence does not contain a similar restriction; and the long-stop of forfeiture will not be available.

On this point, therefore, it is submitted that the stance taken by leasehold is preferable, and that under commonhold it should be possible for the CHA to enforce negative duties against all occupiers. This would require amendment of the primary legislation.

### 3. ENFORCEMENT OF OBLIGATIONS BY ANOTHER OWNER/TENANT/OCCUPIER

The body corporate should generally be the legal person who has the greatest interest in enforcing obligations, whether they are cast upon an owner, renting tenant, or occupier, but there may be circumstances in which this is not the case. The Aldridge Report identified the problem thus:

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\(^8\) Above n 79 for the provenance of the section.

\(^9\) Above n 53.

\(^9\) As was previously suggested for ‘minor positive obligations’ – above, text to nn 65-66.
The commonhold association will have the right to enforce all the regulations. This will apply not only to enforcement against unit owners, who are members of the association, but also to tenants and other occupiers of units even though the association has no direct contract with them. We do not consider, however, that it would be satisfactory to leave enforcement of the regulations exclusively in the hands of the association. There may be disputes between members of the association. Committee members may be amongst those in default, or the majority may be apathetic. For the individual unit owner, something important may be at stake, e.g. if there is a question of the use of services within his unit. For this reason, an individual owner who suffers prejudice because a regulation has been broken will also have a right to enforce it.\(^{90}\)

_Aldridge_ has a good point, and there is a strong case for allowing owners, as well as the body corporate, to enforce such obligations. _Aldridge_ would, in fact, have gone even further, and extended this to tenants and occupiers:

Similarly, tenants and other occupiers who are bound by the regulations will also have the right to enforce them. Their interest in the unit may be somewhat limited. This will not, however, reduce their right to enforce the regulations against others in breach, but in practice they will not do so when it is unreasonable because the remedies available to them will be restricted proportionately with their interest.\(^{91}\)

It is not easy to discern precisely what is meant by the last clause.\(^{92}\) Would it have been reasonable for a tenant with twelve months unexpired to require another tenant, or a unit-holder, to carpet his flat to comply with the Commonhold Declaration?\(^{93}\)

Leasehold, unlike commonhold, distinguishes between negative and positive obligations, and so enforcement by individual owners and others must be discussed separately depending on the nature of the obligations.

3.1 Enforcement of positive obligations by another owner/tenant/occupier

3.1.1 against owner

3.1.1.1 under leasehold

As previously outlined, the privity of estate between a leaseholder and the RMC will enable the RMC itself to enforce any positive covenant in the lease. This will not,

\(^{90}\) 7.25.

\(^{91}\) 7.26.

\(^{92}\) No draft Bill was annexed to _Aldridge_.

\(^{93}\) What is the CCS under the CLRA was termed the ‘Commonhold Declaration’ in _Aldridge_.

87
however, enable any other leaseholder – or, a fortiori, a sub-tenant or occupier – to enforce such a positive covenant, as neither privity of contract nor privity of estate will exist between leaseholders within the same development.

The ‘internal box’ scheme adopted in most leasehold developments means that the obligations upon which the fundamental integrity of the building depends will be cast upon the RMC itself. Certain positive obligations which may have an impact on residents’ safety and comfort may, however, have to be cast upon other leaseholders, and these cannot be directly enforced by one leaseholder against another. The RMC may, however, not be inclined to take action, for various reasons identified by Aldridge, and it has therefore become increasingly common for well-drawn leasehold schemes to include a ‘mutual enforceability’ clause: a covenant on the part of the RMC to enforce lessees’ covenants at the request of any other lessee. It should therefore be possible for Leaseholder A to enforce a positive covenant by Leaseholder B by the roundabout route of the complainant, Leaseholder A, taking proceedings against the RMC for a mandatory injunction to require it to take proceedings itself against the alleged defaulter, Leaseholder B. Although such

94 Above, text to n 10.
95 E.g. requirements that the principal entrance door be kept locked, or that floors be kept carpeted.
96 Above n 90 and text thereto. Although the Report is discussing the CHA, the factors would apply equally to an RMC.
97 Such clauses are found whether or not the ground landlord is an RMC.
98 In order to ensure that the RMC does not become embroiled in trivial or unmeritorious litigation, such mutual enforceability clauses commonly include a proviso that the ground landlord will not be bound to enforce a covenant by Leaseholder B at the request of Leaseholder A unless Leaseholder A undertakes to indemnify the RMC against all costs (and sometimes to provide security therefor); sometimes a clause will also include a proviso that the RMC need not commence proceedings unless counsel of a designated seniority advises that such proceedings have a good prospect of success.
99 It would also be possible for negative covenants to be enforced in this way, but as negative covenants they should fall within the scope of a ‘letting scheme’, if the leases are appropriately drafted, and it will then be less cumbersome for Leaseholder A to take proceedings directly against Leaseholder B (below, n 135 and text thereto). Occasionally, in an intractable case of an alleged breach of a negative covenant, it may be advantageous for the RMC rather than Leaseholder A to enforce, because of the possibility of the RMC enforcing by taking forfeiture proceedings, a course of action which will never be open to Leaseholder A.
proceedings are not common, they are occasionally encountered. As one is dealing with positive covenants it would be irrelevant whether there is a ‘letting scheme.’

As no privity of estate exists between a sub-tenant and the RMC, or between an occupier and the RMC, only a leaseholder would be able to invoke a mutual enforceability clause, though if the defendant leaseholder has passed on the obligation in the tenancy agreement, he or she would be able to join a renting tenant in the proceedings.

3.1.1.2 under commonhold

It will be noted later that, under RMC Leasehold, one leaseholder may directly enforce a negative obligation against another, and indeed against any sub-tenant or other occupier. Enforcement of positive obligations, on the other hand, will involve the RMC via a mutual enforceability clause: a form of indirect enforceability. As the CLRA does not distinguish between negative and positive obligations, enforcing commonhold duties could be considerably simpler. It would not extend to licensees, admittedly, but section 37 would permit general direct enforceability i.e. for unit-holders and tenants to sue other unit-holders and tenants.

However, in a rather curious parallel with the indirect procedure required by mutual enforceability clauses in leases, the Model CCS makes the indirect procedure the norm in most cases when one unit-holder (or tenant) (‘A’) is attempting to enforce either a negative or a positive obligation against another unit-holder (or tenant) (‘B’), by requiring A to use the dispute resolution procedure set out in some detail in the CCS. The only exceptions are when the duty is to pay money, or in an emergency.

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100 Personal information.
101 Below n 135 and text thereto.
102 Or, mutatis mutandis, a licensee.
103 Above, text to nn 62-66.
104 CLRA, s 37(2)(e)&(g).
105 CCS, 4.11.17.
106 CCS, 4.11.19 - 4.11.30.
107 CCS, 4.11.18.
It is likely to be unusual for A to have a monetary claim against B.\textsuperscript{108} Enforcement of a provision of the CCS in an emergency may be necessary if A urgently requires access to a unit owned by B to carry out works which are necessary for the protection of A's unit. In such a case A could take court proceedings immediately, including applying for an interim injunction. In the great majority of cases, however, a unit-holder would have to follow the procedure set out in the CCS.\textsuperscript{109} It is described in \textit{Clarke on Commonhold},\textsuperscript{110} and there is little point in repeating here what is a very elaborate (and arguably too cumbersome) procedure. The important point is that it would be necessary for A first to involve the CHA, to establish whether the CHA is prepared to take action, and only if it would not would A have the right firstly to take up the formal complaints procedure against B and then to take court proceedings directly against B. The involvement of the CHA in a dispute between two unit-holders clearly resembles the procedure for mutual enforceability of positive covenants under RMC Leasehold.

This is not, however, an exact parallel. If the CHA would not take proceedings against B, if the claim were for money, or there were an emergency, then A could take proceedings directly against B, which would never be possible in respect of a positive covenant under RMC Leasehold.\textsuperscript{111} It should also be noted that the indirect enforcement procedure is required only because of the way in which the prescribed Model CCS has been drafted. If it were thought desirable that positive and/or negative duties should always be enforceable by one owner against another owner, this could be provided for by regulation, as it would be \textit{intra vires} the CLRA.\textsuperscript{112} Some of the disadvantages of the indirect enforcement procedure under commonhold, and why it was adopted, will be considered later in this chapter.

\textsuperscript{108} A possible example is a claim for monetary compensation by A against B after B has damaged A's unit when exercising a right of entry to carry out emergency repairs.

\textsuperscript{109} CCS, 4.11.19 - 4.11.30.

\textsuperscript{110} 19[10] (written in fact by the present writer).

\textsuperscript{111} If the example given - a dispute over access for emergency repairs - were to arise under RMC Leasehold, it is unlikely that the RMC would have to be involved, because the matter would almost always be a right ancillary to an easement, and proceedings could be taken directly against the other leaseholder to enforce and support an easement (and see further above n 55).

\textsuperscript{112} CLRA, s 37(2)(e)&(g).
Although, therefore, the enforcement of positive duties under commonhold will not be as straightforward as under the original Aldridge proposals, having to involve the CHA is no worse than having to involve the RMC via a mutual enforceability clause to enforce a positive covenant in RMC Leasehold; and being able to sue another unit-holder direct in an emergency is clearly better and more convenient than under RMC Leasehold. Comparing the enforcement of positive covenants in commonhold with their enforcement under RMC Leasehold, commonhold would clearly seem to have the advantage.

3.1.2 against renting tenant

3.1.2.1 under leasehold

Whilst a mutual enforceability clause would enable one leaseholder indirectly to enforce a positive covenant against another leaseholder, it could be enforced against a renting tenant\(^\text{113}\) only if the defendant leaseholder could require a tenant to comply with it under the terms of the tenancy agreement. Whether this would serve any useful purpose would depend on what the covenant related to. For example, if a leaseholder has covenanted to carpet a flat, another leaseholder would have no interest in enforcing that obligation against that leaseholder's tenant. On the other hand, it might be desirable to ensure that a tenant complied personally with any obligation to maintain the security of the building.

3.1.2.2 under commonhold

Section 37 of the CLRA permits the making of regulations to allow one unit holder to enforce a duty against another unit-holder,\(^\text{114}\) and this also extends to a unit-holder enforcing a duty against a tenant,\(^\text{115}\) a tenant against a unit-holder,\(^\text{116}\) or a tenant against a tenant.\(^\text{117}\) The appropriate regulations are made by the Model CCS.\(^\text{118}\)

\(^{113}\) Similarly it would not allow one renting tenant to enforce a positive covenant against a leaseholder (or a fortiori, the renting tenant of another leaseholder).

\(^{114}\) CLRA, s 37(2)(e).

\(^{115}\) Ibid.

\(^{116}\) CLRA, s 37(2)(g).

\(^{117}\) Ibid.

\(^{118}\) CCS, 4.11.17 - 4.11.30.
wide enforceability is then restricted by the requirement of the CCS that enforcement should, in the first instance, involve the CHA.\(^{119}\)

The potential for enforcement of positive covenants by other owners and renting tenants is therefore considerably wider under commonhold than RMC Leasehold. As with the enforcement of duties against renting tenants by the CHA,\(^ {120}\) however, whilst in some cases this may be desirable,\(^ {121}\) in many cases the extent of permissible enforcement is arguably too wide.\(^ {122}\)

3.1.3 against occupier

3.1.3.1 under leasehold

Positive covenants can be enforced against other leaseholders only indirectly, i.e., if there is a mutual enforceability clause, and cannot be enforced against renting tenants, unless there is additionally an appropriate clause in the tenancy agreement. \textit{A fortiori}, therefore, it will not normally be possible to enforce positive covenants against occupiers. The only exception could conceivably be if (a) there was a mutual enforceability covenant in the lease, and (b) any licence agreement allowed the leaseholder to pass on the liability to a licensee.

3.1.3.2 under commonhold

There is no provision in the CLRA for obligations under the CCS to be enforced against licensees, save to the extent that the position of those who enjoy matrimonial home rights\(^ {123}\) is equated\(^ {124}\) with that of tenants. Again, it is conceivable that one unit-holder (or tenant) could enforce against another, who might in turn be able to enforce against a licensee under the terms of any express licence.

The arguments for being able to enforce positive obligations against licensees are considerably weaker than those for enforcing restrictive obligations against them. Whilst Law Com No 127 would have permitted the continued enforcement of negative obligations against occupiers,\(^ {125}\) this would not have extended to positive

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\(^{119}\) CCS, 4.11.17 and 4.11.18 - 4.11.30.

\(^{120}\) Above, text to nn 44-45.

\(^{121}\) E.g. the enforcement of obligations relating to security.

\(^{122}\) E.g., enforcement of an obligation to carpet a flat against a tenant: above, text to nn 44-45.

\(^{123}\) Above n 36.

\(^{124}\) CLRA, s 61.

\(^{125}\) Above, text to n 49.
obligations, apart from access obligations. It has previously been submitted that it would be desirable for certain positive ‘neighbourly obligations’ to be enforceable by the CHA against licensees: if this were permitted then they should also be enforceable by another unit-holder or tenant.

3.2 Enforcement of negative obligations by another owner/tenant/occupier

3.2.1 against owner

3.2.1.1 under leasehold

It was mentioned previously that the law on enforcement of negative obligations in leasehold developments is potentially complicated by its merging into the broader corpus of law on restrictive covenants generally; this is especially so when considering enforcement not by the owner of the reversion but by other leaseholders – or sub-tenants or occupiers – who claim to be entitled to enforce by virtue of a scheme. In the discussion which follows there is more to be said on who may enforce restrictive covenants than who is bound by them – the latter will follow the previous discussion of enforcement of restrictive covenants by an RMC against sub-tenants and occupiers.

Under RMC Leasehold the position is complicated as it needs to be considered separately for leases entered into before 1 January 1996 (‘old tenancies’) and those entered into after 31 December 1995 (‘new tenancies’). The position is then further complicated as, it will be submitted, there are three arguable views as to what the law on new tenancies is, and two of them would lead to the law on new tenancies diverging from that on old tenancies. It is not certain whether the L&T(C)A has changed the law: whether or not the law has been changed, it has certainly been muddied, but this has been largely unremarked by commentators.

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126 Above, text to n 50.
127 Above, text to nn 54-61.
128 Such as to maintain the security of the building – above n 68.
129 Above, text following n 72.
130 Above, text to nn 74-75.
131 Above, text to nn 77-82.
132 Above, text to nn 85-87.
133 Above n 74 and text thereto.
Nevertheless, whether developments comprise old or new tenancies, it should be fairly easy to find that a development of leasehold flats amounts to a ‘letting scheme’, the leasehold equivalent of a ‘building scheme’. Although the stringent requirements for a freehold building scheme set out by Elliston v Reacher, and further extended by Reid v Bickerstaff, have been considerably relaxed by decisions such as Re Dolphin’s Conveyance, developers of freehold developments are often reluctant to ‘tie their hands’ by imposing a building scheme. With a development of leasehold flats, on the other hand, leases are more commonly set up so that any leaseholder can claim the benefit of restrictive covenants entered into by

134 Unless ‘letting schemes’ have been completely abolished for new tenancies: below, text to nn 160-164.

135 See e.g. Hudson v Cripps [1896] 1 Ch 265 (Ch) (a case involving a letting scheme though an injunction was granted against the freeholder); Newman v Real Estate Debenture Corp [1940] 1 All ER 131 (KB) (another letting scheme - the second defendant held a concurrent lease of the whole building from the first defendant). Although these cases are both cited as examples of letting schemes (and the decisions rested upon this), in both cases as a result of this a leaseholder was able to take proceedings against his reversioner. (The latter decision was described as a ‘high-water mark’ (per Cohen LJ in Kelly v Battershell [1949] 2 All ER 830(CA)). An example of one leaseholder enforcing a restrictive covenant against another leaseholder - although, unusually, in a commercial context - is Williams v Kiley (T/A CK Supermarkets Ltd) EWCA Civ 1645, 1 P&CR D38). It would be possible to infer from this case (see [17]) that the presence of a covenant for mutual enforceability might militate against the presence of a letting scheme. Preston and Newsom (2-58) suggests that the use of the term ‘letting scheme’ should be dropped, and would prefer such schemes to be called ‘leasehold schemes’.

136 [1908] 2 Ch 374 (Ch), 384. ‘The classic statement of the facts to be proved required that there should have been a common vendor who first laid out the property for sale in lots subject to restrictions consistent only with a scheme of development; that the common vendor should have intended the restrictions to benefit all the lots to be sold; and that the purchasers from the common vendor should have purchased on the footing that the restrictions were for the benefit of the other lots.’ (Megarry and Wade 16-077).

137 [1909] 2 Ch 305 (CA), 319. This stressed that the area affected by the scheme should be clearly defined.

138 [1970] Ch 654 (Ch); the modern requirement for only two pre-requisites - an intention to impose a scheme of mutually enforceable obligations, and over a defined area - was approved in more recent decisions such as Williams v Kiley t/a CK Supermarkets Ltd (above n 135), and also in Jamaica Mutual Life Assurance Society Ltd v Hillsborough Ltd [1989] 1 WLR 1101 (PC).
the other leaseholders.\textsuperscript{139} Frequently the leaseholder’s covenants will be expressed to be with the ground landlord and with the other leaseholders,\textsuperscript{140} so generally ensuring that those of a restrictive nature can be enforced by any other leaseholder. Such covenants will, however, also have a wider effect, both in terms of who is bound by the covenants, and who may enforce them. Precisely how far the benefit and burden extend may depend upon whether the letting scheme is of ‘old’ or ‘new’ tenancies.

To compare the enforceability of restrictive obligations within commonhold with that within RMC Leasehold, it is necessary first to discuss the law on the latter, and to attempt to reach a view on it.

3.2.1.1 Letting schemes of ‘Old tenancies’

The width of enforceability of restrictive covenants within letting schemes of ‘old tenancies’\textsuperscript{141} is clear, but perhaps surprising. Within the typical leasehold scheme, restrictions are likely to relate to such things as the keeping of pets or the causing of nuisances, including the making of noise.\textsuperscript{142} Looking first at the burden, one leaseholder may enforce such a covenant directly against another by ordinary injunction proceedings, but such covenants should be binding not only on other leaseholders, but also on any sub-tenants, and even on any occupiers, whether (in either case) they have notice of the restrictive covenants or not. Although most text

\begin{footnotesize}
\textsuperscript{139} The fact that flat-owners will be living in closer proximity to one another - literally ‘under the same roof’ - may make this more important. Another reason for this may be that developers of estates of houses are often reluctant to commit themselves to the commercial inflexibility which is often necessitated by a building scheme, but it is less easy to change the plans for a development of flats, especially if of a single block.

\textsuperscript{140} One may note in passing that sometimes a lease will express this solely in respect of restrictive covenants; this is not, however, always done, and if positive and restrictive provisions are included indiscriminately within a clause which purports to be a leaseholder’s covenant with the ground landlord and with fellow leaseholders, the clause can give a misleading impression.

\textsuperscript{141} And within freehold building schemes, whenever set up.

\textsuperscript{142} Any excessive noise will be actionable as a nuisance under the ordinary law of tort regardless of any leasehold covenants or provisions in a CCS. It is, however, generally considered that the specific wording of leases (and presumably in future of CCSs) e.g. banning the making of noise which is audible outside the unit between specified hours does make it easier to say with certainty that a covenant has been breached than one can say that a nuisance has been caused. This certainly seems to be the assumption of practitioners in the field.
\end{footnotesize}
books seem to cite \textit{Hall v Ewin}\textsuperscript{143} as authority for being able to enforce restrictive covenants against sub-tenants, and some cite \textit{Mander v Falcke}\textsuperscript{144} to enforce against occupiers, there is in fact now clear statutory authority\textsuperscript{145} for both these propositions. The issues are the same as when a landlord is enforcing.\textsuperscript{146}

Turning then to the passing of the benefit, the benefit of restrictive covenants within letting schemes of old tenancies\textsuperscript{147} is cast as wide as the burden, as the relevant provision\textsuperscript{148} is worded in equally wide terms.\textsuperscript{149} The fact that even \textit{occupiers} are treated as successors in title, and thus the benefit runs to them, appears to be recognised by some leading authors, but not others,\textsuperscript{150} and no case has been traced

\textsuperscript{143} Above n 78.
\textsuperscript{144} Above n 85.
\textsuperscript{145} LPA 1925, s 79; above n 79.
\textsuperscript{146} Above nn 78-82 and 85-87 and text thereto.
\textsuperscript{147} And indeed within freehold building schemes.
\textsuperscript{148} LPA 1925, s 78(1): ‘A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.
For the purposes of the subsection in connexion with covenants restrictive of the user of land “successors in title” shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.’
\textsuperscript{149} \textit{Preston and Newsom} (8-01) states that the extended meaning of ‘successors in title’ to allow even occupiers to enforce restrictive covenants, was introduced by the LP(A)A 1924 reversing the previous law, as set out in \textit{Forster v Elvet Colliery Co} [1908] 1 KB 629 (CA) (also below n 171 and text thereto). Whereas the first sentence of LPA 1925, s 78(1) (above n 148) re-enacts a provision derived from the Conveyancing Act 1881, s 58, which is generally regarded merely as a ‘word-saving’ provision, the second sentence is derived from the LP(A)A 1924 (sch 3, pt 1, para 11), and seems clearly intended to effect a change in the law (and see below n 166). It must, however, be acknowledged that, although ss 78 and 79 of the LPA 1925 are similarly worded, s 78 has, \textit{on the point of annexation of the benefit of covenants}, been more widely interpreted than has s 79 (see the discussion of \textit{Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board} [1949] 2 KB 500 (CA), \textit{Williams v Unit Construction Ltd} (1951) 19 Conv (NS) 262 (CA), \textit{Sefton v Tophams Ltd} [1961] 1 AC 50 (HL) and \textit{Federated Homes Ltd v Mill Lodge Properties Ltd} [1980] 1 WLR 594 (CA) in \textit{Rhone v Stephens} [1994] 2 AC 310, 322 (HL)).
\textsuperscript{150} \textit{Megarry and Wade} states (16-037, n 55): ‘As regards restrictive covenants, ‘successors in title’ is deemed to include the owners for the time being of the land: [LPA 1925] s. 79(2).’ Why only the ‘owners’? \textit{Elements} does note that successors in title are deemed to include the occupiers for the time being (9.170, n 3). Wade does not draw attention to it in ‘Covenants - A Broad and Reasonable view’
where an occupier has attempted to enforce a restrictive covenant. The need for this would be unusual: but the possibility is there.

Thus within a development of flats, where there is a letting scheme of old tenancies, it would be possible for a leaseholder to enforce a restrictive covenant against the short-term occupier of an adjacent flat; but, perhaps more surprisingly, that same occupier could enforce a restrictive covenant against a leaseholder. At least as far as 'old tenancies' are concerned, therefore, restrictive obligations will be much more readily enforceable within RMC Leasehold than within commonhold.

3.2.1.1.2 Letting schemes of 'New tenancies'

Section 78(1) of the LPA 1925 continues to govern the running of the benefit of new freehold restrictive covenants. In respect of new tenancies, however, it would appear at first sight to have been disapplied by section 30(4) of the L&T(C)A, and replaced by provisions contained in section 3 of the L&T(C)A. The comparative clarity of the pre-1996 law has been replaced by a confusion which is largely unremarked upon by commentators. Only really Megarry and Wade mentions the possible difficulties in any detail; Preston and Newsom refers to changes having been made; neither author seems to believe that the net effect is of a change in the law.

[1972B] CLJ 157 esp 171-173. Preston and Newsom (at 8-01) remarks that it is a 'significant change' on the law as it was before the enactment of the LP(A)A 1924 (above n 79 for the provenance of the change).

151 Above n 148.
152 15-079, n 51 and 16-064, n 92.
153 E.g. (3-02) 'Formerly, where the parties did not have privity of estate, the leasehold covenants were enforceable only under the Rule in Tulk v Moxhay. Now, as regards new tenancies, section 3(5) of the L&T(C)A provides that [quotes subsection]. Section 3(5) thus gives statutory effect to the Rule in Tulk v Moxhay as against subtenants, licensees and squatters.... At all events the Rule in Tulk v Moxhay is not revoked; nor is existing law as to leasehold schemes of restrictive covenants changed, such schemes will continue to have effect, whether or not section 3(5) gives them statutory endorsement.'
The starting point of the discussion must be section 30(4) of the L&T(C)A, which at first sight appears to suggest that we should ignore the old law and look only at the L&T(C)A. When one turns to section 3(5), that deals with the passing only of the burden of restrictive covenants, and not with the benefit. It continues to cast the burden of restrictive covenants in leases as widely as does section 79 of the LPA 1925, but there is nothing in section 3(5) which corresponds to section 78 and determines how far the benefit should run.

The sub-section was considered in detail by Neuberger J in *Oceanic Village Ltd v United Attractions Ltd*, but his actual decision does not seem relevant to the question at issue. The issue in *Oceanic Village* was whether a landlord covenant could be binding on another tenant of another part of the building. It was held that it could not, as a landlord covenant for the purposes of section 3(5) was held to refer only to premises *demised by the lease in question* and not to all the premises *demised by the landlord*. This interpretation of section 3(5) would clearly continue to allow a landlord to enforce restrictive covenants contained in a new tenancy against sub-tenants or occupiers, but it is not directly relevant to the question of letting schemes; although it restricts the scope of a *landlord covenant* to the premises demised by the lease, it says nothing about who, besides the landlord, may enforce a *tenant covenant*, i.e., whether it can be enforced by one tenant against another.

In the face of sections 30(4) and 3(5) of the L&T(C)A, one may argue for three possible views of the current which may be summarised as follows:

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154 'In consequence of this Act, nothing in the following provisions, namely-
(a) sections 78 and 79 of the Law of Property Act 1925 (benefit and burden of covenants relating to land),
(b) sections 141 and 142 of that Act (running of benefit and burden of covenants with reversion),
shall apply in relation to new tenancies.'

155 Above n 81. This subsection has already been discussed in the context of who is bound by covenants which are enforced at the suit of the ground landlord.

156 [2000] Ch. 234 (Ch).

157 It was conceded by Neuberger J (at 246E-247B) that this would leave a narrow compass within which s 3(5) could operate as regards *landlord covenants*, but the reference in the subsection to landlord as well as tenant covenants would not be wholly redundant.

158 No real guidance can be drawn from Law Com No 174, which does not mention LPA 1925, ss 78, 79 at all. The draft Bill appended to the Report would not have specifically repealed the sections.
(1) that sections 78 and 79 of the LPA 1925 have been disapplied, and section 3(5) of the L&T(C)A applies only to extend the scope of the burden of a restrictive covenant enforceable by the lessor to cover sub-tenants and occupiers, so there is now no scope for a letting scheme to apply at all; or

(2) that section 79 has been replaced by section 3(5) of the L&T(C)A, so the position with regard to the burden of restrictive covenants is unaffected, but as the latter section does not continue the provision for the extended passing of the benefit contained in section 78, the law on the passing of the benefit of covenants within a letting scheme has reverted to that applicable prior to 1881; or

(3) that covenants within a letting scheme are not ‘tenant covenants’ at all for the purposes of the L&T(C)A, so the position as regards the passing of both benefit and burden within a letting scheme remains entirely unchanged by the L&T(C)A.

These various arguments will now be examined in detail.

The first line of argument would run that section 30(4) of the L&T(C)A repeals sections 78 and 79 of the LPA 1925 as applied to leases without any apparent scope for exceptions; therefore we can no longer rely on sections 78 and 79 of the LPA 1925; section 3(5) of the L&T(C)A deals with the running of the burden, but not of the benefit; the L&T(C)A is intended to be a complete code for the enforcement of landlord and tenant covenants; and so under section 3(5), tenant

Indeed, what is now s 30(4) was introduced as an amendment in the House of Lords as part and parcel of the amendments agreed between the British Property Federation and the Retail Consortium (HL Deb vol 565 col 398 (21 June 1995)) and accepted with virtually no debate. The Government appeared eagerly to have seized upon this compromise on this controversial topic: it is not surprising that the two protagonists did not address how their amendments might affect letting schemes.

159 When the Conveyancing Act 1881, s 58, the predecessor of LPA 1925, s 78, came into force. Megarry and Wade argue (16-075, n 30) that building schemes can be traced back to Whatman v Gibson (1838) 9 Sim 196, 59 ER 333, and thus predate Tulk v Moxhay. It is further argued (16-075) that, if the full scope for taking the benefit of covenants in respect of plots that had already been sold, and for annexation in respect of all land retained, had been appreciated, it would not have been necessary for the doctrine of the building scheme to evolve.

160 As the Act refers to a ‘tenant’ rather than a ‘leaseholder’ it seems more appropriate to retain this term.
covenants can be enforced against the tenant, his sub-tenants, and any other occupiers, but, as nothing is said about who may enforce them, they can be enforced only by the landlord.\textsuperscript{161} If only the landlord can enforce restrictive covenants then the L&T(C)A has in effect abolished letting schemes,\textsuperscript{162} an amendment to the law which has gone entirely unremarked. If this is the case, then if it is desired that one leaseholder should be able to enforce restrictive covenants against another\textsuperscript{163} (or sub-tenant or occupier), this could be done only by including negative as well as positive covenants within the scope of a mutual enforceability clause, and restrictive covenants could not be enforced directly by sub-tenants or occupiers. This view, however, overlooks that, historically, the building or letting scheme evolved independently of statute.\textsuperscript{164}

On the second view the law would have reverted, by the disapplication of section 78 of the LPA 1925,\textsuperscript{165} to what it was before section 58 of the Conveyancing Act 1881 was passed.\textsuperscript{166} It had by then been established, under general equitable principles, that, within a building scheme, one owner might enforce restrictive

\begin{footnotesize}
\begin{itemize}
\item[161] Some might argue that Oceanic Village impliedly supports this view, but the present writer would argue that this fails to take account of the fact that the court was dealing there with a landlord covenant. One might also suggest that looking at Hansard (Pepper (Inspector of Taxes) v Hart [1993] AC 593 (HL)) would add support to the former argument, as, introducing the amendments referred to (above n 158), Lord Mackay expressed the view (at col 356) that ‘The clause [i.e. new clause 3 to be introduced by Amendment 10] also embodies those parts of Sections 78 and 79 of the Law of Property Act 1925 as are to be preserved for tenancies. Together with the clause to be introduced under the next amendment, it replaces Sections 141 and 142 of the 1925 Act, which will not apply to new leases.’
\item[162] There would be a ‘scheme’ only in the sense that identical or similar covenants were being imposed across the development, which could be enforced by the ground landlord, and not in the sense that one leaseholder could enforce against another.
\item[163] Or against a sub-tenant or occupier.
\item[164] Above n 159.
\item[165] Although s 79 is also disapplied, it is on this view effectively re-enacted by s 3(5) of the L&T(C)A. Section 78(1) of the 1925 Act re-enacted section 58 of the Conveyancing and Law of Property Act 1881 (44 & 45 Vict c 41) as applied by section 96(3) of the Law of Property Act 1922 and amended by section 3 of, and paragraph 11 of Schedule 3 to, the Law of Property Amendment Act 1924. Section 79 was a new provision, first introduced in the 1925 Act’ (per Chadwick LJ in Crest Nicholson Ltd v McAllister [2004] EWCA Civ 410, [2004] 1 WLR 2409 [44]); and see further the commentary on these sections, above nn 148-149 (s 78), and n 79 (s 79).
\end{itemize}
\end{footnotesize}
covenants against another.\footnote{167} That similar principles applied within a letting scheme was accepted in \textit{Hudson v Cripps}.\footnote{168} \textit{Newman v Real Estate Debenture Corporation and Flower Decorations Ltd.}\footnote{169} although heard after 1925, was argued on the basis of case law rather than statutory provisions, and an injunction was granted at the suit of one tenant against another.\footnote{170} On this view the disapplication of section 79 to new tenancies would still mean that under section 3(5) of the L&T(C)A one leaseholder would be able to enforce tenant covenants against another leaseholder or sub-tenants or occupiers. But the disapplication of section 78, without a corresponding replacement, means that if one has reverted to the pre-1925 law, then occupiers would clearly be unable to enforce covenants. In \textit{Forster v Elvet Colliery Company Ltd}\footnote{171} the view was expressed \textit{obiter} that mere occupiers would not be able to enforce covenants.\footnote{172} But this is open to the objection that this decision relied on section 58 of the Conveyancing Act 1881,\footnote{173} which was itself repealed by the LPA 1925,\footnote{174} and so the repeal of section 78 of the LPA 1925 (insofar as it relates to tenancies) by section 30(4) of the L&T(C)A would not revive the provisions of the 1881 Act: the law would have reverted to its pre-1881 state. But even prior to the 1881 Act, a covenant which affected the value of land would run with it,\footnote{175} so a covenant with the lessor and the owners of other leasehold estates would seem bound to run with both.

Whatever may be the position as regards annexation where a letting scheme is not involved, in a block of flats there is likely to be a letting scheme, and the case

\begin{footnotes}
\item[167] Above n 159.
\item[168] [1896] 1 Ch 265 (Ch). The actual decision involved injunction proceedings by a tenant against her landlord. Neither the arguments of Counsel nor the judgment contains any reference to any statutory provisions.
\item[169] [1940] 1 All ER 131 (KB).
\item[170] An injunction was also granted against the landlord.
\item[171] [1908] 1 KB 629 (CA), 635-6.
\item[172] The plaintiffs were clearly the successors in title of the original covenantees, and for the same estates, but it is not clear from the report whether they held freehold or leasehold estates in the surface of the land over the colliery workings.
\item[173] What was originally the Conveyancing and Law of Property Act 1881 was renamed the Conveyancing Act 1881 by the Conveyancing Act 1911, s 16(4).
\item[174] Above n 166.
\end{footnotes}
law suggests that the building scheme is a creature of equity which does not depend upon statutory provisions, which would seem sufficient to allow one leaseholder to enforce restrictive covenants against another. There would seem to be a dearth of authority on whether sub-tenants within post-1995 letting schemes would be able to enforce restrictive covenants, but Forster would suggest that they would not. Finally, the third possibility is that, notwithstanding the wording of section 30(4) of the L&T(C)A, section 3(5) of that Act does not apply at all to tenant covenants if with other tenants. This would seem to be the view expressed in Megarry and Wade, which acknowledges - although very briefly – that the L&T(C)A may have had repercussions on letting schemes, although even here the editor’s conclusions are far from clear, and found only in two footnotes, one of which reads:

It should also be noted that L.P.A. 1925, s.78 does not apply to new tenancies granted after 1995 under L.& T.C.A. 1995: see ibid, s.30(4); ante, para 15-079. However, this disapplication is restricted to covenants in the lease. Thus a tenant under a lease granted after 1995 could take advantage of a covenant that was annexed to the freehold under L.P.A. 1925, s.78 (as in Smith v River Douglas Catchment Board [1949] 2 K.B. 500; ante, para. 16-015). The section would also apply to a covenant entered into with the tenant for the benefit of his leasehold estate by a neighbour. This could be taken as implying that the exception would apply only if neighbours entered into a deed incorporating restrictive covenants, and that letting schemes would not be included, but the other footnote states:

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175 By virtue of the Real Property Amendment Act 1845, s 5.
176 Above n 159. Elements (10.17) treats the development scheme as a method of transmitting the benefit of covenants which is distinct from annexation (express, implied or statutory) and assignment. Preston and Newsom also treats building schemes (at 2-53 - 2-84) separately from, and as distinct from, statutory annexation (at 2-07 - 2-13).
177 And, a fortiori, occupiers.
178 Cases such as Smith v River Douglas Catchment Board (above n 149) and Williams v Unit Construction Co Ltd (above n 149) would suggest that sub-tenants would be able to sue, but these cases both rely on LPA 1925, s 78.
179 16-064, n 92.
180 Which would inevitably involve ‘covenants in the lease.’
181 15-079, n 51.
the disapplication of L.P.A. 1925, ss. 78 and 79 would appear to be confined to their application to covenants between landlord and tenant and not, e.g. to a restrictive covenant entered into for the benefit of leasehold land by a neighbour.

This defines a ‘tenant covenant’ differently from the meaning implied in the earlier footnote, suggesting that for section 30(4) to apply it is insufficient that a ‘tenant covenant’ is contained in a lease: *it must be a covenant between a landlord and a tenant.* This would not therefore include a covenant in a lease by one tenant with other tenants, for their benefit; as such a covenant is not a ‘tenant covenant’ for the purposes of section 30(4), it continues to be governed by sections 78 and 79 of the LPA 1925, and not by section 3(5) L&T(C)A. The definition section \(^{182}\) of the L&T(C)A would tend to support this:

‘tenant covenant’, *in relation to a tenancy,* means a covenant falling to be complied with by the tenant of premises demised by the tenancy (italics added)

It is difficult to see what the italicised words add to the sense of the clause, unless they were inserted to make it clear that a covenant by a tenant with another tenant - even if contained in a lease \(^{183}\) - is not a ‘tenant covenant’ in the scheme of the L&T(C)A. Further support for this view may also be derived from the fact that, in discussing letting schemes, *Megarry and Wade* \(^{184}\) does not suggest that the law has been altered by the L&T(C)A.

This would, however, have the cumbersome result that the same wording in a lease may be governed partly by section 3(5) of the L&T(C)A and partly by section 79 of the LPA 1925: typically a series of clauses including restrictions will be introduced by words such as ‘The lessee hereby covenants with the lessor and the other lessees for the time being of the flats contained in the building...’. This clause would then be both a ‘tenant covenant’ within the meaning of section 28(1) of the L&T(C)A and so enforceable by the landlord against the sub-tenants and occupiers of the demised flat, \(^{185}\) and also a covenant which, although by a tenant, is not a ‘tenant covenant’ but a covenant with neighbours who are also tenants of the same

\(^{182}\) S 28(1).

\(^{183}\) As it almost always will be: deeds imposing restrictive covenants otherwise than in leases are rare in developments of leasehold flats.

\(^{184}\) 16-080.

\(^{185}\) Under L&T(C)A, s 3(5).
landlord. As it is not a ‘tenant covenant’ for the latter purpose, the passing of the burden under the covenant remains governed by section 79 of the LPA 1925, and will bind the tenant’s sub-tenants and occupiers, and the passing of the benefit remains governed by section 78 of the LPA 1925, and the covenant can therefore be enforced by other tenants, and by their sub-tenants and occupiers.

Of these three alternatives, the third seems the most likely: when the L&T(C)A was passed there was no apparent intention to amend the law on letting schemes, and Megarry and Wade would tend to support this interpretation. If this is the case then the law applicable to letting schemes of new tenancies is no different from that applicable to schemes of old tenancies. On this basis, covenants within the scope of a letting scheme remain enforceable under sections 78 and 79 of the LPA 1925 and not under section 3(5) of the L&T(C)A. They may therefore be enforced against leaseholders, sub-tenants and occupiers, and may be enforced by leaseholders, sub-tenants, and even occupiers.

3.2.1.2 under commonhold

As previously noted, the CLRA does not distinguish between negative and positive duties. Negative duties in the CCS must therefore be enforced against owners in exactly the same way as positive duties. The Model CCS requires one unit-holder or tenant

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 to use the dispute resolution procedure set out in some detail in the CCS, subject to specified exceptions. Breach of a negative duty (e.g. not to make alterations which affected the structure of the building) might give rise to the need to take emergency proceedings, but most will not, and the indirect enforcement procedure will be applicable.

There is an element of irony in this: commonhold is broadly intended to facilitate the enforcement of obligations, but here does the opposite. It applies an

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186 Apart from when they are enforced by the RMC, when they become ‘tenant covenants’ within the meaning of the L&T(C)A, and are enforceable under s 3(5).
187 CCS, 4.11.17.
188 CCS, 4.11.19 - 4.11.30: see previous discussion, above nn 109-110 and text thereto.
189 CCS, 4.11.18: above nn 107-108 and text thereto.
indirect procedure which is redolent of mutual enforceability clauses in leases to disputes within commonhold, but whereas in leasehold developments the indirect procedure is necessary only for positive obligations, under commonhold it applies to most disputes between unit-holders (or tenants), and thus applies to negative obligations as well.190

3.2.2 against renting tenant
3.2.2.1 under leasehold
On the basis of the previous discussion, the better view would seem to be that covenants of a restrictive nature can be enforced against a sub-tenant by another leaseholder, another sub-tenant, or even by an occupier.

3.2.2.2 under commonhold
Under commonhold, negative duties are enforced in exactly the same way as positive duties. Section 37 of the CLRA allows for enforcement by and against tenants, insofar as regulations may permit, and the provisions of the CCS require the use of the indirect enforcement mechanism previously described. Commonhold therefore makes enforcement of negative duties against tenants more difficult.

3.2.3 against occupier
3.2.3.1 under leasehold
Again, on the basis of the previous discussion, the better view would seem to be that covenants of a restrictive nature can be enforced against an occupier by a leaseholder, a sub-tenant, and even by another occupier.

3.2.3.2 under commonhold
As already noted, commonhold does not distinguish between the enforcement of negative and positive duties. There is no provision in the CLRA for duties under the CCS to be enforced against licensees.191

Whilst the circumstances in which it would be necessary to take enforcement proceedings against a licensee for breach of a positive duty are likely to be limited,192 it is more likely that one might wish to take proceedings against a licensee for the breach of a negative duty. The CCS will commonly contain provisions restrictive of

190 For a discussion of why this indirect procedure has been adopted, see below text to nn 236-249.
191 Save for those who enjoy matrimonial home rights: above n 36.
192 A possible scenario is described above, text to n 61.
noise, business use, or other inconsiderate use of the unit, and may, for example, prohibit the keeping of pets. It seems undesirable that it should not be possible to enforce these directly against occupiers. Wording a provision in such a way that, if the occupier breaches a restriction, this puts the unit-holder in breach, may mitigate this shortcoming, but this device is really only of any use if the unit-holder can take proceedings against the occupier under the terms of any licence, and it is possible to take proceedings against the unit-holder. If the unit-holder lives outside the jurisdiction, and the unit is in practice being occupied by a succession of licensees – or even a long-term licensee - it may be impossible for another leaseholder to take any effective enforcement proceedings. This difficulty in enforcing against occupiers is compounded by the impossibility of the CHA taking forfeiture proceedings.

4. COMPARING THE ENFORCEMENT OF OBLIGATIONS IN COMMONHOLD AND RMC LEASEHOLD

4.1 Enforceability

On the assumption, therefore, that there is no change in the law relating to ‘new tenancies’ compared with ‘old tenancies’, in comparing commonhold with RMC Leasehold, we are faced with the following ironies (bearing in mind that commonhold was intended to make the enforcement of covenants simpler):

(a) the restrictive duties of the CCS, though enforceable against unit-holders and tenants, are not enforceable by either the CHA or other unit-holders or tenants against licensees and other occupiers (under leasehold a restrictive covenant may be enforced by the RMC or a leaseholder against another leaseholder, a sub-tenant, or any occupier);

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193 Above n 142.
194 For example, by stipulating ‘not to keep a pet on the premises, or to permit or allow a pet to be kept there’.
195 Above, text to n 61.
196 As it is possible to take enforcement proceedings directly against an occupier for breach of a restrictive covenant, forfeiture proceedings against a leaseholder should rarely be necessary; it may be more useful in the rarer cases where one needs to enforce a positive covenant: below, text to nn 250-286.
(b) restrictive duties are enforceable only by a unit-holder or tenant against another unit-holder or tenant through the elaborate procedures set out in the CCS\textsuperscript{197} and not usually by direct court proceedings (under leasehold a leaseholder, sub-tenant or occupier could take proceedings directly against another leaseholder, sub-tenant, or occupier to enforce a restrictive covenant).

The former is as a result of the way that the CLRA has been drafted; the latter as a result of the way that the delegated legislation has been drafted, as sections 19, 31 and 37 of the CLRA would allow for enforcement by one unit-holder or tenant against another unit-holder or tenant.

Against this, one must concede that under commonhold:
(a) there is no need to distinguish between positive and restrictive obligations;
(b) if, after invoking the procedure under the Model CCS, the CHA would not take proceedings against a unit-holder or tenant to enforce a positive obligation, it would be possible for the complainant unit-holder or tenant to take proceedings directly against a unit-holder or tenant in default: positive covenants may therefore be more easily enforced (under leasehold it would always be necessary to take proceedings through the RMC under a mutual enforceability clause);
(c) subject to having to use the procedure under the Model CCS, positive duties may be directly enforced by tenants (under leasehold sub-tenants could not enforce positive covenants).\textsuperscript{198}

It may be appropriate now to consider why the provisions of the CLRA do not seem to have been fully thought through. Law Com No 127 would have distinguished between ‘positive’ and ‘restrictive’ and ‘active’ obligations. \textit{Aldridge}, on the other hand, would have allowed all commonhold duties to be enforced by and against all unit-owners, tenants and occupiers. Following \textit{Aldridge}, the question of who was to be liable to perform, and able to enforce, obligations within a commonhold became increasingly confused.

\textsuperscript{197} 4.11.18 - 4.11.30: above, text to nn 109-110.
\textsuperscript{198} Unless the leaseholder/sub-landlord had undertaken in the sub-lease to enforce such covenants, which would be very rare.
4.1.1 The 1990 Draft Bill

The 1990 Draft Bill and Consultation Paper addressed the issue of enforceability, and attempted a principled response, although there is a certain inconsistency in its application which is difficult to account for. Under the draft Bill, obligations imposed by commonhold regulations would have been binding automatically on unit owners, on tenants under long leases, occupiers with rights of occupation under the Matrimonial Homes Act 1983, and other occupiers, but not on tenants under short leases or those deriving MHA rights of occupation from such leases. One can appreciate the rationale behind tenants under short leases being treated differently from unit owners and long leaseholders, but it is very curious that occupiers should be equated with unit owners rather than with ‘short’ tenants. One may surmise that this was because otherwise it would be too easy to avoid liabilities, though nowhere is this stated in the Notes to the Draft Bill. Tenants under short leases were, however, to be subject to ‘any passive obligation imposed by the commonhold regulations’. ‘Passive obligations’ would have included restrictions on the doing of some act within the commonhold, obligations to afford access, and ‘reciprocal’ rights. The notes to clause 7 comment:

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199 See ch 2, n 27.
200 Cl 7(1).
201 It had been floated that it should not be possible to create a long leasehold out of a commonhold unit, but no firm decision had been taken on this.
202 If derived from the interest of the unit owner or a long-leaseholder.
203 Cl 7(2)(a)-(c).
204 Defined by cl 7(10) as those for under 21 years.
205 Cl 7(2)(c)(i) and (ii).
206 Identified in the Wilberforce Report, paras 19 to 21, and Law Com No 127, 11.8.
207 Those who drafted the Bill may have had in mind the scenario described above, text to n 61.
208 Cl 7(3).
209 Cl 7(5). This derives from Law Com No 127 and Aldridge. It is far from clear what a ‘reciprocal right’ would have amounted to in a commonhold. Law Com No 127 included among ‘neighbour obligations’ (at 6.6) ‘reciprocal payment obligations’ being obligations ‘requiring the making of payments in a specified manner (whether to a person of a specified description or otherwise) on account of expenditure which has been or is to be incurred by a person in complying with a positive obligation.’ This was intended to cover the situation in ordinary freeholds where one owner repairs a facility (e.g. a wall or driveway), and another has to contribute towards the cost, but it is difficult to
Tenants under short leases are thus put into much the same position as subtenants of leasehold flats would be under the leasehold system\textsuperscript{210} which would seem broadly correct.

The distinction between ‘passive obligations’ and other obligations,\textsuperscript{211} although useful in classifying the obligations relevant to adjoining freehold properties, might not have drawn the line in quite the right place within commonholds: one could, for example, make a good case that ‘minor positive obligations’ which did not require any expenditure - for example, to keep the principal door of the block locked - should bind tenants under short leases.\textsuperscript{212} One might even argue that some obligations, which might involve limited regular expenditure, such as to clean windows, ought to bind tenants.\textsuperscript{213}

Obligations might be enforced by unit owners, long leaseholders, and those deriving rights of occupation under the MHA 1983 from such interests,\textsuperscript{214} but not by tenants under short leases, or other occupiers. In this respect, the 1990 Bill was narrower than Aldridge.\textsuperscript{215} Additionally a unit owner would have been under an obligation to ‘to do his best to ensure that any persons who are in the unit or in any common parts by virtue of any express permission given by him do not do anything which, if done by him, would be in breach of the obligation.’\textsuperscript{216}

see how this would have applied in a commonhold, unless a facility shared by, say, only two units, were to be repairable at the joint expense of the relevant unit-holders, rather than under the service charge. ‘Passive obligations’ under cl 7(5) would not have included our examples of an obligation to keep an outer door of a building locked, or to clean windows.

\textsuperscript{210} P 55.

\textsuperscript{211} The 1990 Draft Bill did not use the term ‘active obligation’ although Law Com No 127 had referred to ‘positive’ obligations.

\textsuperscript{212} It should be noted that occupiers other than short tenants would have been bound in any event under clause 7(1): above, text to n 206.

\textsuperscript{213} Although such an obligation could be imposed upon the unit-holder, who could then impose it on his tenants if he wished, this might not be practicable if the unit-holder were resident abroad.

\textsuperscript{214} Cl 8(1) and (2).

\textsuperscript{215} There was, however, a proviso (cl 8(7)) that a unit owner would be able to enforce another’s obligation ‘if (and only if) a contravention of the obligation would or might - (a) cause him personal injury or loss arising from damage to property; or (b) prejudicially affect his estate or interest in the unit or his use or enjoyment of it.’

\textsuperscript{216} Cl 7(8).
4.1.2 The 1996 Draft Bill

The 1996 Draft Bill closely followed the 1990 draft. By this time, the Government had decided against allowing long leases of commonhold units,\(^{217}\) which simplified the permutations. Many points of detail, including on enforceability, were transferred to the Schedules of the draft Bill. Again it provided that ‘all obligations imposed by commonhold regulations on the owners of units are binding also on any occupiers of the units’\(^{218}\) subject to an exception for tenants, and those holding matrimonial home rights deriving from tenancies, who were to be subject only to ‘passive obligations,’ the definition of which followed the 1990 proposals.\(^{219}\) Again, only unit owners\(^{220}\) would be entitled to enforce obligations,\(^{221}\) and unit owners would have certain responsibilities for the conduct of those on the unit or common parts with their permission.\(^{222}\)

The intention of the Aldridge proposals,\(^{223}\) and of the 1990 draft Bill,\(^{224}\) was that commonhold would have been enacted as part of a general reform of the law on freehold covenants, so the concept of ‘passive’ obligations would have been drawn from the new law. By 1996, commonhold had become a freestanding reform. The 2000 draft Bill, and the 2001 draft Bill, which became the CLRA, did not consider how obligations would need to be classified, and which should be enforceable, by whom, and against whom. Clearly occupiers could not be bound by all obligations, which were imposed only on unit-holders and tenants. This overlooked the fact that, by virtue of sections 78 and 79 of the LPA 1925, and letting schemes, occupiers were already bound by, and able to enforce, restrictive covenants; that Aldridge would have allowed all obligations to be enforced by and against all unit owners, tenants, and occupiers; and that the 1990 and 1996 draft Bills contained provisions that would have allowed ‘passive obligations’\(^{225}\) to be enforced against occupiers and tenants.\(^{226}\)

\(^{217}\) By cl 2(3) the maximum duration of any lease would have been 25 years.

\(^{218}\) Sch 1, para 1.

\(^{219}\) The definition was contained in para 1(5) of the 1996 draft Bill.

\(^{220}\) And those deriving matrimonial home rights from them.

\(^{221}\) Sch 1, para 3(5).

\(^{222}\) Ibid para 2.

\(^{223}\) 110.

\(^{224}\) 2.7; pt II of the draft Bill would have followed that annexed to Law Com No 127.

\(^{225}\) A category that is wider than ‘restrictive covenants’ – above n 209.
The draft CCS in July 2003 would have included provisions which were clearly *ultra vires* the CLRA, suggesting that the limited scope of sections 19 and 37 may have been an oversight.

Merely allowing *all* obligations in the CCS to be enforced by or against occupiers would, it is suggested, still be inappropriate: *Aldridge* was wrong to propose such far-reaching enforceability. A possible improvement would be for any amendment to the CLRA to restore the distinction in the 1990 and 1996 draft Bills between positive and passive obligations, and to allow passive obligations to be enforced against occupiers, and arguably by them. Ideally, however, it would be better to draw the line between those obligations which can be enforced against tenants and occupiers, and those which cannot, so as to include not only passive obligations, but also what were previously referred to as ‘minor positive obligations’ i.e. those which, although technically positive, do not involve expenditure.

On the other hand, the CLRA may go too far in allowing all duties, including positive ones, to be enforced against tenants: tenants as well as unit-owners should be able to enforce positive duties, but most ‘positive’ duties - those incurring any substantial expenditure or effort - should be primarily enforceable against the unit-holder, and should be enforceable against a tenant only.

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227 Above, text to n 70.
228 As under *Aldridge*: above n 53 and text thereto.
229 This would, at the very least, ensure that duties to allow access to the unit would be owed by occupiers: this is potentially a difficulty if, as it seems, such duties are not easements (above n 55).
230 They might alternatively be defined so as to include minor expenditure of a recurrent nature e.g. the cleaning of windows.
231 It could be argued that it would be appropriate to include also obligations which involve only minimal effort or expenditure: obligations to keep the interior of windows cleaned might be examples of this class of obligations which should be enforceable against tenants and occupiers. On the other hand, it may be simpler to leave the unit-holder responsible for these, subject to the safeguard that the tenant or occupier should be liable if it was impracticable to make the unit-holder comply.
232 I.e. including those which may involve substantial expenditure.
233 E.g. obligations as to interior repair, and in particular any obligation to carpet the flat.
when it is impracticable to force the unit-holder to comply, and to the extent that it is reasonable so to do. Similar provisions should apply in respect of occupiers.

As to whether commonhold or RMC Leasehold has the better enforcement mechanisms is perhaps too close to call. Neither is entirely satisfactory. One may justifiably ask why, after such a long delay in enacting commonhold, and so many draft bills and consultations, commonhold as enacted still has these shortcomings in dealing with the enforcement of obligations.

4.2 Why has the indirect enforcement procedure been encouraged?
The choice in commonhold as enacted of an indirect method for enforcing obligations between one unit-holder (or tenant) and another unit-holder (or tenant) may also be viewed as a shortcoming, but in this case its adoption is clearly deliberate. The Government appears to fear that, if enforcement is too easy, it will open the floodgates to frivolous and vexatious claims. This was raised in passing in the Consultation Paper of August 2000: the draft Bill included the novel provision:

But in respect of a particular failure on the part of a unit-holder a commonhold association
(a) need not take action if the association considers that inaction is in the best interests of establishing or maintaining harmonious relationships between all the unit-holders, and
(b) shall have regard to the desirability of using arbitration, mediation or conciliation procedures wherever possible.

This clause was amended during the Bill’s passage so the Act now reads:

But in respect of a particular failure on the part of a unit-holder (‘the defaulter’) the directors of a commonhold association
(a) need not take action if they reasonably think 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 defaulter) significant loss or significant disadvantage, and

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234 Most commonly if the unit-holder is resident outside the jurisdiction.
235 So tenants and occupiers might be required to comply with positive obligations which require no expenditure, such as to maintain security; and possibly also those that require minimal expenditure or effort, such as cleaning windows, etc.
236 Cl 28(3).
(b) shall have regard to the desirability of using arbitration, mediation or conciliation procedures (including referral under a scheme approved under section 42) instead of legal proceedings wherever possible. 237

This provision is desirable, in that it avoids any argument to the effect that the CHA must strictly enforce obligations or regulations in all cases. At the very least, if one unit-holder is complaining of the conduct of another, it provides the directors of the CHA with justification not to take up the complaint.

During the passage of the Bill, 238 a further clause was added 239 permitting regulations to require that a CHA should be a member of an approved ombudsman scheme. This may be one reason the CCS requires 240 enforcement 241 to be through the CHA rather than directly: a CHA can more easily be required to use an ombudsman scheme than can a unit-holder. It marks a clear departure from the original intention of the Aldridge Committee. 242

The background to this is the awareness that the New South Wales strata title system is backed by a strata title commissioner scheme, which makes a public officer available for the resolution of disputes. The Aldridge Committee 243 noted the existence of the scheme, the adoption of which had been enthusiastically urged upon it by the National Consumer Council and the Welsh Consumer Council, 244 but did not think that a Commonhold Commission was essential to the working of commonhold. Although the NSW Strata Title Commissioner scheme has been widely commended, 245 it has led to the suspicion that making it too easy to bring disputes

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237 S 35(3). Kenny (see ch 2, n 53, at 6) opines: 'This section is written not in the normal drafting style of legislation but in pious terms of general expectation... What do these extraordinary worded [sic] obligations mean in reality?'
238 During the Report stage of the passage of the 2000 Bill on 10 April 2001, see HL Deb vol 624 col 1123.
239 Which became s 42.
240 4.11.19 - 4.11.30.
241 Save in respect of monetary claims, or in an emergency.
242 7.25, 7.26, quoted above, text to nn 90-91.
243 At 15.6. It also noted that the Commissioner had been added to the NSW scheme 12 years after its original implementation.
244 Ibid.
245 Leaseholds - Time for a Change? (see ch 2, n 7) p 11; N Bailey and D Robertson Management of flats in multiple ownership (Bristol, Policy Press, 1997) 22.
before a competent forum tends to encourage the making of complaints. So it has been stated:

The review [in 1996] in NSW also recognised that adjudication has certain limits. Although it does allow a binding decision to be taken and enforced, it does not necessarily resolve the underlying causes of a dispute. It was felt that one side-effect of providing relatively easy access to adjudication was that some people were seeing an order as a means of solving relatively minor disputes. This was seen as leading to a confrontational approach which was counterproductive. Following the 1996 Act, complainants are required to seek a solution through mediation before their case will be considered by the adjudicators. Efforts to encourage the use of mediation services were also apparent in France and the USA.\(^\text{246}\)

So too Clarke, discussing the CLRA, states:

To establish a commonhold commissioner, and a new disputes procedure, would be expensive and there would be relatively little work for the commissioner to do for some years, at least until commonhold was well established. Much more importantly, the Australian experience suggests that charging fees to resolve disputes does not cover the costs of the operation so the general taxpayer is funding a limited dispute resolution procedure for the benefit of a few. There is also at least some evidence that having such a simple (and inexpensive) resolution procedure encourages relatively minor disputes to be pursued to final determination rather than resolved internally.\(^\text{247}\)

This is a difficult issue. Clarke concedes\(^\text{248}\) that it may be argued that it is better to provide subsidised dispute resolution services than for greater expense to be incurred in court proceedings. The view, however, seems to be increasing that the civil court system should be self-funding from fees charge to litigants.\(^\text{249}\) Although there is no reason why commercial undertakings should not pay the economic cost - including the cost of judges and the court system - of settling their disputes, there is a powerful

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\(^{246}\) Bailey and Robertson (above n 245) 22-23.


\(^{248}\) Commonhold: The New Law, 11.3, n 3.

argument that the provision of an accessible judicial system by the state is a disincentive against citizens resorting to self-help measures and thus essential in a civilised society.

4.3 Mechanisms for enforcement

4.3.1 Availability of forfeiture

In considering enforceability, we have so far considered whether a legal nexus permitting enforcement is available. Chapter 2, when discussing tenure, made the point that forfeiture of a commonhold unit would not be possible, and considered whether forfeiture could ever be consonant with freehold ownership. We return to the issue in this chapter, to examine the role played by forfeiture in leasehold (including RMC Leasehold) as a mechanism for enforcement. This is an aspect of the broader issue of how far the legal system is prepared to go to ensure that those who have accepted obligations when they acquire a property, either as a first or subsequent purchaser, actually fulfil them. This is a difficult problem, as the law has a limited armoury available. Damages will rarely be appropriate. The most efficacious remedy will usually be an injunction, though if the defaulter continues to disobey an injunction, one is left with the draconian remedy of imprisonment (or possibly of fining) for contempt of court. Occasionally it may be appropriate to allow the person with the right to enforce an obligation – the body corporate, or a neighbour – to enter on the defaulter’s property to carry out works itself, at the defaulter’s expense. An obligation to perform an act thus gets transformed into a financial claim, which can more easily be enforced. Such rights of entry may be more practicable than obtaining and enforcing mandatory injunctions, but, if an owner refuses to allow

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250 The discussion of the indirect enforcement procedure set out in the CCS, 4.11.17 - 4.11.30, could be seen as relating to procedure, rather than to legal nexus, but its requirements are integral to enforcement, as under the CLRA enforcement is permissible only in accordance with the prescribed Regulations.

251 Even this remedy may not be available if the alleged offender is suffering from a mental disorder such that the Disability Discrimination Act 1995 is engaged (North Devon Homes Ltd v Brazier [2003] EWHC 574 (QB) and Wookey v Wookey [1991] Fam. 121); below nn 282-286 and text thereto.

252 There is a possible problem here, in that, if the defaulter is in ‘negative equity’, it may be difficult for whoever is trying to enforce the obligation to recover the expenses incurred. But, on the other hand, it seems unlikely that a defaulter in contempt would be sent to prison if the reason for not carrying out works was lack of money.
access to the property to carry out the works, they may still need to be backed up with the ultimate sanction of injunctive relief. Such difficulties are encountered both in commonholds and in leasehold developments. It should be noted, however, that one sanction which is available in leasehold – namely, forfeiture – is not and cannot be available in commonhold. Although forfeiture would appear not to be widely used, and, where it is used or threatened, it is mainly to enforce financial obligations, it can also be used in an intractable case of breach of a positive or restrictive covenant as an alternative to an injunction.

4.3.2 Proposals for reform

4.3.2.1 Law Commission Report No 142

The first Law Commission Report on forfeiture in 1985 made little reference to residential tenancies: forfeiture was discussed almost entirely within the context of commercial tenancies at a rack rent. Only briefly did it make the point that the present system operates particularly unfairly where a premium has been paid for a long lease. Forfeiture was discussed in connection with the non-payment of rent and service charges rather than for breach of other covenants.

4.3.2.2 Commonhold and Leasehold Reform Bill 2001

Forfeiture attained a certain prominence during the passage of the 2001 Commonhold and Leasehold Reform Bill. Considerable disquiet had been expressed in the Commons on the abuse of forfeiture; even if rarely effected, the threat of its

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253 Including RMC Leasehold.

254 CLRA, s 31(8). The view that forfeiture is inconsistent with commonhold, as a ‘freehold with special attributes’ can be traced back to Aldridge (7.27).

255 See ch 2, n 103, though examples are to be found in the law reports, most notably Di Palma v Victoria Square Property Co Ltd [1986] 1 Ch 150 (CA) and Jones v Barnett [1984] Ch 500 (Ch); and below, n 258.


257 16.2.

258 Examples were given on the Second Reading and Committee Stage of the CLRA in the House of Commons, e.g. that given by Barry Gardiner MP at HC Deb vol 377 col 477 (8 January 2002) of the forfeiture by the London Borough of Camden of a flat worth £350,000 in respect of service charge and ground rent arrears amounting to £1,266.38 (the leaseholder had not been seen for two years and it appeared that she might have been in psychiatric care); or the case of Fiona McMillan (Session 2001-02, vol IV, Standing Committee D, col 169/170, 24 January 2002), given by Dr Iddon MP.
use for non-payment of small sums of ground rent and service charges was seen as unnecessary and oppressive. At the Report Stage,\textsuperscript{259} therefore, Government amendments were introduced\textsuperscript{260} to restrict, but not abolish, forfeiture. The Government was accused of having reneged on its promise\textsuperscript{261} to replace forfeiture with a system which provided for compensation to be paid to the leaseholder for loss of the lease and thus prevented the landlord from making a windfall gain. The Under-Secretary of State\textsuperscript{262} explained that the Government felt that, due to the complexity of the issue, wholesale reform of forfeiture was best left to the Law Commission, who could formulate such proposals in their forthcoming Report.

\textit{4.3.2.3 Termination of Tenancies for Tenant Default (CP No 174)}

It therefore came as a surprise that when the Law Commission published its Consultation Paper \textit{Termination of Tenancies for Tenant Default}\textsuperscript{263} in January 2004 it contained hardly any more recognition than did Law Com No 142 of the fact that the practical effect of forfeiture when a lease had a capital value was very different from its effect when the tenant was paying a rack rent.\textsuperscript{264} Although CP No 174

\section*{Notes}

\textsuperscript{259} 13 March 2002.

\textsuperscript{260} Government Clauses 9, 10 and 11. Back-bench and Opposition amendments had been tabled to abolish forfeiture outright (New Clause 3), or for the payment of the value of the tenant's interest after deduction of moneys owed and costs to the tenant (New Clauses 6, 8 and 19). New Clauses 6 and 8 did not specify how the value of the tenant's interest would be quantified, given that it would 'merge' back into the landlord's interest. New Clause 19 would have abolished forfeiture of leases of more than 21 years where the rent was less than £1,000 p.a. and converted the landlord's financial claims into a first charge on the leasehold interest, taking priority over existing mortgages, a device which has certain parallels with rejected proposals for enforcement of commonhold assessment in commonholds (see e.g. \textit{Commonhold: The New Law}, 11.21).

\textsuperscript{261} In \textit{Residential Leasehold Reform in England and Wales: The Way Forward} (DETR, December 1999) para 12. This was published in response to the consultation begun by the Consultation Paper published in November 1998. The amendments to the CLRA implemented the other reforms to forfeiture set out in para 11.

\textsuperscript{262} Ms Sally Keeble, MP.

\textsuperscript{263} Consultation Paper No 174 (London, TSO, 2004) ("CP No 174").

\textsuperscript{264} Para 1.15 recognises that when a commercial or long residential lease has a capital value, forfeiture operates to bestow a windfall on the landlord, but this is not elaborated.
contains a number of changes from Law Com No 142, the proposed termination procedure still amounted to a confiscation of the leaseholder’s interest in the property and a possible windfall for the landlord. No reference was made either to termination conditional upon a payment of compensation to the former leaseholder; or the replacement of forfeiture with a procedure whereby the landlord had the power to sell the leaseholder’s interest, in much the same way as a legal mortgagee. One cannot pretend that the outworking of either scheme would be entirely straightforward. A power of sale could conveniently deal with a residential long lease, which would have a capital value, but not with a commercial lease at a rack rent, which typically would have little or no capital value; as the lease would probably be unsaleable, the landlord would wish to recover possession to relet.

4.3.2.4 Termination of Tenancies for Tenant Default (Law Com No 303)
As a result of the consultation, however, the Law Commission’s Report in 2006 Termination of Tenancies for Tenant Default has proposed amending its original scheme so that one of the possible outcomes of a termination claim would be an order for sale. If a receiver is appointed to carry out a sale, it would, unless the court orders otherwise, in effect be the equivalent of a mortgagee’s sale with (after payment of the receiver’s costs) the landlord’s financial claims ranking in priority to

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265 For example, in the terminology used; in seeking to ensure that court proceedings are always (in line with the Woolf reforms) preceded by notices; and in allowing for extra-judicial termination.
266 It is suggested that the compensation would be the amount due to the leaseholder after deduction of all sums due to the landlord, the landlord’s expenses, and prior charges. As the leaseholder was ex hypothesi in default, compensation for disruption would not be appropriate.
267 This latter proposal would have similarities to that envisaged by New Clause 19, proposed during the Report Stage of the passage of the CLRA (above n 260).
268 Mention should be made in particular of the paper presented at a seminar at the Institute of Advanced Legal Studies on 29 March 2004 by David Clarke.
269 ‘Law Com No 303’ (Cm 6946) (London, TSO, 2006).
270 See 2.27. The sale would not be by the landlord: the court would appoint a receiver to carry it through.
271 Draft Bill (‘Landlord and Tenant (Termination of Tenancies) Bill’) to Law Com No 303, cl 14(5).
the first and subsequent charges, and the tenant receiving any proceeds that are left over.

4.3.3 Restrictions on use of forfeiture

Measures have already been taken to restrict the use of forfeiture for residential long leaseholds and to ensure that the threat of it is not used to intimidate leaseholders and prevent them from, for example, disputing service charges where they have grounds to do so. So a landlord may not exercise a right of re-entry or forfeiture for non-payment of service charges unless and until either the arrears have been agreed or admitted by the tenant, or determined by the court or an arbitral tribunal. Section 167 of the CLRA further restricts the use of forfeiture to enforce the payment of rent, service charges or administration charges unless the sum unpaid exceeds a prescribed amount, or has remained unpaid for a specified period. Thus although restricted, forfeiture remains an ultimate sanction.

The proposed new scheme deals quite comfortably with one of the problems with which the Law Commission attempted to grapple in CP No 174, namely, how a termination order should deal with the derivative interests of mortgagees.

Above n 271, clause 14(3)(4).

Housing Act 1996 (‘HA 1996’), s 81; this was reinforced by s 82 whereby the landlord might not serve a notice under LPA 1925, s 146 so as to threaten forfeiture for non-payment of a service charge, unless the notice also advised the leaseholder of the protection afforded by s 81. Whether or not it would have been necessary to serve a Section 146 Notice would depend upon whether the service charge was reserved as rent (s 82 was repealed by CLRA, s 80 and sch 14).

As the annotation to the section in Hill and Redman (A[21945]-A[21946]) points out, this can mean that, in order to use forfeiture proceedings to enforce non-payment of service charges, a landlord will first have to establish the reasonableness of the charges under LTA 1985, s 19 before the LVT, then have to commence court proceedings for the debt, and only when judgment has been obtained can forfeiture be sought, relying on that debt. (One may observe that the order of first two steps may be varied, in that, if the landlord first sues for the debt, and if the tenant disputes the reasonableness of the charge the action may be referred by the court to the LVT (formerly under LTA 1985, s 31C; LTA 1985, s 27A now applies by CLRA, s 155) and then the court will proceed with the case after the LVT has ruled on the reasonableness of the charge).

Or any combination thereof.

The prescribed amount may not exceed £500 (CLRA, s 167(2)). The regulations prescribe the amount as £350; and the prescribed period is three years (Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (England) Regulations 2004 SI2004/3086, in force 23 November 2004).
The principle introduced in 1996 for financial claims, of default being admitted or proved before forfeiture can be threatened, is taken a stage further by Section 168 of the CLRA, which requires that, before any Notice under Section 146 of the LPA 1925 can be served, the existence of the breach must either have been admitted by the tenant, or finally determined by the court or an arbitral tribunal, or else determined by the LVT. How this reform will work in practice remains to be seen. It is submitted that it is misconceived, in that the live issue in claims for forfeiture for breach of a non-financial covenant will in practice rarely be whether the covenant has been breached: more often it will be whether the court should exercise its discretion, and, if so, on what terms. Section 168 serves unnecessarily to divide responsibility for dealing with alleged breaches between the tribunal and the court.

4.3.4 Criticism of current law on forfeiture

The present state of the law on forfeiture is hardly in a satisfactory state: the wish to protect leaseholders from landlords who threatened forfeiture for non-payment of trivial sums, even when there might be a bona fide dispute as to the amount, is understandable. The present safeguards, however, arguably serve to make forfeiture too cumbersome a procedure, and would to some extent be redundant if forfeiture were recast as a landlord’s power of compulsory sale. If a landlord were able, after giving due notice, and allowing time for any breach to be remedied, to go to court to obtain possession of the property and have a receiver appointed to exercise a power

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278 On an application made under CLRA, s 168(4).
279 So if the claim related e.g. to whether a lease should be forfeited for having failed to carpet a flat, or for persisting in keeping a pet in breach of an outright covenant against keeping an animal, if the leaseholder failed to respond to claims that he had breached the terms of the lease, the LVT would have first to ‘find the facts’ – and the landlord would have to bear its own costs on the application. If, on the other hand, the leaseholder responded in terms admitting the technical breach, but alleging that the landlord’s claim was a wholly disproportionate response, the landlord could proceed straight to the county court for forfeiture.

In cases where there is a flagrant breach, but the leaseholder fails to concede it, rather than taking proceedings before the LVT under s 168(4), the landlord might do better to seek an injunction: the ruling on the facts (or concession if settled on undertaking) would then permit the landlord to proceed straight to serve a section 146 Notice, and then to forfeiture, if the injunction were breached.
280 One would assume that such heavy-handed action would be more typical of OGLs than of RMCs.
of sale, this would be a highly effective remedy to ensure the performance of both positive and restrictive covenants. Although the leaseholder would lose his home, he would not lose the financial stake that it represented. Indeed, in such cases courts might more readily agree to the exercise of a power of sale than they would to allow forfeiture.\textsuperscript{281} The use of the power of sale might even, in extreme circumstances, be used against a defaulter suffering from mental disorder where an injunction could not be used. \textit{Wookey v Wookey}\textsuperscript{282} and \textit{North Devon Homes Ltd v Brazier}\textsuperscript{283} would seem to hold that an injunction cannot be made against a defendant with a mental disability if the court would not be able to send him or her to prison for contempt. \textit{Manchester City Council v Romano}\textsuperscript{284} does at least retain the possibility of evicting a mentally disordered tenant if the health or safety of neighbours (or of the tenant himself) is being put at risk. If a leaseholder were in breach of a lease by reason of conduct arising from mental disorder, then in view of the draconian financial consequences of forfeiture, it seems unlikely that a court would ever refuse relief. An order for sale against a leaseholder, on the other hand, might conceivably be countenanced in circumstances which were similar to those that existed in \textit{Manchester City Council v Romano}, viz where the eviction was necessary ‘in order not to endanger the health or safety of any person.’\textsuperscript{285} \textsuperscript{286}

\textsuperscript{281} In effect the law would be saying that, if one were not prepared to abide by the provisions of the lease, one should not expect to retain one’s interest in the property. CG van der Merwe, ch 5 ‘Apartment Ownership’ in AN Yiannopoulos (ed) vol VI of \textit{The International Encyclopedia of Comparative Law} (Tübingen, Mohr, and Dordrecht, Martinus Nijhoff, 1994), para 257, p 104, suggests that jurisdictions vary greatly in their view on whether those who persistently offend against the by-laws should be excluded permanently from the community. France and Belgium (para 257) view exclusion as inconsistent with ownership. Netherlands, Spain and Denmark allow for temporary exclusion (para 258, pp 104-5). Germany, Switzerland, Austria and Turkey all allow for a court order to permit forced sale if there is persistent breach of the by-laws (para 259, pp 105-7).

\textsuperscript{282} Above n 251. This case was not cited, or referred to in the judgments, in the \textit{North Devon} case (above n 251) or in \textit{Manchester City Council v Romano} [2004] EWCA Civ 834, [2004] 4 All ER 21.

\textsuperscript{283} Above n 251.


\textsuperscript{285} Disability Discrimination Act 1995, s 22(3)(a).
The present application of the law of forfeiture to leasehold flats is therefore cumbersome and not clearly thought out. The Law Commission proposals on termination of tenancies for tenant default, including the order for sale, if implemented, would be a more rational and fairer scheme. Although responsibilities would remain divided in an unsatisfactory way between the LVT and the County Court, it would provide a system whereby a leaseholder who flagrantly and persistently disregarded the terms of a lease could be evicted from a flat, without also incurring the wholly disproportionate additional financial penalty inherent in forfeiture. Alongside this distinctively property-oriented remedy, there would still exist injunctive relief and the mixed injunctive/financial remedy of allowing a ground landlord to obtain entry to carry out works at the expense of the defaulter.

4.4 Comparison of position under commonhold

Turning to the position under commonhold, it has been noted that the possibility of a unit-holder losing ownership of a unit for failure to comply with his obligations has been deemed to be incompatible\textsuperscript{287} with the freehold ownership which is the goal of commonhold.\textsuperscript{288} This, it is suggested, is misconceived, and the stance taken by Civil Law systems derived from the German Code bears this out. Disputes within commonholds will therefore have to be litigated within a framework offering only the remedies of damages and injunctions.\textsuperscript{289} This is likely to be sufficient for most disputes, as few litigants are prepared to disregard injunctions. Nevertheless, it is suggested that the failure to provide a distinctively property-based sanction to assist in the resolution of disputes may well prove a disadvantage where a CHA is attempting to enforce the performance of a negative or positive duty owed by a unit-holder in the following circumstances:

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\textsuperscript{286} One may, of course, question why the owner of a leasehold flat should be subject to the possibility of being removed from his home, when such a remedy would not be available in the case of the owner of a freehold house. One could perhaps argue that conduct such as that complained of in the North Devon or Romano cases becomes even more intrusive if it takes place literally ‘under one’s own roof’.

\textsuperscript{287} See ch 2, n 98.

\textsuperscript{288} Above n 281.

\textsuperscript{289} If the CCS is seen as deriving its force from contract, then an order for specific performance would be the appropriate remedy; if it is seen as deriving its force from statute, then a mandatory injunction would be more appropriate. The latter would seem the better view: see Clarke on Commonhold 19[16] n 5.
(a) where the unit-holder is resident abroad and the flat is in practice occupied by others. Under the CLRA there may simply be no sanction available here.

(b) where an injunction cannot be made against a unit-holder because, by reason of mental disability, they are unable to understand what they must comply with in order to avoid committal for contempt of court. It is not suggested that in a case such as this the court will readily make an order for sale, but in an extreme case it may be more palatable than a threat of imprisonment which would probably be redundant as it could never be enforced.

(c) where the unit-holder is being unusually obdurate and elects to serve time in prison for contempt of court than to comply with an order of the court. Such instances are rare, but examples are to be found in the law reports.

The failure of commonhold to provide for an order for sale of a unit at the suit of the CHA must therefore be seen as a shortcoming when compared with RMC Leasehold, and this will become more marked if within leasehold the fairer alternative of sale by a receiver replaces the unsatisfactory remedy of forfeiture.

4.5 Broader observations

Looking at the issue more broadly, there may be good practical reasons why the common law has approached the enforcement of positive covenants with caution. The enforcement of positive obligations to pay money can be backed up with money judgments, and the remedy of re-entry. The historic existence of the rentcharge, and the modern persistence of the estate rentcharge, is testimony to this. Forcing landowners to perform positive acts against their will is more difficult.

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290 Above, text to n 61.


292 Bell (above n 2 at 59) suggests that the lack of examples between 1848 and 1881 of the burden of positive covenants running is because ‘the equitable remedy of mandatory injunction, as opposed to the traditional negative injunction, only emerged in the period immediately prior to 1881 and mandatory injunctions are an essential pre-condition for the enforcement of positive covenants’. Griffith, on the other hand (above n 2 at 32-34) argues that mandatory injunctions had been granted as early as 1804 or even 1785, even though they were usually in a cumbersome form, paying lip-service to negativity, until the judgment of the Court of Appeal in Jackson v Normanby Brick Company [1899] 1 Ch 438.

293 Until the passing of the Tribunals, Courts and Enforcement Act 2007, s 71, the remedy of distress would also have been available in certain circumstances.
TABLE COMPARING ENFORCEABILITY OF OBLIGATIONS IN LEASEHOLD DEVELOPMENTS AND COMMONHOLDS

**Negative Obligations**

**Leasehold Covenants, Old (i.e. pre-1996)**

<table>
<thead>
<tr>
<th>against:</th>
<th>landlord</th>
<th>lessee</th>
<th>subtenant</th>
<th>occupier</th>
</tr>
</thead>
<tbody>
<tr>
<td>by landlord</td>
<td>-</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>by lessee</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>by subtenant</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>by occupier</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
</tbody>
</table>

**Leasehold Covenants, New (i.e. post-1995)** (for the purpose of this table it is assumed that the L&T(C)A 1995 has made no change to the scope of enforcement of restrictive covenants i.e. it follows Option 3 in Ch 3, 3.2.1.1.2, pp 99 and 102-4)

<table>
<thead>
<tr>
<th>against:</th>
<th>landlord</th>
<th>lessee</th>
<th>subtenant</th>
<th>occupier</th>
</tr>
</thead>
<tbody>
<tr>
<td>by landlord</td>
<td>-</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>by lessee</td>
<td>Y - s 3(2)(3)</td>
<td>Y</td>
<td>Y*</td>
<td>Y*</td>
</tr>
<tr>
<td>by subtenant</td>
<td>N</td>
<td>Y</td>
<td>Y*</td>
<td>Y*</td>
</tr>
<tr>
<td>by occupier</td>
<td>N</td>
<td>Y</td>
<td>Y*</td>
<td>Y*</td>
</tr>
</tbody>
</table>

**Commonhold Duties**

(technically the CCS contains sui generis duties, not covenants)

<table>
<thead>
<tr>
<th>against:</th>
<th>CHA</th>
<th>unitholder</th>
<th>tenant</th>
<th>occupier</th>
</tr>
</thead>
<tbody>
<tr>
<td>by CHA</td>
<td>-</td>
<td>Y</td>
<td>N</td>
<td>CLRA 2002, s.37(2) (f)</td>
</tr>
<tr>
<td>by unitholder</td>
<td>Y</td>
<td>Y*</td>
<td>N</td>
<td>CLRA 2002, s.37(2) (e)</td>
</tr>
<tr>
<td>by tenant</td>
<td>Y</td>
<td>Y*</td>
<td>N</td>
<td>CLRA 2002, s.37(2) (g)</td>
</tr>
<tr>
<td>by occupier</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>N</td>
</tr>
</tbody>
</table>

* by virtue of CCS, 4.11.17 and 4.11.19 to 4.11.30, except in emergency, enforcement must be attempted in first instance via the Commonhold Association

**Positive Obligations**

**Leasehold Covenants (Old and New - not affected by the L&T(C)A 1995)**

<table>
<thead>
<tr>
<th>against:</th>
<th>landlord</th>
<th>lessee</th>
<th>subtenant</th>
<th>occupier</th>
</tr>
</thead>
<tbody>
<tr>
<td>by landlord</td>
<td>-</td>
<td>Y</td>
<td>N</td>
<td>N</td>
</tr>
<tr>
<td>by lessee</td>
<td>Y</td>
<td>Only via landlord, if a mutual enforcement clause</td>
<td>N*</td>
<td>N</td>
</tr>
<tr>
<td>by subtenant</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>N</td>
</tr>
<tr>
<td>by occupier</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>N</td>
</tr>
</tbody>
</table>

* may exceptionally be possible (via landlord and head-lessee), if a mutual enforceability clause, and the sublease passes on the obligation

**Commonhold Duties**

(CLRA 2002 does not distinguish between negative and positive obligations, so as for ‘Commonhold Duties’ under ‘Negative Obligations’ (above))


Chapter 4: Service Charges and Commonhold Contributions

1. Introduction

Any scheme for ownership of individual properties with shared facilities and services will require arrangements to ensure that each owner contributes towards their cost. Inevitably this aspect of communal living involves an element of compromise. The owner of a freehold house can choose to run the risk of insuring it less than comprehensively, or not at all; to keep it in a meticulous state of repair, or to allow it to deteriorate; to repair it when he wants to; to obtain as few or as many quotes for the work as he chooses, or even not to ask for a price in advance. He can fund a future project (e.g. exterior redecoration) by saving towards it, or by assuming that it can be paid for from capital or future income, or by borrowing. Any communal arrangements for repairs, insurance and services will inevitably have to impose some kind of structure on what, in the case of an individual property, can be left to ad hoc decisions.

In leasehold these common services are funded by the service charge; in commonhold, by the commonhold assessment and the reserve fund levy(ies): ‘commonhold contributions’¹ in this study. Both are fulfilling the same functions, requiring individual owners to compromise with their neighbours. The balance that is struck in each is, however, slightly different. The particular issues that need to be considered are: (a) what heads of expenditure can be included in the charges; (b) how far individual owners can challenge the reasonableness of the charges; (c) how far the body corporate needs to consult with owners before incurring expenditure; (d) what the legal status is of the funds that are collected, and in particular how far they are protected from seizure; and (e) how easily the body corporate can enforce payment of financial contributions. In addition, it will be argued that provisions for commonhold contributions in the CLRA do not give commonhold sufficient flexibility to cope with complex developments, especially those involving mixed uses.

¹ Below, text to n 34.
2. Leasehold service charges - some points of difficulty

2.1 Implications of the definition of 'service charges'

Services charges have become an accepted part of the typical long lease of a residential flat. In considering the statutory definition found in section 18 of the Landlord and Tenant Act 1985\(^2\) ("LTA 1985"), however, several points can be noted:

(a) ‘Service charge’ is defined for the purposes only of ‘the following provisions of this Act’;\(^3\) a lease may itself define ‘service charge’ to include items which lie outside the statutory definition. Formerly the head of expenditure which most often fell within the scope of a lease but outside the statutory definition was ‘improvements’. There was often scope for argument as to whether a particular expense was a ‘repair’ or an ‘improvement’,\(^4\) but an expense might still be recoverable under the service charge provisions of a lease even though it fell outside the statutory definition.\(^5\) The CLRA\(^6\) extended the statutory definition of

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\(^2\) '(1) In the following provisions of this Act ‘service charge’ means an amount payable by a tenant of a dwelling as part of or in addition to the rent-
(a) which is payable, directly or indirectly, for services, repairs, maintenance[, improvements] or insurance or the landlord’s costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.
(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
(3) For this purpose-
(a) ‘costs’ includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.’ (Text in brackets [ ] inserted by CLRA, s 150 and sch 9, para 7).

\(^3\) i.e. ss 19-30.

\(^4\) In Wandsworth LBC v Griffin [2000] 2 EGLR 105 (LT) the landlord wished to replace single-glazed wooden windows with uPVC double-glazed sealed units, and a flat roof with a pitched roof (two of the most common examples of this kind of dispute).

\(^5\) The point is confirmed in Sutton (Hastoe) Housing Association v Williams [1988] 1 EGLR 56, 58K (CA): ‘the Schedule [now ss 18-30] does not prohibit and has no impact upon a service charge imposed in order to pay for some other item, including improvements’, per Glidewell LJ. This point is further discussed by N Roberts, ‘The Leasehold Valuation Tribunals and Service Charges - Some Problems of Jurisdiction’ [2001] Conv 61 at 70-2.

\(^6\) S 150.
a service charge to cover ‘improvements’; since it came into force, it is still possible in theory for a lease to require contributions towards expenses which are outside the scope of the statutory definition, though it is difficult to envisage any in practice.

(b) Although there has been a considerable amount of litigation as to whether items of expenditure fall within the service charge provisions of a lease, in practice the wording of section 18 seems to have sufficed to define whether the statutory controls on reasonableness, the provisions as to the obtaining of estimates and consultation, and the statutory trust of service charge moneys should apply to any given service charge.

(c) For a contribution to fall within the statutory definition of a ‘service charge,’ its amount must vary with the relevant cost. The requirement with some long leasehold developments – the writer has seen them exclusively with sheltered developments for the elderly – that a fixed percentage of the price on any sale be paid to the ground landlord for the credit of a sinking or reserve fund does not therefore fall within the statutory definition, and the reasonableness of such payments cannot be reviewed under section 19 of the LTA 1985. As it is not possible to adopt a similar device within commonhold, no direct comparison is possible.

(d) A service charge may be reserved ‘as rent’ or as a payment covenanted to be made in addition to the rent; alternatively, it may be covenanted to be paid, but to be ‘recoverable as if rent in arrear’. If covenanted to be paid as rent, or deemed to

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LTA 1985, s 19.

LTA 1985, s 20.

LTA 1987, s 42.

It is possible that the statutory definition includes payments such as reimbursement of the landlord’s costs of serving notices under LPA 1925, s 146 - see the views of J Farrand in Hadden v Dugdale Building and Development Co Ltd, London LVT (11 September 2002) (Lease Website No 842), not following the decision in Forcelex Ltd v Sweetman [2001] 2 EGLR 173 at para 34 (LT) (per PR Francis, FRICS). (Lease website: http://www.lease-advice.org/decisions/other/table2.html).

See ch 2, nn 269-270, and text thereto.

For discussion of this, see ch 2, n 271.

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be so recoverable, then the self-help remedy of distress will be available where appropriate.\(^{14}\) In view of the willingness of some ground landlords to resort to forfeiture, or more accurately to the threat of forfeiture,\(^{15}\) it is perhaps surprising that, until its abolition, they did not attempt to use distress to recover arrears of service charge when applicable.\(^{16}\) This may have been because of the highly technical nature of the law of distress.\(^{17}\)

(e) a ‘service charge’ may include estimated future expenditure as well as costs which have already been incurred.\(^{18}\)

(f) The same definition as in section 18 of the LTA 1985\(^{19}\) was adopted in section 42 of the Landlord and Tenant Act 1987 (‘LTA 1987’), which provides that service

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\(^{14}\) For further details see J Adams, ‘Insurance premiums paid to a landlord who sells - getting your own back’ [1992] Conv 236.

\(^{15}\) Which resulted initially in the passing of ss 81 and 82 of the HA 1996, and subsequently in the enactment of ss 167 to 171 of the CLRA, which impose restrictions on the right of forfeiture. The abuses are discussed in Residential Leasehold Reform in England and Wales - A Consultation Paper (see ch 2, n 43), paras 8-10.

\(^{16}\) The only statutory restrictions upon the use of distress against a residential tenant deal with protected or statutory tenants (RA 1977, s 147) and assured tenants (HA 1988, s 19) and require the leave of the court before distress may be levied. ‘It is understood that distress is seldom levied in either case’ (PF Smith (ed), Evans and Smith: The Law of Landlord and Tenant (6th edn, London, Butterworths LexisNexis, 2002) 173, n 52). It may be used by local authority landlords and other social landlords of property let on secure tenancies, but, after a brief vogue in the 1970s and 1980s, it again now appears to be seldom used. The LCD Consultation Paper (Enforcement Review Consultation Paper 5) Distress for Rent (LCD, May 2001) ch 2, para 2 points out that ‘The Chartered Institute of Housing is very clear about its position towards the use of distress for rent believing that distress has no place in modern day housing management, and its recommended standards for rent arrears specifically state that landlords should not levy distress. In addition the National Housing Federation has a condition in its Code of Conduct (1990) that Housing Associations should not use distraint as a means of recovering rent arrears.’ Lightman J. opined in obiter comments in Fuller v Happy Shopper Markets Ltd [2001] EGLR 32 (Ch) that distress might breach the ECHR art 8 (respect for tenant’s family and home), the case involving a shop with residential accommodation let at a rack rent. A fortiori, this could apply where the premises are wholly residential and held on a long lease granted at a premium. The Consultation Paper recommends its abolition for residential tenancies (at ch 2, para 4); this was effected by the Tribunals, Courts and Enforcement Act 2007, s 71.

\(^{17}\) See, for example, Hill and Redman ch 9, A[5001] - A[6166].

\(^{18}\) LTA 1985, s 18(3)(b).

\(^{19}\) With a minor exception not relevant to long leasehold properties.
charges shall be held upon the trusts therein specified. This raised the possibility that a service charge which included contributions towards improvements would have been only partly held on a section 42 trust. Again, this might in theory still occur, but only in the unlikely event that the lease required contributions towards expenditure which was not within the extended\textsuperscript{20} statutory definition.

2.2 The construction of service charge provisions

Provisions for service charge have in general been restrictively construed, but it is not easy to reconcile the case law on this. A detailed view is to be found in the larger works on landlord and tenant law\textsuperscript{21} which it is not proposed to repeat here. In outline, disputes have arisen as to whether items such as the following may be charged to the service charge account:

(i) managing agents' fees, especially where the agent is connected with the landlord;\textsuperscript{22}

(ii) interest on borrowings to fund the service charge account;\textsuperscript{23}

(iii) costs of legal proceedings against a leaseholder which cannot be recovered from the defendant;\textsuperscript{24}

(iv) future expenditure.\textsuperscript{25}

The general principle is that each case depends on the interpretation of the individual lease, construing any disputed words in their context. There is, however, a fundamental tension between the desire to interpret leases strictly,\textsuperscript{26} and the principle

\textsuperscript{20}I.e. by CLRA, s 150.


\textsuperscript{22}E.g. Finchbourne v Rodrigues [1976] 3 All ER. 581 (CA); Skilletter v Charles [1992] 1 EGLR 73 (CA); Embassy Court Residents' Association Ltd v Lipman [1984] 2 EGLR 60 (CA).

\textsuperscript{23}E.g. Boldmark Ltd v Cohen [1986] 1 EGLR 47 (CA); Skilletter v Charles (above n 22).

\textsuperscript{24}E.g. Sella House Ltd v Mears [1989] 1 EGLR 65 (CA); Holding and Management Ltd v Property Holding and Investment Trust PLC [1989] 1 WLR 1313 (CA); Reston Ltd v Hudson [1990] 2 EGLR 51 (Ch); Morgan v Stainer [1993] 2 EGLR 73 (Ch); Delahay v Maltlodge [1987] CLY 2158 (Cty Ct).

\textsuperscript{25}E.g. Capital and Counties Freehold Equity Trust Ltd v BL PLC [1987] 2 EGLR 49 (Ch) (though in a slightly different context). Service charges may not be levied for future expenditure unless the lease so provides: below n 191.

\textsuperscript{26}As may be illustrated, e.g. by the decisions in Boldmark Ltd v Cohen (above n 23); Sella House Ltd v Mears (above n 24).
of giving business efficacy to leases where possible. This is most clearly brought into focus when considering leases where there is an RMC (whether or not it owns the freehold). The desire on the part of the judiciary - reflecting the policy of recent legislation - to protect leaseholders against landlords who use their money irresponsibly may rebound when the landlord is an RMC which makes an honest mistake, only to find that part of the service charge is irrecoverable. It is not easy to see what the RMC can do or is expected to do in such circumstances. Normally the RMC will have no substantial source of income, save for the service charge. It may have an income from ground rents, although most RMCs seem to resolve not to collect ground rent if they enfranchise. It may also have a small income from fees charged for consents, or to register assignments, and from charges made for the provision of information to conveyancers when flats are sold. RMCs which are limited by shares are almost invariably fully-paid up, and, with those limited by guarantee, members' liability to contribute arises only on winding up (and is then usually limited to a nominal one pound).28

The need to prioritise giving business efficacy to leases, over any strict canons of interpretation, seems to be implicitly or explicitly acknowledged by the courts in dealing with RMCs. Embassy Court Residents' Association Ltd v Lipman29 merits careful consideration. The lease of a flat had originally been granted by the vendor-landlord, and subsequently the landlord had granted an overriding lease of the block to the plaintiff residents' association, so bringing about privity of estate between it and the defendant leaseholder. Cumming-Bruce LJ seems to acknowledge that the test for whether an OGL and an RMC can recover expenditure is different. He contrasts the situation when there was an OGL:

27 Applied most clearly in Embassy Court Residents' Association Ltd v Lipman (above n 22), but also evident in Skilleter v Charles (above n 22) and Reston Ltd v Hudson (above n 24).
28 Avon Castle Drive Residents' Company Ltd v Collings & C R Vending and Electronics Ltd, Southern LVT (22 March 2002) (Lease Website No 745) is a rare example of a residents' company limited by shares which had provision in its Articles of Association for an annual subscription. There would be no incentive to resign membership, however, as the use of the subject driveway was conditional upon making contributions (cf Halsall v Brizell [1957] Ch 167 (Ch)). Membership of the company therefore gave the advantage of the right to participate in setting the contribution.
29 Above n 22. Although in this case the RMC did not own the freehold, for the present discussion the principles involved are the same.
Of course it is right that when Kasner [the vendor-lessee] was the landlord he was not entitled to try to recover from the tenants anything in respect of the expense to which he was put in recovering rent from the tenants and

Again, it is perfectly clear that if an individual landlord wants to do that [sc. employ managing agents] and to recover the costs from the lessee, he must include explicit provisions in the lease

with the position where the ground landlord is an RMC:

But here the transaction contemplated management by the Association Company, which had no funds, and somebody had to do the administrative work.

Although when the lease was granted, there was an OGL (Kasner), it is clear from the decision that the lease was tripartite, the RMC being a party to the original leases; and that it was always intended that an overriding lease of the block would be granted to the RMC after the last flat lease had been granted. The existence of the overriding lease and the Memorandum and Articles of Association of the RMC were explicitly taken into account in interpreting the flat leases. In that context, the decision seems correct and highly practical. Its ratio does, however, leave unresolved the question of how one should interpret a lease which was originally granted by an 'outside' lessor, with no expectation that the reversion would be assigned to an RMC, but where an RMC has subsequently acquired that reversion. A succession of cases has stressed that the modern trend for interpretation of contracts (which applies no less to leases) is to adopt a broadly purposive approach rather than one relying upon technical rules of legal construction. However, as Lord Hoffman makes clear in the Investors Compensation case:

Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would

30 Recital 4 in the lease.
31 Prem v Simmonds [1971] 1 WLR 1381 (HL) at 1384-1386 per Lord Wilberforce; Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co [1976] 1 WLR 989 (HL) per Lord Wilberforce; and Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 (HL) per Lord Hoffmann.
32 Above n 31 at 912H.
reasonably have been available to the parties in the situation in which they were at
the time of the contract. (italics added)

The factual background is clearly intended to be those existing when the
contract (or lease) was drawn up, not those that have supervened and exist when it has
to be interpreted. The implications of this have not been explored. Can it be correct to
interpret identical leases differently, depending on whether the reversion is still held
by the developer, or has been acquired by an RMC? Such a policy may be expedient,
but the developer who continues to hold the reversion may have understandable
objections.

3. Commonhold: corresponding provisions
The financial requirements of a commonhold are covered by sections 38 and 39 of the
CLRA. Section 38 is headed ‘Commonhold assessment’ though this term does not
appear in the section or elsewhere in the CLRA, and remains undefined. The
expression does, however, appear in the Model CCS, and will be used in this study.
Section 39 is headed ‘Reserve fund’ and refers to a ‘levy’ being set towards this.
‘Commonhold assessment’ and ‘reserve fund levy’ will be compositely referred to as
‘commonhold contributions’, though this expression does not appear in the CLRA.
Curiously, nowhere in the CLRA is the precise relationship between ‘assessments’
and ‘levies’ made clear. There are potential difficulties in this area which will be
explored later.

3.1 Definition and construction
The difficulties over what heads of expenditure may be included in a service charge
should not arise in commonhold. ‘Commonhold assessment’ is not defined in the
CLRA or the Commonhold Regulations. Section 38(1)(a) simply refers to ‘the
income required to be raised from unit-holders to meet the expenses of the
association,’ without specifying what they may include. It must therefore be read as

33 CCS, 4.2.1 - 4.2.5.
34 As in Clarke on Commonhold ch 17.
35 As a defined expression or in a section heading; nor does it appear in the model CCS.
36 Below, text to nn 56-84.
37 Aldridge, Commonhold Law 3.3.17 makes the point that this must mean the net sum required, it
being implied that any income of the commonhold (e.g. from lettings of the common parts) would be
offset against its financial requirements. This seems unlikely to present any difficulties in practice.
permitting the commonhold assessment to cover any expenses which may properly be incurred by the CHA. No attempt is made to identify or to itemise any separate ‘heads’ of expenditure such as those which have caused difficulties within leasehold.\(^{38}\) Within commonhold the most problematic area is likely to be those expenses which, for whatever reason, cannot be recovered from other unit-holders.\(^{39}\)

The fact that section 38 (and in this context, also section 39) does not attempt to distinguish between repairs and improvements will remove a common area of dispute, but may occasionally be the source of different problems. In leasehold there can be a problem if the landlord embarks on works which can be viewed as improvements rather than repairs, and the lease permits the service charge to be spent only on repairs.\(^{40}\) Sometimes the element of ‘improvement’ may be minor, as where a landlord wished to install security lighting,\(^{41}\) or an RMC wished to install an entryphone system.\(^{42}\) Perhaps the most extreme example to be found in the Lease website is one where, in an application made by four of the leaseholders, the respondent fifth leaseholder alleged that the provision of a mat to the communal hallway amounted to an improvement.\(^{43}\)

It must surely be welcomed that the directors of a CHA can decide to install up-to-date facilities in their block without unit-holders objecting that the cost of doing so is irrecoverable. What could, however, be more problematic is that the greater flexibility given by section 38 compared with typical service charge provisions could mean that unit-holders are faced with unexpectedly high assessments because they include the cost of substantial improvements, or of services which it was not originally envisaged would be provided (e.g. the provision of leisure facilities). These

\(^{38}\) Above, text to nn 22-25.

\(^{39}\) It is nowhere made clear whether ‘the expenses of the association’ include those expenses which were due from other unit-holders, but which it has not been possible to recover from them. This is discussed in more detail in ch 6, text to nn 200-206.

\(^{40}\) Above n 4.

\(^{41}\) *Kingsmead Lodge Management Ltd v Cole*, London LVT (22 April 1999) (Lease website No 89).

\(^{42}\) *Southall Court (Residents) Ltd v Bedi*, London LVT (26 September 2001) (Lease website No 634) at para 5.

\(^{43}\) *Moylan v Snook*, London LVT (30 November 2001) (Lease website No 677). He also disputed whether the cleaning of windows to the common parts came within a covenant to clean the common parts. He did, to be fair, raise more serious issues as well.
could be part of a determined policy for a block to become more ‘up market’. By electing directors, unit-holders will be able to control the policy of a commonhold, but this does still give scope for a bare majority of the unit-holders to act with scant regard for the expectations of a minority. Of course, to some extent this is possible under leasehold, as terms such as ‘repair’ are rarely defined, and either ‘patching’ or refurbishment to a considerably higher standard may both fall within its permissible spectrum of meaning, but under commonhold the scope for contention may be wider, as no attempt need be made to distinguish repairs from improvements. The question of reasonableness will be considered subsequently; how far changes of policy are possible by amending the leases or the CCS will be considered in Chapter 5.

The reference in section 38 of CLRA to ‘the expenses of the association’ is apparently unrestricted and it is difficult to see how a disgruntled unit-holder would have much scope for objection. Payment of expenses which should properly, under the terms of the CCS, have been borne by individual unit-holders could clearly be challenged. A unit-holder might also allege that expenditure was improper, e.g. subscribing to a local political grouping. For the CHA to subscribe to a political party per se would seem improper; the considerations would be similar if it were to subscribe to a local residents’ association that put up candidates for election, though a CHA might consider it quite reasonable to subscribe to a residents’ association that confined itself to campaigning, e.g. for better amenities, or to preserve the character of an area. Clearly, however, the scope for disputing whether expenditure is permissible is going to be a good deal narrower under commonhold than under leasehold.

3.2 Commonhold assessment and reserve fund levy

Nowhere in the CLRA is the precise relationship between the ‘commonhold assessment’ and the ‘reserve fund levy’ made clear. Section 38 refers to ‘the expenses of the association’ which would seem at first sight to deal with current expenditure. Section 39 then provides that the CCS may require the directors to ‘establish and

44 Or quite possibly a minority, given the low quorum, and the likelihood that directors will control more proxies.

45 Whether the landlord is an RMC or an OGL.

46 Though it has to be conceded that in general a limited company may make political donations of which all its members may not approve.
maintain one or more funds to finance the repair and maintenance of the common parts ...[and] commonhold units'. Those who are familiar with the practice of having a 'reserve fund' or a 'sinking fund' within a leasehold service charge may assume that the reserve fund here fulfils the same function. Whilst this may have been the intention of Parliament, the true position may be somewhat more complicated.

The first point to be made is that there is no apparent connection between 'commonhold assessment' and 'reserve fund levies'. They are dealt with separately in the CLRA and in the Model CCS, and although in practice it is likely that they will be set and demanded at the same time, there is nothing in the CLRA, the Commonhold Regulations or the CCS which requires this. This sharply contrasts with the position under leasehold service charges, where, if there is a reserve fund, the amount to be transferred to it invariably forms part of the general service charge, and is thus collected with contributions to current expenditure.

The provisions for commonhold assessment are more elaborate than those for reserve fund levies, because:

(a) there is a requirement for the directors to make an annual estimate of the income required to meet the expenses of the CHA, and for an assessment to follow;
(b) directors may if necessary make other occasional estimates additional to the annual estimate. Having more than one estimate in a year is clearly not to be encouraged, but it may be necessary if expenses arise unexpectedly. (In the case

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47 These terms are generally used as if synonymous, but some commentators would restrict the use of 'sinking fund' to a fund intended to replace a specific item of plant or machinery with a limited life (e.g. a lift, or a communal central heating boiler) and use the term 'reserve fund' to describe a fund to cover e.g. periodic redecoration, or a general 'contingency reserve fund' (A point made by the present writer in *Clarke on Commonhold* 17[9], n 1).
48 Both are dealt with in Part 4.2 ('Financial Matters') of the CCS, but 4.2.1 - 4.2.5 deal with the commonhold assessment and 4.2.6 - 4.2.14 deal with reserve fund levies. 4.2.15 and 4.2.16 deal with both together, but the former is simply the requirement to pay both, and the latter provides for interest to be payable on late payments. The remainder of the Part - 4.2.17 - 4.2.42 - deals with diversion of payments of rent from tenants and sub-tenants.
49 Nothing has been found to suggest that the writer's experience is at all atypical.
50 CCS, 4.2.1.
51 Ibid.

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of both (a) and (b) a consultation procedure is to be followed after the estimate and before the assessment is made; this will be discussed later.

(c) besides the possibility of making further occasional estimates additional to the annual estimate, it is also possible for the directors to make an emergency assessment. The distinction is that the amount required becomes payable without any consultation i.e. without any opportunity for the unit-holders to make representations.

With the reserve fund levy or levies, on the other hand, the directors simply have power to set them ‘from time to time’, subject to similar requirements as to consultation.

3.3 No ‘divided assessment’

The provisions for funding the CHA are inflexible in one important respect, and this may be seen as one of the major shortcomings of the 2002 commonhold scheme.

Paragraph 1 in Annex 3 of the CCS clearly assumes that there will be only one allocation. A CCS must follow the model form, and amending it so as to provide for a ‘divided assessment’ would seem to infringe this. If this were the sole provision preventing a divided assessment, it could be amended by delegated legislation. However, section 38(1)(c) of the CLRA requires the CCS to ‘specify[…] the percentage of any estimate which is allocated to each unit’, and subsection (2)(a) goes on to require that ‘the percentages allocated by a commonhold community statement to the commonhold units must amount in aggregate to 100’. Clarke argues that these subsections are drafted on the basis that there must be one commonhold assessment, and one allocation of the percentage contributions to that assessment, so a divided assessment would also breach the provisions of the CLRA, and thus the primary legislation would have to be amended to allow for one.

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52 CCS, 4.2.2 - 4.2.4.
53 CCS, 4.2.5.
54 CLRA, s 39(2)(a).
55 There is no formal requirement to make estimates, but see below, text to nn 196-205.
56 Commonhold Regulations, reg 15(1).
56A The term is believed to originate in Clarke on Commonhold 7[23].
57 Ibid.
58 Although it is stated (ibid) that this is ‘generally accepted’ to be the position, Fetherstonhaugh (see ch 2, n 222) 2.17.18 does not mention the point, and, indeed, the reference there to expenditure on lift
The divided assessment is familiar within leasehold. To take two typical examples:\(^59\)

**Example 1 (leasehold)**

A development consisting of shops, with flats above. Here all the units would contribute to ‘Part A’ of the service charge, covering the insurance of the building, and the repair of the foundations, roof, and main structure, but only the flats would contribute to ‘Part B’, which would cover exterior decoration of the upper floors, the heating, lighting, decoration and maintenance of the hall and stairways, the maintenance of the lift, and the upkeep of the entry-phone system. Each flat might then pay (say) 4 per cent of ‘Part A’, but 6 per cent of ‘Part B’.

**Example 2 (leasehold)**

A development consisting of houses and flats. Here, all the properties would contribute to ‘Part A’ of the service charge, covering items such as the upkeep of the roadway, gardens and any other communal facilities, whilst only the flats would contribute to ‘Part B’ covering the insurance and repair of the main structure of the building containing the flats, and all the other expenses associated with apartment blocks.

In each of these examples it would seem impossible to set up such an arrangement under commonhold, as the CLRA does not permit it, and therefore the model CCS makes no provision for it.

The lack of any provision for a ‘divided assessment’ can be traced back to the Aldridge Report itself.\(^60\) The Committee acknowledged:

\(^{59}\) The examples are both taken from and paraphrase the examples given in the writer’s contribution to Clarke on Commonhold 17[3].

\(^{60}\) Aldridge 9.5. The only exception – which is no real exception – is that where an individual unit owner causes damage, he should bear the cost (9.6).
it would be possible to have separate service charge calculations in respect of any facility which is not used equally by all owners, dividing the costs of them between only those owners who benefit

but recommended 'In the interests of simplicity, there will be no such differential charges in commonholds.' It is easier to understand why Aldridge should have taken this view than why it was retained in the CLRA. Aldridge was proposing a commonhold regime which would be based essentially on statute and regulations, and would thus be highly standardised. It recognised that commonhold would be used principally for blocks of flats, but might also be used for commercial developments. What it did not explore in any detail was the implications of the larger 'commonhold community' which Clarke foresees: the 'gated community' or retirement village consisting of both flats and houses, or the mixed-use development of flats over shops on the ground floor - perhaps also with offices on the intermediate floors.

Developments such as these will inevitably require more sophisticated provisions for insurance, commonhold contributions and voting rights than can be accommodated in a 'one size fits all' standardised set. By requiring only a prescribed minimum in the CCS, the Government has attempted to allow flexibility, and for the CCS to be applied in diverse scenarios, but the lack of any facility for a divided assessment must seriously hamper the prospect of commonhold being adopted for mixed-use single blocks, let alone more complex communities. The Commonhold Working Party must have been aware of the potential problems arising from mixed-use communities, as they were alluded to in a working paper presented to them. Its author advocated 'the Master Planned Community', a two-tier structure for mixed commercial and residential developments, with separate CHAs for the commercial and residential elements, with a master association acting as an umbrella association over both. She did not, however, go into detail when discussing how mixed uses might impact upon

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61 Aldridge 1.1, 3.11.
63 Outlined ibid 5-6 and described in greater detail at 17-18.
the division of the expenses of the master association and the subsidiary associations.\(^{64}\)

The shortcomings of the CLRA in this respect may have been clouded by the fact that the provisions for commonhold contributions are divided between sections 38 and 39. Although the CCS does not allow for the percentage of commonhold assessment attributed to each unit to vary depending on the nature of the expenditure, sections 38 and 39\(^{65}\) clearly allow for the percentage of assessment allocated to a particular unit to differ from the percentage of the reserve fund levy allocated to it.\(^{66}\) Paragraph 2 of Annex 3, moreover, specifically envisages that the percentage of one reserve fund levy allocated to a particular unit may differ from the percentage of another reserve fund levy allocated to that same unit. This may at first glance disguise the problem by appearing to be a solution to it, but, in the view of the writer, it serves only further to confuse the issue.

Example 3 (commonhold)

As it is possible to have more than one reserve fund, in a block of flats, all contribute\(^{67}\) to a reserve fund for the eventual replacement of the flat roof, but the flats on the ground floor are excused having to contribute to a separate reserve fund for the replacement of the lift, the remaining flats paying a correspondingly higher percentage.\(^{68}\)

These provisions, however, would be confusing from the outset; although the CCS could provide that the cost of eventually replacing the lift would be borne only by the designated owners, recurrent expenditure on the lift would seem more naturally to form part of the general expenses of the commonhold, and thus to form part of the commonhold assessment. One could argue that all expenses involved in maintaining the lift were expenses relating to ‘the repair and maintenance of common parts’\(^{69}\) and

\(^{64}\) Ibid 24-25.

\(^{65}\) And paras 1 and 2 of Annex 3 to the CCS.

\(^{66}\) This is the course of action followed at para 59 in Commonhold - Guidance on the drafting of a Commonhold Community Statement including Specimen Local Rules (see ch 3, n 64).

\(^{67}\) In the same proportions as they contribute to the commonhold assessment.

\(^{68}\) Although this is given as an example, a strong case could equally be made that, in the case of a lift, all residents should contribute towards the cost of it, even those living on the ground floor. (This would be the writer’s drafting preference).

\(^{69}\) CLRA, s 39(1)(a).
so could be charged to the reserve fund, but this raises further difficulties. Although reserve fund levies may be raised ‘from time to time’ 70 and thus do not necessarily have to be raised at the same time as the commonhold assessment, 71 and may be made more than once a year, there is no provision 72 to enable an emergency levy towards the reserve fund to be made without going through the consultation process. So the result would be that if money had to be raised towards the repair of the lift in an emergency, it might have to come out of the general fund, and thus be borne in the proportions applicable to the commonhold assessment. Further, it is notoriously difficult to predict exactly how much future repairs will cost. Attempting to fund the maintenance of the lift entirely from a reserve fund could mean that any shortfall would be borne in the percentage applicable to the allocation of the commonhold assessment, and not in that applicable to that reserve fund levy. But this device could be made to work in a rough and ready way if it were desired that expenditure on the lifts should be borne by only certain units.

Further, although ‘repair and maintenance’ are broad words, 73 there are limits to how far their meaning can be extended, which will impose a limit on how far the use of reserve fund levies can be stretched to make up for the lack of a divided assessment. To revert to Example 1: 74 if it is desired that only the flat-owners should contribute to the expenses relating to the upper floors, the cost of repairing and redecorating them would clearly amount to their ‘repair and maintenance’ and so could be funded from a reserve fund relating only to the upper floors. On the other hand, the cost of heating and lighting the common parts could not be considered to be ‘repair and maintenance’, which would take it outside the scope of any reserve fund established under section 39. 75 Bearing in mind that a reserve fund would normally be

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70 CLRA, s 39(2)(a).
71 Above, text to n 48.
72 Corresponding with CCS, 4.2.5.
73 ‘A reference to maintaining property includes a reference to decorating it and putting it into sound condition’: CLRA, s 69(2)(b).
74 Above, text to n 59.
75 Clarke on Commonhold suggests (7[23]) that ‘even the wages of a gardener maintaining a garden for the benefit of only a proportion of the units, could be met from a reserve fund set up for the purpose rather than from the commonhold assessment’; this is clearly taking the meaning of ‘repair and maintenance’ to its utmost limits.
intended to fund occasional capital expenditure, rather than regular current expenditure, this would seem correct. If one takes the example a stage further, the impracticality of using a reserve fund as a substitute for the lack of a divided assessment becomes even clearer. Say, for example, in Example 1, it was proposed to employ a porter to supervise the flats on the upper floors. In leasehold the cost of this would naturally be borne by Part B of the service charge, but clearly the meaning of ‘repair and maintenance’ could not be stretched so far as to permit the payment of such expenditure from a reserve fund. The porter would have to be paid for out of the commonhold assessment, not a reserve fund, and the expenditure borne by all unit-holders in the proportions allocated to that. Clarke suggests as an alternative possible solution that it might be possible to adjust the allocated percentages of the assessment so as to take account of the likely benefits expected by each unit. So, in Example 3, the expenses relating to maintaining the lift could form part of the general commonhold assessment, but their likely amount would be estimated, and the ground floor flats would pay a slightly lower percentage allocation as a result. Such a solution may work as a ‘broad brush’ approach to the problem, particularly if the degree to which the contributions need to be ‘fine-tuned’ is not too great, but if the services enjoyed by units vary greatly this is not likely to work, and will become unfair. So whilst such a device might offer a rough solution to the problems raised by Example 1, it will clearly not cope at all with Example 2, where the service charge payable by the flats will be largely unrelated to the more limited service charge payable by the houses.

The three potential solutions outlined in Clarke on Commonhold are:

1. to have the same percentages allocated to the commonhold assessments and the reserve fund levies, possibly after adjusting the allocations to take account of differential use of certain facilities.

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76 Above, text to n 59.
77 Clarke on Commonhold 7[23].
78 Above, text to n 68.
79 Above, text to n 59.
80 Ibid.
81 17[13].
(2) to attempt to get over the problem by having reserve funds and levies where the percentage contributions are set at different proportions from those for the assessment, which solution would introduce the accounting difficulties set out above;\textsuperscript{82} or

(3) to dispense with commonhold altogether and to revert to long leasehold to enable one to have a divided assessment.

To have to revert to long leasehold in such developments is unfortunate, given that differential allocation of votes has been provided for\textsuperscript{83} partly to facilitate more complex developments, and in many respects commonhold might have come into its own if used for these. It may well be that before commonhold can be extended to more complex, mixed-use developments, its use will have to become established in single-use developments.\textsuperscript{84} The ability to have a ‘divided assessment’ is, however, likely to be an essential pre-requisite for most mixed-use developments, and this will, it seems, require amendment of the CLRA.

4. The requirement of reasonableness

4.1 Service charges - the position under Section 19 LTA 1985

Whether one may interpret a lease differently once the reversion has been acquired by an RMC compared with when it was owned by an outside ground landlord may involve a difficult point of principle,\textsuperscript{85} but when a particular item of expenditure clearly falls within the scope of the service charge provisions of a lease, a more flexible test may be applied to the question which then arises under section 19 of the LTA 1985 of whether the expenditure has been reasonably incurred or not. No guidance is given in the LTA 1985 on the factors that are to be taken into account in determining this, and only limited interpretation has been undertaken in the High Court or the Lands Tribunal. In \textit{Russell v Laimond Properties Ltd}\textsuperscript{86} it was held that, even if a ‘head’ of service charge expenditure was within the scope of the lease, it

\textsuperscript{82} Above, text to nn 72-80.

\textsuperscript{83} See ch 6, n 49.

\textsuperscript{84} This term could include not only the block of flats, but also the village of holiday chalets, the estate of factory units, and the shopping mall.

\textsuperscript{85} Above, text to nn 29-33.

\textsuperscript{86} [1984] 1 EGLR 37 (QB) (per Judge Main sitting as an additional judge of the QBD).
was nevertheless subject to limitation on the ground of reasonableness, and this was applied by the Lands Tribunal in *Veena SA v Cheong*.

The question is not solely whether costs are ‘reasonable’ but whether they were ‘reasonably incurred’, that is to say whether the action taken in incurring those costs and the amount of those costs were both reasonable.

In effect therefore there are three tests to be satisfied:

(a) whether the proposed item of expenditure falls within a relevant ‘head’ of the service charge set out in the lease;

(b) whether the cost has been reasonably incurred, in the sense of whether the course of action taken by the landlord is a reasonable one, and

(c) whether the actual cost is reasonable, in the sense of how it compares with the cost of the same work if it had been done by another contractor.

The Lands Tribunal has stressed that here, too, the test is whether the expense is ‘reasonably incurred’: the landlord need not necessarily choose the cheapest, as there is a ‘band of reasonableness’, within which factors other than price may lead a landlord to choose one contractor rather than another. The thrust of *Forcelux Ltd v Sweetman* would seem to be that the matter is to be viewed from the perspective of the landlord rather than the leaseholder: was the expenditure reasonably incurred by the landlord, rather than is the expense reasonable, as viewed by the leaseholder?

4.1.1 Is a different test applied under Section 19 for RMCs?

In theory these three tests will apply equally whether the ground landlord is an RMC or an OGL. In practice, there may be differences. *Embassy Court Residents’ Association Ltd v Lipman* suggests that, when a lease is being interpreted, an RMC

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88 Per PH Clarke FRICS, at [103].
89 See, for example Wandsworth LBC v Griffin, above n 4.
90 See, for example Forcelux Ltd v Sweetman, above n 11: ‘The question that I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.’ (per P R Francis FRICS). This was confirmed by a two-person Tribunal in *Ustimenko v Prescot Management Company Ltd, LRX/65/2004 (14 July 2005) (Lands Tribunal website), HHJ Rich QC and PH Clarke FRICS.
91 Ibid at [12], accepted at [40],[ 41].
92 Ibid (the case involved insurance premiums).
93 Above n 22.
may be given more latitude than would an OGL, but that principle may not extend to the position where, when the lease was granted, an RMC was not envisaged. At the next two stages, the requirement for reasonableness does seem broad enough to encompass any relevant considerations, including the identity and composition of the landlord, and including that it is an RMC. It seems unlikely, for example, that an RMC would have been subjected to such a rigorous examination of its ‘cost-in-use exercise’ as was the appellant council in Wandsworth LBC v Griffin. It may not even be reasonable for an RMC, especially one that is being self-managed by volunteers, to consider competitive quotes to the same extent as would be expected of a property company or a local authority. This does, however, raise the issue of whether the same standards should be expected of different OGLs: for example, an individual owning only a few reversions, as compared with a large property-owning company.

In Ashworth Frazer Ltd v Gloucester City Council, Lord Bingham of Cornhill stated that ‘reasonable’ should be given a broad, common sense meaning; Lord Rodger of Earlsferry expanded upon this:

The test of reasonableness is to be found in many areas of the law and the concept has been found useful precisely because it prevents the law from becoming unduly rigid. In effect, it allows the law to respond appropriately to different situations as they arise...In this context I would follow Viscount Dunedin’s advice in Viscount Tredegar v Harwood [1929] AC 72, 78 that one ‘should read reasonableness in the general sense’.

These quotes seem to leave the door ajar for an LVT or court to approach the issue of reasonableness differently when an RMC rather than an OGL is involved.

Quite a number of the LVT decisions on applications under section 19 of the LTA 1985 which are set out in the Lease website do involve RMCs, though it is

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94 I.e. at stages (b) and (c): above, text to nn 89 and 90.
95 Above n 4.
97 At [5].
98 At [67].
100 http://www.lease-advice.org/decisions/other/table2.html.
difficult to know precisely where to draw the line. Normally, where a developer has set up an RMC leasehold scheme, steps will have been taken to ensure that all the leaseholders are members of the RMC. A difficulty more commonly arises where a scheme was originally set up with an OGL and the leaseholders subsequently acquire the freehold, but not all participate in the purchase. Does the presence of such ‘non-participating’ leaseholders prevent the company that owns the freehold from being considered an RMC? The LVT decisions reported on the Lease website rarely make this clear, but the impression gained is that a substantial number of both ‘non-participating’ and ‘participating’ leaseholders do make applications in respect of service charges levied by RMCs. There are occasional references which suggest that LVTs do take into account the position of self-managed RMCs when assessing reasonableness.

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101 Descriptions used in other contexts may not be relevant. Until ss 160-2 of the CLRA were brought into force (on 26 July 2002, in England, by the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002 SI 2002/1912), an RMC (in the broader sense, rather than the specific sense used in this study) which did not have a reversionary estate could not be a landlord for the purposes of LTA 1987, pt II, so default by such an RMC could not lead to the appointment of a receiver and manager under the Part (though see Passenger v Cronin, S&SE LVT (31 May 2001) (Lease Website No 571) for an instance of where an RMC was struck off, the landlord had no repairing obligations in default, and a manager was therefore appointed). This distinction is not relevant to s 19, as an RMC which does not have privity of estate with the leaseholder will still be a ‘landlord’ for the purposes of the section: see the definition in LTA 1985, s 30.

102 See ch 1, text to n 39.

103 Or occasionally a head leasehold estate.

104 E.g. 3 St. Mary’s Terrace Ltd v Botarelli, London LVT (23 July 1999) (Lease website No 174) (freehold owned by company owned by other four leaseholders); Whiteside v 87 St. George’s Square Management Company Ltd, London LVT (26 May 1999) (Lease website No 382) (freehold owned by company owned by other five leaseholders).


106 For example, in Fautley v Godrevy Court Management Company Ltd, SW LVT (13 July 1999) (Lease website No 182), when dealing with a consolidated application under s 19 and for the appointment of a manager, the Tribunal stated (at 6.6(a)): ‘Given the statutory reference to ‘all the circumstances of the case’ in matters relating to the appointment of managers, the Tribunal had
The Lands Tribunal addressed the point thus in *Ustimenko v Prescot Management Company Ltd.*

It appears from paragraph 27 of their Decision that the LVT were prepared to take a less stringent view of what should be accepted as reasonable in the expenditure of a tenants' management company than in a case where the expenditure was made by or on the decision of a company which was not controlled by the tenants.

The dispute largely involved estimates of transfers into the reserve fund. The Lands Tribunal ruled:

Reasonableness is not however an absolute standard, such that only one decision is reasonable and any other decision is unreasonable. There can be a whole range of decisions, any one of which would satisfy the requirement that a service charge is payable only if reasonable. In our judgement such range may well be wider where, as here, the judgement of what provision to make is entrusted to a tenants' management company controllable and answerable to the tenants and therefore having, at least *prima facie*, an identity of interest with the tenants required to make payment than it would be in circumstances where there is a conflict of interest between those fixing the charge and those paying it.

particular regard to the context of these applications and to Mr Bull's contention that this was a small company, run on an informal, amicable basis by a group of the tenants themselves. There is at least one reference to the procedure of the application itself being tailored to meet the specific circumstances of an RMC: in *Rowland v Nuthatch Gardens North (Thamesmead) Management Company Ltd*, London LVT (7 July 1999) (Lease website No 161), a pre-trial review was adjourned so as to enable the service charge to be discussed at the AGM of the respondent management company.

107 Above n 90 at [3]. The LVT had granted permission to appeal so that the point could be addressed.

108 Ibid at [25]. See also the comments of the Tribunal at [29]: 'In general, however, we accept that it is reasonable for a tenants’ managing company to make such provision as they think fit, provided only that it may properly be judged not to be disproportionate to future needs. We also accept that it is reasonable for such a company to make such judgement on such material as may be obtained without itself involving the company in disproportionate costs. In considering therefore whether a service charge should be held not to be payable because not reasonable, we would, in respect of such a company, need some convincing evidence that the decision which was challenged was beyond the range of decisions that were possible to a body given an absolute discretion to determine the level of contribution to be made to a fund to be held in trust for future expenditure. The larger the provision however the greater the need for professional assessment of the amount and timing of future expenditure, and in the absence of such evidence the more readily will it appear that a decision is not to be treated as within such range.'
Besides applications by leaseholders, there are also a number of applications by RMCs themselves, either as a prerequisite of obtaining payment of arrears from a leaseholder’s mortgage or to forestall challenges to controversial expenditure. Nonetheless there are cases where RMCs have not been permitted to pass on via the service charge all the costs that they have incurred. One is left wondering how the shortfall was funded. The provision for an RMC to make a prospective application is undoubtedly a useful safeguard, but it is required mainly because a landlord is so vulnerable to challenge on the reasonableness of any service charge, especially when it is an RMC with no other assets to call upon.

The fact that a fair number of applications are made by leaseholders even when the service charge is being levied by an RMC suggests that section 19 is fulfilling some function. It should be borne in mind that, with RMC Leasehold, the terms of the lease will still prevail over any decision of the company. Although the company will be governed by its own Memorandum and Articles of Association, in most cases the Articles will be based on Table A. Article 70 begins:

Subject to the provisions of the Act, the memorandum and the articles and to any directions given by special resolution, the business of the company shall be managed by the directors who may exercise all the powers of the company.

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109 As in The Pavilion Management Company Ltd v Amu, London LVT (31 July 1998) (Lease website No 11), or Spinney (Plymouth) No 1 Ltd v Jeffery, SW LVT (23 February 2000) (Lease website No 309).

110 Most notably in Sproughton Court Maintenance Ltd v Ingram, Chilterns, Thames and Eastern LVT (26 July 2001) (Lease website No 618) (contract for remedial structural works amounting to £1,042,000 chargeable between leaseholders of 48 flats and maisonettes). Princes Court (1984) Ltd v Summerskill, Merseyside and Cheshire LVT (undated - Jan 2000?) (Lease website No 280), is an application by what appears to be an RMC against all the lessees in respect of the cost of a substantial programme of repairs.

111 E.g. Aldwick Court Management Ltd v Kronin, London LVT (8 September 1999) (Lease website No 203) (chargeable cost of painting reduced from £3,320 to £3,000 because of poor standard of work).

112 Formerly under LTA 1985, s 19(2B); now under CLRA, s 27A(3).

113 I.e. Table A in the Companies (Tables A to F) Regulations 1985 SI 1985/805.
Although many RMCs seem to have evolved a practice of approving the proposed service charge at an AGM, they are not compelled to do so. One may argue that this is an example of how the trading company model upon which the RMC is based is inappropriate. Article 70 itself contains the means for the members to take control here, as a special resolution may be proposed at an AGM or EGM which can require the directors to act, or not to act, in a certain way, and this could be used to restrict the service charge, either directly, by the special resolution setting it, or indirectly: for example, by requiring that proposed works be deferred. Alternatively, members who object to the way in which an RMC is being run can stand for election themselves as directors, either standing for any vacancy, or even removing existing directors by an ordinary resolution with special notice.

4.2 Reasonableness under commonhold

It was previously noted that the objects for which the commonhold assessment may be levied are not defined, so this should remove the possibility of some of the rather “nit-picking” disputes over the scope of service charges which have arisen between RMCs and leaseholders. Further, there is no equivalent to section 19 of the LTA 1985 under commonhold, so apparently there is no similar scope for disputes between the CHA and unit-holders as to the reasonableness of commonhold contributions.

The starting point must again be section 38 of the CLRA, requiring that the CCS:

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114 Given the requirement to lay the audited accounts for the previous year before the AGM, this can be difficult to organise; some RMCs seem to have evolved a practice of approving the service charge for the coming year at an EGM.

115 Such a direction cannot retrospectively invalidate a decision duly made by the directors.

116 Provisions such as art 76 in Table A are commonly retained in RMCs; arguably they are more appropriate to the private limited company which is trading, and are inappropriate to the RMC, though they have been retained in the prescribed Articles of Association for Right to Enfranchise Companies under CLRA, pt 2, ch 1 (The RTM Companies (Memorandum and Articles of Association) (England) Regulations 2003 SI 2003/2120, art 54 in Schedule) and also under the prescribed Articles of Association for Commonhold Associations (Commonhold Regulations, sch 2, art 43).


118 Above n 43 and text thereto.
must make provision requiring the directors of the commonhold association to make an annual estimate of the income required to be raised from unit-holders to meet the expenses of the association,\textsuperscript{119} with a further provision for additional assessments.\textsuperscript{120} There is no requirement that such expenses be \textit{reasonably} incurred, nor any requirement under section 39 that the reserve fund levy or levies be raised reasonably. This is deemed to be unnecessary, as the directors, being accountable to the unit-holders, are assumed to be likely to act reasonably. This assumption is probably correct, although there have been instances where an RMC has, in effect, been taken over by a minority of members. If this did happen in a CHA, there are devices whereby the majority could reassert their will - though it would be difficult for them to make their voice heard in time to prevent any particular assessment from becoming effective. (This is further considered below in the context of consultation requirements).

5. Consultation requirements - general

5.1 Consultation under RMC Leasehold

Legal provisions have existed requiring a ground landlord to consult with leaseholders before incurring items of 'major expenditure' since 1974;\textsuperscript{121} the current law is contained in section 20 of the LTA 1985, which has itself been amended by section 151 of the CLRA. Some of the difficulties of these provisions have been explored elsewhere.\textsuperscript{122} The provisions are intended to ensure that OGLs consult with the leaseholders before they incur large items of expenditure which, after all, will generally\textsuperscript{123} be borne entirely by the leaseholders. As the number of self-managed blocks has grown, due partly to RMCs being set up on the first sale of flats, partly to statutory enfranchisement,\textsuperscript{124} and partly to voluntary\textsuperscript{125} sales of reversions, no attempt

\textsuperscript{119} CLRA, s 38(1)(a).
\textsuperscript{120} CLRA, s 38(1)(b).
\textsuperscript{121} Section 124 of the Housing Act 1974 inserted s 91A in the Housing Finance Act 1972 and introduced the requirement for consultation if more than £2,000 was to be spent. S 136 of the Housing Act 1980, giving effect to sch 19, enacted provisions substantially similar to those in the LTA 1985.
\textsuperscript{123} Not always: the landlord may be contributing in respect of flats let at rack rents.
\textsuperscript{124} Including for these purposes not only the LRHUDA, pt I, ch 1, but also the LTA 1987, pts I and III.
has been made to exempt RMCs from their scope. The result is that, even though the
leaseholders have the right to elect the directors who set the service charge, the RMC
must still go through consultation procedures which were designed to regulate a
wholly different legal structure.\(^{126}\)

Early decisions by various LVTs on whether they had jurisdiction to
determine compliance with section 20 of the LTA 1985 were highly inconsistent.\(^{127}\)
The only Court of Appeal decision on the section, \textit{Martin v Maryland Estates Ltd}\(^{128}\) is a useful ruling on how the financial limit for minor works should be applied, and
how the court should exercise its discretion in deciding whether the landlord had
acted reasonably, but did not address the issue of whether the dispensing power might
be exercised by the LVT.\(^{129}\) The cases reported on the Lease website would suggest
that LVTs increasingly\(^{130}\) came around to the view that section 20 issues i.e. (a)
whether the requirements of the section had been complied with and (b) if not,
whether the landlord should be dispensed\(^{131}\) from strictly complying with its
requirements were matters for the county courts, not the LVTs.\(^{132}\) The Government
eventually accepted that, although some LVTs had held otherwise, they had not been
given power to determine section 20 issues\(^{133}\) and specifically extended their powers

\(^{125}\) The existence of compulsory enfranchisement no doubt contributes towards the number of voluntary acquisitions.

\(^{126}\) This point is made particularly in J Brenan ‘Lessee-Owned Blocks: Moving Towards Commonhold’ (2004) 8 \textit{L & T Rev} 2.

\(^{127}\) See, in particular, Roberts, above n 5 at 72-4.

\(^{128}\) [1999] 2 EGLR 53 (CA).

\(^{129}\) The original county court decision predated the transfer to the LVT of jurisdiction under LTA 1985, s 19.

\(^{130}\) See Roberts, above n 5 at 72-4. A case which is against the trend is \textit{Tyrell Investments Ltd v Luty}, South-Western LVT (31 March 2000) (Lease website No 330) where, after argument, an LVT chaired by David Clarke adopted a purposive and common sense construction and construed ‘the court’ under the former LTA 1985, s 20(9) as including a tribunal (at 4.27 - 4.30).

\(^{131}\) Under the former s 20(9).

\(^{132}\) Ironically the decision to the contrary in \textit{Wilson v Stone} [1998] 2 EGLR 155 (London LVT) would appear to be the only case reported more widely than on the Lease website.

\(^{133}\) See Ch V, para 8 (p 163) and para 26 (p 167) in \textit{Commonhold and Leasehold Reform: Draft Bill and Consultation Paper} (see ch 2, n 196).
by the CLRA. In view of the limitations of the previous law, little guidance can be derived from the LVTs’ decisions on whether the power would be used more liberally in favour of RMCs than where there is an OGL. Although Blofeld J in Martin v Maryland opined that ‘A landlord acting reasonably is simply a landlord doing what a reasonable landlord would do in all the relevant circumstances,’ that says nothing about whether the landlord’s identity is relevant. Similar arguments as were applied more generally on the issue of reasonableness under section 19 could be employed on the issue of consultation. For example, in 38 Cleveland Square Management Ltd v Villatte the landlord was a company owned by all the leaseholders and it was unsuccessfully argued that the reference to building works in company minutes which had been distributed to leaseholders might amount to section 20 notices. In Aldwick Court Management Ltd v Kronin only two weeks’ notice was given under section 20, because of the alleged urgency of the situation. The LVT, whilst acknowledging that the validity of the section 20 notice was not a matter for the tribunal, noted that ‘it was clear that the tenants had known about the proposed works for some time and those works were not begun until 1998’ (i.e. at least a month after the notice was given).

It may be noted that the right to be consulted is a weak right: Hill and Redman suggests that whilst the person ultimately charged with making the decision ‘may not ignore the responses, he is entitled to give the consultation no weight.’ In practice

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134 S 151. The present writer has already observed (Roberts, above n 5 at 76) that the new s 20(1) and s 20ZA(1) (inserted by CLRA, s 151) do not grant any dispensatory power to the court, thus making the same mistake as the previous s 20(9), only in reverse, as there may occasionally be cases where service charge disputes need to be reserved to the courts (see, for example, Aylesbond Estates Ltd v McMillan and Garg (2000) 32 HLR 1 (CA); further instances of where the court might have needed to retain such disputes were given in Gallagher, above n 5 at 44-45). Although the new LTA 1985, s 27A (inserted by CLRA, s 155) greatly mitigates the problem by reducing the number of instances where it would be appropriate for a county court to retain a dispute, cases involving a claim for damages for failure to repair timeously, or involving allegations of fraud, would still be better heard in the county court.

135 Above n 128 at 57C.


137 London LVT (8 September 1999) (Lease website No 203).

the section 20 notice procedure may be more useful than this pessimistic comment might suggest. A leaseholder who responds challenging the necessity for the work, or the manner of carrying it out, will be in a much stronger position to mount a challenge under section 19 to the reasonableness of the landlord's action. Similarly, obtaining a cheaper quote from an alternative contractor will put a leaseholder in a stronger position to challenge the reasonableness of the cost if the landlord insists on accepting a higher quotation.

The precise interplay between the requirement of reasonableness and the requirement to consult is perhaps still to be fully worked out, because of the previous unfortunate division of responsibilities between the LVT and court. Now that the new section 20 of the LTA 1985 is in force and the LVT has jurisdiction over both sections 19 and 20, a more coherent view should emerge, and consultation can be seen as contributing to the issue of reasonableness.

It may be noted that the consultation exercise on service charges which preceded the passing of the CLRA considered the problem entirely from the perspective where there is an OGL. It was not thought that the situation where the landlord is an RMC required any special consideration. It was proposed by the Federation of Private Residents' Associations Ltd that a service charge which had been approved by a General Meeting of those who would have to pay it should not be susceptible of challenge under section 19. This proposal was modelled on similar provisions under some condominium legislation. One may, however, question how well it would work in practice. First, any such scheme would have to accommodate

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139 This will be more feasible in smaller blocks.
140 I.e. as amended by the CLRA, s 151.
141 See Residential Leasehold Reform in England and Wales - A Consultation Paper (see ch 2, n 43); An Analysis of Responses to 'Residential Leasehold Reform in England and Wales - A Consultation Paper': Final Report (DETR, December 1999) at para 57; Commonhold and Leasehold Reform: Draft Bill and Consultation Paper (see ch 2, n 196) at 162-8; and Analysis of responses to the consultation paper on Leasehold Reform (DETR, January 2001), ch 5.
142 An organisation which includes both leaseholders' organisations and RMCs.
143 Private information.
144 Below n 183 and text thereto.
the difficulty in defining an RMC. For this purpose it would not matter whether or not the RMC had the freehold or another reversionary estate in the land, but what proportion of ‘participating leaseholders’ would be required for any management company to be considered an RMC? If one does not require that all leaseholders have to be members of the management company for it to qualify as an RMC, then where does one draw the line?

There may be further complications. The writer is aware of a case where a landlord was entitled to retain shares in what was apparently an RMC on the basis that it held a legal estate in each flat (viz the reversionary interest), and thus controlled the voting of the company, even though each leaseholder held a share which was duly transferred on the sale of a flat. What appeared on the face of its Memorandum and Articles of Association to be an RMC was thus, in effect, the alter ego of the landlord. It was not clear whether this state of affairs had arisen by design or because the Articles of Association had, by oversight, been poorly worded.

Finally, where a developer is prepared to set up a legal regime involving an RMC, it will, not unreasonably, often wish to retain control of the RMC until a substantial number of flats are sold, or even until the final flat is sold. If sales proceed more slowly than expected, or if there is a deliberate change of plan, and the developer decides to let the unsold flats at rack rents, the RMC may exist without ever assuming its intended managerial role.

For this purpose, the definition of an RMC could be less strict than that which has been used in the rest of this study: see ch 1, text to nn 32-41.

As an extreme example, one may take the case of Morshead Mansions Ltd, one of the companies which has featured most frequently before the LVTs and LT (De Marco v Morshead Mansions Ltd, London LVT (13 May 1999) (Lease website No 132); Capital Entertainment Ltd v Morshead Mansions Ltd, London LVT (13 January 2000) (Lease website No 277); BR Maunder Taylor v Morshead Mansions Ltd, London LVT (5 March 2001) (Lease website No 528); and Morshead Mansions Ltd v Wismayer, LRX/38/2001 (2 April 2002) (Lands Tribunal website)). The block comprised 104 flats; the 101 shares in the company were all owned by leaseholders, and all but one of the leaseholders each held one share in MML for each flat that they owned.

There are parallels here with the arguments over whether RMCs should be able to convert to commonhold with less than unanimity among the estate owners.

This was a requirement of the Memorandum of Association.

There is an instance in the cases reported on the Lease website (Birkett v Wright and Paddock House Management Company Ltd, Chilterns, Thames and Eastern LVT (undated – 1999?) (Lease

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For all these reasons it must be acknowledged that any attempt to set up a separate regime, with less stringent provisions, relating to sections 19 and 20 of the LTA 1985 for self-managed blocks looks doomed to failure, unless perhaps restricted to cases where all the leaseholders are members of the RMC and there are no other members.

5.2 Consultation under commonhold

It has already been noted that there is no requirement in either the CLRA, or the Model CCS, that the commonhold assessment and reserve fund levy be raised reasonably. Nor do sections 38 and 39 of the CLRA impose any requirement to consult before the commonhold contributions can be demanded. Some requirements are imposed by the CCS, but these fall considerably short of those in section 20 of the LTA 1985.

The model CCS requires the directors of the CHA to:

- make an annual estimate of the income required to be raised from unit-holders to meet the expenses of the commonhold association

and goes on to permit them to make additional estimates. They must then serve notice of the proposed commonhold assessment. Each unit-holder then has one month in which to 'make written representations to the commonhold association regarding the amount of the proposed commonhold assessment'. It should first be noted that the unit-holder is in a very much weaker position than the leaseholder. If

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website No 212)) where all but one of the flats which were intended to be sold had been retained by the developer, so even though he owned a share in the freehold, the one 'independent' leaseholder had no real influence. A similar state of affairs could come about under commonhold.

150 i.e. in CLRA, ss 38, 39.

151 The weaker consultation requirements under commonhold compared with the LTA 1985 was given as one reason for Crest Nicholson using commonhold for the Oakgrove Millennium Scheme (see ch 1, n 7).

152 CCS, 4.2.1.

153 Ibid.

154 CCS, 4.2.2. Notice of proposed commonhold assessment (Form 1 in sch 4 to the Commonhold Regulations) must be used.

155 CCS, 4.2.3.
the landlord is contemplating entering into a 'qualifying long term agreement',156 or is contemplating the undertaking of 'qualifying works',157 the landlord will be required to go through an elaborate procedure of specifying what is proposed;158 he must have regard to any observations that the leaseholders may make on the proposals;159 he must invite the leaseholders, and any recognised tenants' association160 to put forward the names of contractors from whom he should attempt to obtain estimates;161 he must then prepare at least two proposals for the qualifying agreement,162 and in general also for the long term works,163 at least one of which must be from a person unconnected with the landlord.164 If the landlord fails to go through the correct procedure he risks finding that the balance of the expenditure over the prescribed limit per leaseholder is irrecoverable.165

Under commonhold, on the other hand, although the directors are required to make an annual estimate of the income required to be raised from the unit-holders, they are under no obligation to disclose it to the unit-holders. The Notice of proposed commonhold assessment166 simply requires the directors to give a figure for the total commonhold assessment, the percentage allocated to the relevant unit,167 and the amount payable by it. The unit-holder is given no indication of how the total figure has been arrived at, or what works are comprised in the figure: whether a steep

156 Broadly speaking, any contract which is intended to subsist for more than a year (not being a contract of employment) and which involves expenditure costing more than £100 to each leaseholder. (Service Charges (Consultation Requirements) (England) Regulations 2003 SI2003/1987 regs 3, 4.
157 Broadly speaking, a contract for works which involves expenditure costing more than £250 to each leaseholder. (Service Charges (Consultation Requirements) (England) Regulations 2003 SI2003/1987 regs 6, 7).
158 Ibid reg 8 for long term agreements; ibid reg 35 for qualifying works.
159 Ibid reg 10 (agreements); ibid reg 37 (works).
160 I.e. recognised under LTA 1985, s 29.
162 Ibid reg 12(1).
163 Ibid reg 38.
164 Ibid reg 12(2) (agreements); ibid reg 38(6) (works).
165 LTA 1985, s 20(7) (inserted in the LTA 1985 by CLRA, s 151).
166 Above n 154.
167 This will of course be fixed as originally set out in para 1 of annex 3 of the CCS.
increase in the commonhold assessment is due to an increased insurance premium, complete redecoration, or substantial improvements.

The CCS then gives the unit-holder the chance to 'make written representations to the commonhold association regarding the amount of the proposed commonhold assessment.'\textsuperscript{168} The reference to the 'amount' of the assessment would seem broad enough to permit representations to be made regarding (a) the need for any works to be carried out (b) the manner and timing of their execution and (c) the likely cost, but not, it would seem, the identity of any contractor, and there is no requirement that more than one estimate be obtained, or that it be from someone unconnected with an individual director.

The directors must then 'consider any representations made in accordance with paragraph 4.2.3'\textsuperscript{169} but, as previously noted in connection with consultation under section 20 LTA 1985,\textsuperscript{170} this is a weak right. In practice it offers less protection than section 20, as if the directors choose to ignore any representation, they do not run the risk - as would the directors of an RMC\textsuperscript{171} - of an LVT subsequently holding that the assessment was raised unreasonably, there being no specific requirement that the assessment be reasonable.

The reason for the lack of provision for more consultation is of course that the unit-holders are in ultimate control of the CHA, and thus their will can prevail. The existing mechanisms, however, make it difficult, if not impossible, for the unit-holders to assert their will in time so as to prevent the imposition of an assessment which does not have majority approval. Unit-holders - particularly if resident at the commonhold - would be able to request\textsuperscript{172} the directors to convene an Extraordinary General Meeting of the CHA before the expiry of the Notice of proposed commonhold assessment ('Form 1'),\textsuperscript{173} after which the directors can proceed to issue

\textsuperscript{168} CCS, 4.2.3.
\textsuperscript{169} It may be noted that, as this requires that representations be made in writing, the directors can, strictly speaking, ignore representations made in any other way.
\textsuperscript{170} Above, text to n 138.
\textsuperscript{171} Above, text to n 139.
\textsuperscript{172} It is assumed here that the unit-holders make an informal request for the directors to convene an EGM, and that the directors comply immediately, in the interests of maintaining good relationships.
\textsuperscript{173} Above n 154.
Request for payment of commonhold assessment ('Form 2'), but, if unit-holders requisition an EGM in accordance with the provisions of the Companies Act, the directors then have up to 28 days in which to convene it, by which time they will have been able to issue Form 2. (The requisition of a meeting to discuss the proposed assessment does not prevent it from being made). The commonhold assessment becomes payable on the date for payment specified in Form 2, being not less than 14 days after the date when it was given. It would therefore not be possible for discontented unit-holders to compel the directors to call the EGM before Form 1 expires; it is feasible that the directors could be compelled to call an EGM after Form 2 has been issued but before the date specified for payment, but there is no provision in the CCS or the legislation to permit a duly made commonhold assessment to be withdrawn.

It may also be noted that, if discontented unit-holders make representations in response to Form 1, they have no way of knowing whether the directors will take any heed of them, so if they do nothing more, they will certainly find that, by the time the time for making representations has run out, it is too late to override the making of the assessment at an EGM.

If the matter of the disputed assessment can be brought to an EGM, then two options would seem to be open to the objectors. One would be to secure the passing of a Special Resolution under Article 50 of the Articles of Association, either directing the directors not to make the proposed assessment or (more likely) not to make an assessment in excess of a given figure. But while this allows the membership to require the directors to take or not to take specified action in the future, it does not enable them to alter a decision already made. The other option open to the objectors would be to propose a resolution under section 168 of the Companies Act 2006 to remove a director or directors. An ordinary resolution would suffice to effect this, but the requirement of giving 28 days’ special notice of the resolution to the

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174 Form 2 in sch 4 to the Commonhold Regulations.
175 Model Articles of Association (sch 2 to the Commonhold Regulations), art 6.
176 CCS, 4.2.4.
177 This point is made in Clarke on Commonhold 17[7], n 7.
178 Clarke on Commonhold 16[30].

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members\(^{179}\) and to the director(s) concerned would make it almost impossible for this to be done so as to prevent the making of a proposed commonhold assessment. If unit-holders are unhappy at the way in which a commonhold is being run, and, in particular, the level of the assessment, they would seem to have little alternative but to pay up for the present year, and to confine their efforts to changing the future running of the commonhold.\(^{180}\)

Of course, there is nothing to stop CHAs from evolving a practice of discussing the level of the proposed assessment at an AGM or a General Meeting before the directors proceed to issue Form 1, or of deferring the issue of Form 2 until after a General Meeting has been held to discuss the assessment. Form 1 cannot specify a period longer than one month for the making of representations on the proposed assessment;\(^{181}\) but it would be possible for the directors to call a general meeting to discuss the proposed assessment before issuing Form 1. Giving all unit-holders the opportunity to discuss the proposed assessment, and obtaining majority support for it, may bring around those who might otherwise have objected.\(^{182}\)

It might have been preferable to prescribe that the directors should propose the level of commonhold contributions, which would then require confirmation by a general meeting. Rosenberry mentions\(^{183}\) that some jurisdictions require this. None of the previous proposals\(^{184}\) required that the service charge\(^{185}\) receive the prior approval of the unit-owners. It might have been easier to incorporate such a requirement in the earlier commonhold proposals, as then the CHA would have been a sui generis body corporate, but now that it is established under the Companies Acts the requirement

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\(^{179}\) Companies Act 2006, s 312.

\(^{180}\) This point is made in *Clarke on Commonhold* 17[7], n 7.

\(^{181}\) CCS, 4.2.3, and the wording of Form 1 (which is prescribed: above n 154).

\(^{182}\) This point is made in *Clarke on Commonhold* at 17[7], n 10.

\(^{183}\) Above n 62 at 11; she is, however, rather imprecise on the detail: ‘In the US and Australia, the owners determine the service charges. These are based on a yearly budget that must be approved by the owners in some jurisdictions and the board in others. Courts are not involved. Because the owners set their own charges, they are not in a position to argue that service charges are unreasonable. If the owners do not like the service charges, they can recall the board or elect a new board of directors.’

\(^{184}\) 1990 draft Bill, cl 36; 1996 draft Bill, cl 21. *Aldridge* did not go into details on the mechanics of setting the service charge contributions.

\(^{185}\) *Aldridge* and the 1990 and 1996 draft Bills still used this term.
would sit uneasily with the requirement of the Acts that the audited, recent accounts for the previous financial year be laid before the AGM.\textsuperscript{186} The Consultation Paper on Commonhold Regulations\textsuperscript{187} proposed that ‘the commonhold assessment should be approved by a prior special resolution at a general meeting before the unit-holders become liable to pay it’. Although 75% of respondents who responded\textsuperscript{188} felt that this was appropriate, the minority thought that it would encourage unit-holders not to set realistic assessments, and the requirement was not included.\textsuperscript{189}

6. Consultation on reserve funds

6.1 Consultation under RMC Leasehold

In the case of a leasehold development, whether there may be a reserve fund will, as has been noted,\textsuperscript{190} depend upon the wording of the lease. An RMC landlord will not be able to set aside a reserve fund unless it is authorised by the service charge provisions of the lease;\textsuperscript{191} even then, the directors might choose to ignore their power to do so. Although there is no requirement that the directors of an RMC consult before including a transfer to a reserve fund in the service charge,\textsuperscript{192} requiring a contribution to a reserve fund would it seems be open to challenge\textsuperscript{193} on the grounds that such costs were not ‘reasonably incurred’; although this wording suggests that works should already have been carried out, or at least contractual obligations

\textsuperscript{186} It would, of course, have been possible to require that the proposed forthcoming contribution be placed before another General Meeting for approval.

\textsuperscript{187} See ch 3, n 72, at para 166.

\textsuperscript{188} *Analysis of the Responses to an LCD Consultation Paper 'Proposals for Commonhold Regulations' Issued October 2002* (DCA, August 2003) Q 128(a).

\textsuperscript{189} It is not clear whether this is because of the view expressed by the minority, because of the fear that members would not have attended a mandatory General Meeting as well as an AGM, or because of the fear that an over-elaborate procedure might result in a CHA not setting the assessment in time.

\textsuperscript{190} Above n 25.

\textsuperscript{191} If there is no provision for a reserve fund and the directors think it advisable that there should be one, and they cannot get the leaseholders voluntarily to agree to vary the leases, the lack of one may be a ground for an application for a variation under LTA 1987, s 35, and, if there were sufficient support for it, would certainly be grounds for an application for a variation under s 37 (see ch 5 nn 52 and 67 and text thereto).

\textsuperscript{192} LTA 1985, s 20 would not be engaged, because the contribution would not be for a ‘qualifying long term agreement’ or ‘qualifying works’ as such.

\textsuperscript{193} Under LTA 1985, s 19(1)(a).
incurred, by the landlord, sub-section 19(2) of the LTA 1985 makes it clear that the provision applies 'where a service charge is payable before the relevant costs are incurred'. Although this sub-section seems principally intended to cover the usual case where the service charge makes provision for future costs to be estimated in anticipation of their being incurred, and advance payment made to the landlord, it seems sufficiently widely worded to cover a transfer to a reserve fund, even though the eventual cost of the works to be funded from the reserve will be a matter of speculation.\textsuperscript{194} The Lands Tribunal has accepted that what is required is that the amount to be transferred to reserves be based on reasonable estimates of when the works will be necessary and the likely cost at that time;\textsuperscript{195} with these variables, the margin of what is reasonable is likely to be wide.

Under commonhold, reserve funds may be established in a number of ways.\textsuperscript{196} The CLRA provides that regulations may require the directors to establish and maintain a fund, or funds, to finance the repair and maintenance of the common parts, or of the commonhold units;\textsuperscript{197} no such regulations have been made. However:

(1) A fund, or funds, may be set up when a commonhold is established.

(2) The CCS requires the directors to consider whether to commission a reserve study by an appropriately qualified person in the first year in which the commonhold is registered.\textsuperscript{198}

(3) The directors must then commission a reserve study at least once in every ten years.\textsuperscript{199} They must consider the results of any reserve study, and decide whether it is appropriate to establish a reserve fund, or to maintain an existing one, and, if it is appropriate, they must do so.\textsuperscript{200} Failure to do so may, presumably, render them personally liable to the unit-holders.

\textsuperscript{194} As would be the case with a reserve fund for external redecoration in, say, five years' time, or the eventual replacement of a lift or flat roof in 25 years' time.

\textsuperscript{195} Ustimenko v Prescot Management Company Ltd (LT) (above n 90: the passage quoted is dealing with the reasonableness of a contribution to a reserve fund).

\textsuperscript{196} The discussion here follows that in Clarke on Commonhold 17[10].

\textsuperscript{197} CLRA, s 39(1).

\textsuperscript{198} CCS, 4.2.6.

\textsuperscript{199} CCS, 4.2.7.

\textsuperscript{200} CCS, 4.2.8.
(4) Independently of the previous obligations, the directors must also at appropriate intervals decide whether to establish any reserve funds, or maintain any existing funds, and, if appropriate, they are under a duty to do so.

(5) Additionally, the members may, by ordinary resolution, require the directors to establish a reserve fund. There is no provision to cover the reverse position i.e. whereby the members can require the directors to cease to maintain a reserve fund, but a special resolution could be used to this end. The fact that an ordinary resolution suffices to require the directors to establish a reserve fund, but that a special resolution is necessary to require the reverse may at first glance appear not to be even-handed, but it is probably justifiable that there should be some bias in favour of establishing reserve funds, and against ceasing to maintain them.

Overall there is thus considerably more scope for reserve funds to be established in commonholds than in leasehold schemes. With a leasehold scheme there will either be power for the landlord to establish a reserve fund or funds, or there will not; if there is, then how far it is exercised will be within the directors’ discretion, subject to the RMC changing directors, or passing a special resolution directing them to take a particular course of action. If leaseholders consider that they are accumulating too much, there is also the possibility of an application to an LVT under section 19 of the LTA 1985. If there is no authority in the lease to accumulate a reserve fund, the directors will be unable to do so, and, indeed, unless they seek a variation of the leases, they could be prevented by the leaseholders from doing so, no matter how desirable a reserve fund may be.

6.2 Consultation under commonhold
As previously noted, in addition to the commonhold assessment, there may be a levy (or levies) for the reserve fund (or funds). The procedure for raising it follows that

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201 CCS, 4.2.9.
202 CCS, 4.2.10.
203 Commonhold Regulations, sch 2, art 50 (the model Articles of Association).
204 In any event, the members could by simple majority remove the directors who favoured a reserve fund and replace them with directors who would cease to maintain it, either under the Companies Act 2006, s 168, or when they held themselves out for re-election at an AGM.
applicable to the commonhold assessment, with *Notice of proposed reserve fund levy* (Form 4)\(^{206}\) giving a month for the making of written representations\(^{207}\) before *Request for payment of reserve fund levy* (Form 5)\(^{208}\) is issued. Identical considerations therefore apply and it will be difficult for unit-holders to challenge the proposed levy or even have it discussed in a general meeting before it is set unless the directors are prepared to co-operate.

7. **The status of the service charge fund / commonhold contributions**

7.1 **The trust status of the service charge funds**

The earliest legislative intervention on service charges\(^{209}\) required consultation, and that works be of a reasonable standard if leaseholders were to be charged for them, but did not affect the status of service charges. A more extensive regime regulating service charges was introduced by the Housing Act 1980,\(^{210}\) and this essentially formed the basis of the provisions subsequently contained in sections 19 to 30 of the LTA 1985. Although these provisions substantially reformed the law relating to service charges, they did not affect the legal status of such funds. Although some leases provided that they should be held on various trusts which were expressly set out in the lease,\(^{211}\) in many cases the status of the funds was unclear, and it could be argued that the funds belonged beneficially to the landlord, the leaseholders who had contributed to them being merely unsecured creditors.\(^{212}\)

The *Nugee Report* recommended that service charge funds should be held in an identifiable trust fund,\(^{213}\) and that they should belong to the block as a whole rather

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\(^{205}\) For companies registered with Table A (of the Companies (Tables A to F) Regulations 1985 SI1985/805) this will be art 70.

\(^{206}\) Form 4 in sch 4 to the Commonhold Regulations; CCS, 4.2.12.

\(^{207}\) CCS, 4.2.13.

\(^{208}\) Form 5 in sch 4 to the Commonhold Regulations; CCS, 4.2.14.

\(^{209}\) Above n 121.

\(^{210}\) S 136 and sch 19.

\(^{211}\) A trust was held to exist in *Re Chelsea Cloisters (in liquidation)* (1980) 41 P & CR 98 (CA), a case involving rent deposits.

\(^{212}\) The court held that there was no trust in *Frobisher (Second Investments) Ltd v Kiloran Trust Ltd* [1980] 1 WLR 425 (Ch), although this in fact involved the status of interim payments paid on account of an annual service charge.

\(^{213}\) Para 7.3.5.
than to individual leaseholders or to the freeholder. This recommendation was enacted as section 42 of the LTA 1987, which prevails over any implied trust, and over any express trust subsequently created. As with the remainder of the LTA 1987, the provision was passed with very little debate.

One might have expected that the section would have been frequently applied to protect leaseholders from defaulting landlords but it seems to have generated very little case law. It may be that, where a landlord is bankrupt or insolvent, it has not proved difficult to apply the section and ensure that the service charge fund is "ring-fenced".

For an RMC, section 42 LTA 1987 brings two complications. First, service charge moneys should be identified as such in the Company Accounts, and distinguished from assets belonging beneficially to the RMC, even though the latter, apart from the freehold reversion, may well be negligible in value—a distinction some auditors fail to make. When the provisions of section 42A of the LTA 1987 are brought into force it will mean—unless any exemptions apply—that service charge funds received by an RMC will have to be held in a designated trust account, with

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214 Para 7.4.6.
215 LTA 1987, s 42(9).
216 See ch 5, n 27.
217 A search against the section in Westlaw reveals only five cases in which it was cited: Maunder Taylor v Blaquiere [2002] EWCA Civ 1633, [2003] 1 WLR 379; R v London Leasehold Valuation Tribunal, ex parte Daejan Properties Ltd [2000] 3 EGLR 44 (Admin); St Mary's Mansions Ltd v Limegate Investment Co Ltd [2002] EWCA Civ 1491, [2003] HLR 319; Unchained Growth III plc v Granby Village (Manchester) Management Co Ltd [2000] 1 WLR 739 (CA); and Wheatcroft v Barclays Bank plc (Ch D) (unreported). In none of them was s 42 particularly relevant to the outcome. It may be noted in passing that Maunder Taylor v Blaquiere held (at [20]) that the trust did not apply to the service charge contributions until paid; one may also note that the trust status of the service charge fund had not prevented it from being wholly dissipated earlier ([17], quoting [31] of the county court judgment).
218 Apart from the freehold reversion, the assets that belong beneficially to the RMC may simply be sums accumulated from the RMC's own income from items such as ground rents, fees for registering assignments, and fees for supplying information on sale.
219 Inserted in the LTA 1987 by CLRA, s 156—not yet in force as at 15 August 2007, and unlikely to be brought into force until amended by primary legislation: below n 222.
220 LTA 1987, s 42A(2).
the result that any funds which are owned by the RMC beneficially\textsuperscript{221} must be held in a separate account from the service charge funds,\textsuperscript{222} no matter how inconvenient that may be.

Formerly a consequence for an RMC of the section 42 trust was that any interest on the fund - whether on moneys held for current expenditure pending disbursement, or on moneys held in a reserve or sinking fund - was taxable at the 'rate applicable to trusts',\textsuperscript{223} thus penalising service charge funds, compared with funds put aside by an individual houseowner for repairs.\textsuperscript{224} The first £500 of any trust income was taxable at the basic rate, which relieved most RMCs of the additional burden, but larger RMCs might have to pay tax at the higher rate of 40% on interest earned.\textsuperscript{225} This disadvantage was removed by section 65 of the Finance Act 2007.

7.2 The status of the commonhold contributions

Under commonhold, on the other hand, the commonhold contributions\textsuperscript{226} will belong beneficially to the CHA.\textsuperscript{227} Aldridge had proposed that reserve funds (but not, apparently, other moneys) would be held as trust funds.\textsuperscript{228} An amendment\textsuperscript{229} had been

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\textsuperscript{221} Above n 218.
\textsuperscript{222} \textit{Commonhold and Leasehold Reform Act 2002: A Consultation Paper on Regular Statements of Account and Designated Client Accounts} (Department for Communities and Local Government, July 2007) proposes removing s 42A(2)(b) from the LTA 1987 (proposal 1, p 30), whilst retaining the requirement that other moneys should not be held in a service charge account (proposal 2, p 30), and does not propose any exemption for cases where a freehold is owned by an RMC or where 100% of service charge payers agree (para 21, p 33).
\textsuperscript{223} As a trust falling within the Income and Corporation Taxes Act 1988, s 686. The rate is 40%.
\textsuperscript{224} Interest on any such funds would be taxed at 20%, unless the houseowner paid income tax at the higher rate.
\textsuperscript{225} Formerly the rate applicable to trusts was 34%, which applied to all s 42 trust income, regardless of the amount. The changes were discussed in section 2 of Inland Revenue Consultation Document \textit{Modernising the Taxation System for Trusts} (Aug 2004) <http://www.hmrc.gov.uk/trusts/trusts-modernisation.pdf> accessed 15 August 2007.
\textsuperscript{226} This expression includes both commonhold assessment and reserve fund levy or levies; see ch 2, n 95.
\textsuperscript{227} See Clarke on Commonhold 19[3], n 12 and text thereto.
\textsuperscript{228} Aldridge 8.25, 9.8. It is not made clear why it suggests that reserve funds should be trust funds; the reasons given by Lord Bach in 2001 (below, text to n 230) would seem to have been equally applicable to the Aldridge proposals.
\textsuperscript{229} Amendment No 125: see HL Deb, vol 644 col 1118 (10 April 2001).
proposed in the House of Lords to the 2000 Bill to provide that reserve funds should be held as trust accounts. The Minister, Lord Bach, rejected the amendment as unnecessary, as the section 42 regime had been set up because leaseholders paying service charges did not have any control over funds held by landlords or their agents, and were therefore perceived as being at risk. With commonhold, on the other hand, Lord Bach stated that:

the fund will be an asset of the commonhold association, which is wholly owned and controlled by those paying the levies.\textsuperscript{230}

and he stressed that the members of the CHA would have the right to elect and remove directors, who would owe fiduciary duties to the CHA. It seems correct that to have required that the reserve funds be held on trust would have been an unnecessary complication.

Funds held by the CHA and derived from the commonhold assessment will therefore belong beneficially to the CHA, without any qualification. The position with regard to reserve funds is slightly more complicated, as these receive a limited degree of protection from section 39(4) of the CLRA, which provides that:

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.

As noted elsewhere by the present writer\textsuperscript{231} the sub-section is not very clearly worded. To use the example there given:

Say, for example, a commonhold association has set up two reserve funds: one earmarked for regular exterior redecoration, and the other for the long-term replacement of the lift. The commonhold association has a dispute with the painting contractors, who succeed in obtaining a judgment against the association. The general funds of the association, and the decorating reserve fund, are insufficient to meet the judgment. Will it be possible for the painting contractors to obtain a third party debt order against the bank account holding the lift reserve fund? A commonsense and purposive interpretation of the subsection would suggest that they cannot do this. On the other hand, if Parliament had intended to put the question beyond doubt, it would have been quite possible to word the

\textsuperscript{230} Ibid.

\textsuperscript{231} In Clarke on Commonhold 17[14].
subsection so that it ended ‘... except a judgment debt referable to *that* reserve fund activity’. How this will be interpreted in practice remains to be seen.\(^{232}\)

As the current balance of the commonhold assessment, and any reserve funds, will all belong beneficially to the CHA, any interest on them will be liable to corporation tax, but will not be subject to the higher rate applicable to trusts.

The protection given to reserve funds by section 39(4) ceases if a CHA is wound up by the court, or if it passes a voluntary winding-up resolution.\(^{233}\) All reserve funds, for whatever purpose they have been collected, become available for distribution generally.

The status of service charge funds under leasehold, and reserve funds under commonhold, takes on an even greater importance if the RMC, or the CHA, should become insolvent. Discussion of that aspect, however, is best deferred to Chapter 6.

8. Enforcement of financial contributions

Before concluding this comparison of service charges and financial contributions, the mechanisms for their enforcement should be compared. This has been touched on in the context of the enforcement of obligations generally.\(^{234}\) In a sense, the obligation to make a financial contribution is no more than a particular kind of positive obligation: it will, however be convenient to return to the matter here, because of the specific issues involved, and the importance of the enforcement of financial contributions in maintaining the viability of the body corporate.

Commonhold is likely to be less effective than RMC Leasehold in enabling the body corporate to enforce the payment of contributions. Failure to pay service charges - whether they are reserved as rent, or are the subject of a covenant to pay\(^{235}\) - can result in forfeiture proceedings being taken against the leaseholder,\(^{236}\) which may ultimately result in the loss of the lease. Although this is self-evidently unjust where it has a capital value,\(^{237}\) in practice\(^{238}\) a suspended order is likely, and forfeiture does fulfil the important - arguably vital - role of ensuring that any claim by the landlord...

\(^{232}\) Ibid.

\(^{233}\) CLRA, s 56(a) and (b). See further *Clarke on Commonhold* 22[21].

\(^{234}\) See ch 3, text from n 250 to end of chapter.

\(^{235}\) See ch 2, n 101.

\(^{236}\) See ch 2, text to nn 101-103.

\(^{237}\) For proposals for reform, see ch 3, nn 269-273 and text thereto.
for unpaid service charges takes priority over all other interests in the property. The threat of the loss of a flat, and the equity in it, is a potent weapon in the landlord’s armoury. Moreover, as a mortgagee would also lose its charge - whether first or subsequent - over the flat, this means that, in practice, if a landlord threatens forfeiture, the mortgagee is likely to settle the arrears, and add the sum to the security, even if the leaseholder/mortgagor is in ‘negative equity’, because the alternative of losing the security entirely is clearly worse. To quote Clarke:

The threat of forfeiture of long residential leases is a draconian remedy, but it should have been recognised that behind that sledge-hammer is a nut that needs to be cracked. Forfeiture (for all its faults and abuses) does have the undeniable benefit of encouraging and ultimately securing payment of a service charge from those who benefit from the lease and refuse to pay, and in priority to mortgages and charges on the unit.

The desirability of giving a power of sale - and in priority to all other charges on the unit - to the CHA in respect of arrears of service charge was recognised by Aldridge, and by the 1990 and 1996 draft Bills; and, in the context of Land Obligations, by Law Com No 127. Only in the 2000 draft Bill was this provision dropped - because of its associations with forfeiture with its inherent injustices, and because forfeiture was seen as incompatible with freehold ownership.

The matter was raised in the debates in the House of Lords on both the 2000 and 2001 Bills. The Government’s attitude was that allowing a power of

238 Though not always; see ch 3, n 258.
239 For examples where proceedings under LTA 1985, s 19 were taken as a pre-requisite to an RMC obtaining payment from a mortgagee, above n 109.
240 Most mortgage deeds will contain a power for them so to do.
241 Clarke, Commonhold: The New Law 11.23; Clarke on Commonhold 19[20].
242 Aldridge 9.27.
243 Cl 43.
244 Sch 6, paras 5 -13.
245 Law Com No 127 (at 14.9): ‘At this stage we must make explicit a point which is implicit in what we have already said. Any useful and credible charge must have the same priority as the land obligation itself. It must, in other words, date from the creation of the obligation.’
246 HL Deb vol 622 cols CWH1223-5 (27 February 2001) (Grand Committee); HL Deb vol 624 cols 1094-7 (10 April 2001) (Report).
247 HL Deb vol 627 cols 482-584 (16 October 2001).
sale would be tantamount to introducing forfeiture, which was incompatible with freehold ownership.\textsuperscript{248}

In the writer's opinion, the Government's attitude on this question was wholly inconsistent,\textsuperscript{249} given that, in the debate on the Leasehold Reform aspects of the CLRA, when a Liberal Democrat amendment proposed the complete abolition of forfeiture for residential long leasehold, it clearly recognised\textsuperscript{250} the value of forfeiture.

\textsuperscript{248} Baroness Scotland of Asthal expressed the Government's view as follows (HL Deb vol 627 col 508 (16 October 2001)), when dealing with an amendment by Lord Goodhart which would have given the commonhold association the power to apply for an order for sale. It is worth setting out her reply in full: 'Although the noble Lord, Lord Goodhart, made it clear at the Second Reading of the Bill's predecessor that the recovery of debts owing to the commonhold association by unit holders is foremost in his mind—I should imagine that it still is—we are a little surprised that he has chosen this route to address his concerns. We remain firmly of the opinion that forfeiture, or any similar provision by whatever other name, is quite inappropriate for commonhold. The Committee will recall that at Second Reading the noble Lord indicated that, as is often the case in leasehold, the threat of forfeiture would be enough to secure payment of debts to the commonhold association, and, indeed, he repeated that this afternoon. This may be the case, but behind every threat there must lie the possibility of action, and the possibility of a right to forfeiture being realised in the commonhold context remains for us anathema.'

\textsuperscript{249} No greater consistency is shown by the Liberal Democrats, with Lord Goodhart supporting a power of sale in commonhold (above n 248) and Mr Adrian Sanders (below n 250; and see ch 3, n 260: New Clause 3) seeking the outright abolition of forfeiture.

\textsuperscript{250} Ms Sally Keeble, speaking for the Government on the Report Stage (HC Deb vol 381 col 958 (13 March 2002)): 'In considering such a measure, we must accept that managers of leasehold properties need an effective means of redress against those who fail to comply with the terms of the lease. Unfortunately, some leaseholders refuse to pay their fair share of the cost of maintaining their block or estate, no matter how reasonable those charges may be, or carry out structurally damaging repairs—for example, demolishing internal load-bearing walls or taking similar actions that damage the property interests of other leaseholders and of the freeholder. We discussed earlier the importance of ensuring that there is proper financing to pay for the maintenance of property. One of the advantages of the leasehold system is that it provides a means of enforcing certain rules on a group of individuals living in a community, whether it be in a block of flats or on a housing estate. Simply abolishing forfeiture in the manner proposed by the hon. Member for Torbay (Mr. Sanders) in new clause 3 would seriously undermine that system. Leasehold management companies, which are unlikely to have a substantial capital reserve, are particularly vulnerable if irresponsible leaseholders fail to pay their fair share. Other leaseholders may suffer the consequences of essential repairs not being carried out through lack of funds. Ordinary civil debt recovery or injunction proceedings are
in ensuring the financial stability of leasehold management arrangements - especially for RMCs. The only real argument against having a power of sale in commonhold was that it would be to reintroduce forfeiture, and this would be inconsistent with freehold ownership.\(^{251}\) As forfeiture may be used to enforce an estate rentcharge over a freehold property,\(^{252}\) and this liability runs with the land,\(^{253}\) this insistence on the inviolability of freehold is simply inaccurate.

Thus under the CLRA the CHA is left with only the ordinary remedies available to any creditor. In many cases the CHA, after obtaining judgment for arrears of commonhold contributions, will go on to obtain a charging order over the unit, but this will, however, rank in priority according to the date of its registration,\(^ {254}\) and so will rank after existing charges. There will be no incentive for a mortgagee to clear the arrears.\(^ {255}\) In cases where the leaseholder is already in ‘negative equity’ - or where subsequent chargees are squeezed out as interest accrues on earlier charges - the CHA will derive no security from the charging order. Although it has become increasingly difficult for RMCs to resort to forfeiture,\(^ {256}\) the CHA’s lack of a power of a sale will mean that to enforce arrears it must first obtain a judgment, then obtain a charging order, and then - unless a sale is imminent, or the CHA, if adequately secured, is

lengthy and not always effective against those who are determined to avoid their responsibilities. We would need to replace forfeiture with an alternative that provided an effective enforcement mechanism, but without the same scope for abuse.’

\(^{251}\) One may quote Baroness Scotland of Asthal again (above n 248, col 509: ‘A commonhold unit is a freehold estate in commonhold land. Forfeiture is a process used by the holder of a superior interest to prematurely terminate an inferior interest in his property. Termination of the interest by the holder of the superior interest occurs because of the failure of the holder of the inferior interest to fulfil an obligation owed to the holder of the superior interest. Such a relationship simply does not exist, and is not intended to exist, within commonhold. We are talking about unit holders who have a parity of position without superiority or inferiority. There is no one with an interest in a commonhold unit superior to that of the unit holder. The commonhold association is the registered proprietor of the freehold estate in the common parts but has no claim to the units, nor should it, we believe.’

\(^{252}\) See Megarry and Wade 18-031.

\(^{253}\) Ibid 18-028.

\(^{254}\) LRA 2002, s 29(2)(a)(i).

\(^{255}\) Above n 239 and text thereto.

\(^{256}\) See ch 3, nn 274-277 in respect of financial obligations.
prepared to wait indefinitely for a sale by the unit-holder or another mortgagee - to initiate separate proceedings for an order for sale.\textsuperscript{257}

The CLRA therefore left the CHA with no power of sale, and no possibility of obtaining arrears from subsequent owners. But although the CLRA specifically provides that a ‘former unit-holder shall not incur a liability…under or by virtue of the commonhold community statement’,\textsuperscript{258} there is no provision in the CLRA which prevents a unit-holder being made liable for arrears owed by a former unit-holder. It was therefore suggested\textsuperscript{259} that the CCS could include provisions providing for this, and this has been included in the model CCS.\textsuperscript{260} The incoming unit-holder is given a measure of protection in that his liability is limited to the amount specified in a commonhold unit information certificate,\textsuperscript{261} which it is likely that his solicitor will require before any sale.\textsuperscript{262} Its effect approximates to the practice in leasehold conveyancing where the purchaser’s solicitor requires a ‘clear receipt’ for ground rent before completion.\textsuperscript{263}

As with leasehold conveyancing, any arrears existing on completion may be dealt with in several ways: the purchaser may insist that they are cleared by the outgoing unit-holder before completion; if the outgoing unit-holder cannot afford to do so, the purchaser may obtain an undertaking from the vendor’s solicitor to clear the arrears from the proceeds of sale; or an allowance and apportionment can be made on completion, and the new unit-holder will clear all arrears.\textsuperscript{264} Just as in leasehold it is unusual in practice for a lessee to find himself liable for the arrears of a predecessor

\textsuperscript{257} Under LPA 1925, s 90, and the Trusts of Land and Appointment of Trustees Act 1996 (‘TOLATA’), s 14.

\textsuperscript{258} CLRA, s 16(2)(a). This may not be disappplied or varied by agreement (s 16(3)(a)), but is without prejudice to any liability incurred before the transfer takes effect (s 16(3)(b)).


\textsuperscript{260} CCS, 4.7.3. The procedure is discussed in some detail in Clarke on Commonhold 15[13]-[17].

\textsuperscript{261} Form 9 in sch 4 to the Regulations (‘CUIC’).

\textsuperscript{262} CCS, 4.7.1, 4.7.2.

\textsuperscript{263} See LPA 1925, s 45(2). It should be noted that an assignee is not strictly speaking liable for arrears owed by his predecessor (L&T(C)A 1995, s 5(2)), but, as the lease is liable to be forfeited, in practice he will have to clear any arrears.
in title, so too in commonhold it will be unusual for a unit-holder to have to meet\textsuperscript{265} a predecessor’s arrears: the CUIC procedure should mean that arrears will normally be cleared whenever a unit changes hands.

In spite of the existence of this procedure, however, it is submitted that the CUIC procedure is not watertight: the CHA may fail to supply one on time; a further contribution may fall due after a CUIC has been issued; or the purchaser may fall into ‘negative equity’ or become bankrupt before the CHA can enforce the arrears against him. For all these reasons it is submitted that Clarke is correct and the CHA should have had a charge over each unit for commonhold contributions, with priority over all other charges. The lack of this means that the RMC is much more likely than the CHA to be able to enforce flat-owners’ obligations towards it, and thus to maintain its financial stability without requiring other flat-owners to make up the shortfall from defaulters.

9. Conclusions

It is difficult to summarise the overall position when comparing the respective arrangements for funding RMC Leasehold and commonhold. The leasehold model, by strictly requiring that the service charge be confined to prescribed ‘heads’ of expenditure, means that a leaseholder can be more certain of knowing what contributions will be expected, but this is bought at the price of inconvenience if necessary expenditure needs to be incurred which is not within the scope of the service charge. This can be mitigated by careful drafting, and perhaps a ‘sweeping up’ clause, but commonhold seems to have the advantage here. The additional requirement that a service charge be reasonably incurred was imposed with an OGL in mind, and thus arguably over-regulates RMC Leasehold schemes; it can lead to an RMC incurring expenditure which it cannot recover, though the judiciary seem to have avoided this when possible by a robust commonsense approach. It can also lead to RMCs having to make prospective applications to LVTs to protect their position.

The consultation requirements for service charges were also imposed with OGLs in mind, and in some ways also over-regulate RMCs. The consequences of

\textsuperscript{264} Some of the issues as they affect commonhold are more fully discussed in Clarke \textit{on Commonhold} \textsuperscript{15}[13]-[17].

\textsuperscript{265} Under CCS, 4.7.3.
non-compliance can be draconian, and arguably inappropriate for an RMC. On the other hand, the Government in the Commonhold Regulations seems to accept that, even in a self-governing body, it is appropriate to require the directors to consult with flat-owners. If this is the case then those contained in the CCS do not seem adequate in that it would be difficult for a unit-holder to have any influence. The consultation requirements of section 20, combined with the facility under section 19 to challenge for reasonableness, put the leaseholder in an RMC in a much stronger position. In commonhold there would seem to be the danger that, if a faction controls the CHA, they may be able to embark on a move substantially to upgrade the facilities, or to have everything done to the very highest standards, with little possibility of dissenters being able to influence their views, except by passing a Special Resolution under Article 50, or by seeking election to the board, both of which would have effect only for the future; further, neither remedy would be available if the controlling faction had a small majority, and was using it to dominate the minority.

It would be wrong, however, to characterise commonhold as always flexible, and RMC Leasehold as always inflexible, when one is considering the funding of communal facilities. The lack of any possibility of having a divided assessment - or at least any divided assessment which fits into a sensible and clearly fair system of accounting - must be seen as a serious demerit of commonhold as enacted. Although it has been part of commonhold since inception, the ‘one size fits all’ model that the Aldridge Committee had in mind will clearly not cope with the demands of increasingly complicated developments, sometimes with associated leisure facilities, and which may also include houses and/or shops, and sometimes offices as well. This cannot be seen as a defect which is intrinsic to Commonhold, as it would be perfectly possible to devise a commonhold scheme which allowed for the commonhold assessment to be divided and levied in the appropriate proportions, and for reserve funds to be established, to support whatever ‘heads’ of expenditure required the accumulation of reserves. This would require amendment of the primary legislation, and would take commonhold one step further from the simple, standardised, statutory

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266 Larcombe (see ch 2, n 221) at 227 identifies the lack of any requirement that expenditure be reasonable as a drawback of commonhold, which should be amended.

267 As argued here, and in Clarke on Commonhold: above nn 56-84; though Aldridge on Commonhold maintains the contrary position, which Fetherstonhaugh seems on balance also to accept: above, n 58.
regulation-based scheme that Aldridge was aiming for. That ideal was probably an unattainable chimaera at the time, and has increasingly become unattainable as developments have become more complex. At the same time it would be appropriate to clarify the relationship between the commonhold assessment and the reserve fund levy, and perhaps to integrate the two, so that there was only one assessment, part of which could be appropriated to reserve funds.

The trust status of service charge funds clearly gives greater protection to RMC leaseholders than to unit-holders within a commonhold, both from possible defalcations by the directors, but also – and perhaps less justifiably – from claims from creditors. Further consideration will be given to this in Chapter 6.

Finally, the existence of forfeiture means that the RMC is in a much stronger position than the CHA when it comes to enforcing the collection of financial contributions. This advantage should remain if forfeiture were replaced by an order for sale. A similar procedure could be included with advantage in commonhold, though it would require amendment of the CLRA.

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268 As proposed by Law Com No 303.
269 It is clearly not inconsistent with the commonhold concept: above nn 242-245 and text thereto.
270 CLRA, s 31(8).
Chapter 5: Variation of Leases and Amendment of the Commonhold Community Statement

Leases and Commonhold Community Statements (CCSs) both fulfil the function of regulating the relationship *inter se* of those who live in flats. A comparison of the ease with which they may be varied shows up one of the greatest differences between RMC Leasehold and commonhold.

1. VARYING THE LEASE

1.1 The historical background

Traditionally, a lease has been seen as a contract that cannot be varied except by the agreement of the parties. The longer the lease, the more likely that this will be a problem, as changing circumstances may require its amendment. This tended not to be a significant problem with building leases of houses: certain covenants may become obsolete, or quaintly old-fashioned,¹ and are then ignored. If they remain onerous - for example, covenants not to use the property for business purposes - then either a deed of variation may be agreed between the ground landlord and the leaseholder, or if the ground landlord requires too high a payment, or a letting scheme² means that a multiplicity of parties is involved, then section 84 of the LPA 1925³ may allow restrictive covenants to be discharged or modified by the Lands Tribunal.

When flats were sold on long leases, problems began to arise from the difficulty in varying them. Few flats were ‘sold’ on long leases before the early 1960s.⁴ At first there was a fair amount of experimentation with their form. Sometimes the responsibility for insurance, structural repairs and external decoration was cast upon the individual leaseholder. In other schemes the machinery for collecting the service

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¹ One thinks of examples such as the covenant in the leases on Herbert Collins’s ‘Uplands Estate’ in Southampton, prohibiting the hanging out of washing on Sundays or after midday on weekdays (R Williams *Herbert Collins: 1885 – 1975: Architect and Worker for Peace* (Southampton, Paul Cave, 1985) 21).

² See ch 3, n 135 and text thereto; and below n 8.

³ LPA s 84(12) applies the section - which applies principally to freehold land - to leasehold restrictive covenants if the lease was originally created for more than 40 years and at least 25 years have expired.
charge was not adequate to the task, perhaps because no provision was made for advance payments or, if there was such provision, it was of a fixed amount, which became insufficient. In some leasehold schemes the ground landlord had the power to levy service charges, but was under no obligation to repair or redecorate. After perhaps a decade of experimentation, the leases of most flats assumed their usual present form, with what surveyors have termed the ‘internal box’ as the standard pattern for repairing obligations, one policy to insure the whole block, and appropriate machinery to collect the service charge: estimating the total expenditure for the coming year, collecting sums in advance, and then levying a balancing charge at the end of the year.

1.2 The nature of the problem

The complication with varying leases of flats is that frequently any variation in their terms will involve not only the landlord and the leaseholder, but also all the other leaseholders in the block. Take, for example, a lease in which each leaseholder covenants to insure his own flat, to repair it (including so much of the main structure as is included within the demise), and also to redecorate his own part of the exterior. Such a lease would nowadays be considered by most conveyancers to be unsatisfactory, and probably defective. It will, however, prove impossible to vary it unless all the other leases in the block are varied at the same time. So too, it will be

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4 The Nugee Report (2.4 - 2.5) suggests that there was little building of flats for sale before the mid 1950s.

5 At first sight this practice seems grotesquely unfair and one-sided. It should, however, be viewed in context. It seems to have been particularly common with ‘break-ups’ i.e. cases where a block of flats which was formerly let on tenancies at rack rents is sold off flat by flat. Property companies and other landlords were wary of placing themselves under an obligation to repair or redecorate a property, which might involve putting it in repair to a high standard, when only part of the cost would be recoverable from leaseholders, and they would have to bear the remainder of the cost themselves. As it was likely that the remaining flats would have been subject to rent control it is possible that, if major works were undertaken, the recoverable rents might be little more or even less than the service charges which could be levied on the flats that had been sold.

6 See ch 2, n 126.

7 The writer has come across leases such as this. In leases of this kind one may find that the roof and the foundations are common parts, or, more often, that the lessees of the ground floor flats covenant to maintain the foundations and the lessees of the top floor flats covenant to maintain the roof.
difficult substantially to alter any aspect of the service charge unless all the leases are similarly varied. *Every* lease variation will not necessarily require that all leases are varied simultaneously. For example, it has become increasingly common for conveyancers to insist upon ‘mutual enforceability’ of lease covenants i.e. for there to be a provision that the ground landlord, will, at the request of one leaseholder, enforce a lessee’s covenant contained in another lease in the block.\(^8\) There is no reason why this amendment should not be included in each lease as and when it is requested.

The pressure for variation seems to come in general from a desire to put right leases which are defective, rather than because they need to be updated because of changing circumstances, though both factors may be relevant. Bearing in mind that few long leases of flats were granted before the 1960s, the need for updating may well increase with time.

A single reported case\(^9\) suggests that it may be possible at common law for a lease to be varied to meet changing conditions: it dealt with a statutory tenant who was holding over after the expiry of a seven-year lease, but it is more likely to be relevant to long leaseholders. He had covenanted to pay a certain proportion of the total cost of heating a building, but this became unfair when the landlords acquired the adjoining property and heated them both from a new boiler. They agreed to reduce the proportion paid by the defendant, but continued to base his share on the floor area of his flat as a proportion of the enlarged building. He argued that this was not fair, as only part of his flat was covered by the heating system, whereas, in the adjoining property, the flats in their entirety, and the common parts, were heated. Lord Denning MR stated:

> In this case the situation has been radically changed by the new building and the new system of heating. The change is so radical that the terms of the lease no longer apply. The court has to do what is reasonable and fair in the circumstances.\(^10\)

The only case he cited as a precedent was his previous decision in *Staffordshire Area Health Authority v South Staffordshire Waterworks*,\(^11\) which was not a landlord and

\(^8\) It should be necessary only for positive covenants to be enforced in this way; it should be possible to draft leases so that they constitute a letting scheme for the block or development, thereby enabling one leaseholder directly to enforce restrictive covenants against another: see ch 3, n 99 and n 135.

\(^9\) *Pole Properties Ltd v Feinberg* [1981] 2 EGLR 38 (CA).

\(^10\) At 40A.
tenant case, and indeed none of the five cases that he relied upon there involved a lease.

1.3 The problem first addressed - the Nugee Report

The Nugee Report in 1985 identified the problems that result from defective leases and the difficulty in effecting variations. Although these were not the main proposals of the Report, it deals with the issues. They were seen as significant problems: dissatisfaction with the terms of leases was expressed in one-third of postal responses and one-tenth of the sample survey. Two-fifths of landlords and managing agents expressed concern over the terms of leases. The Committee suggested that variations could take three forms:

(1) If there were general agreement on variation, the matter could be dealt with by consent; if there were disagreement over precise terms then it could be referred to arbitration.

(2) If a proposed variation had the support of the landlord and at least 75% of lessees and was not actively opposed by more than 10% the court should have power to vary leases, subject to the following conditions:

(i) The block should be basically residential flats, but a block with one non-residential unit should not be excluded;

(ii) The main object of the scheme should be to remove some factor which tended to prejudice the maintenance or amenities of the block as a whole;

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12 At 1396B-1397F.
13 See ch 2, n 20.
14 Paras 7.6.1 to 7.6.14.
15 Para 7.6.1. These results should, however, be compared with the suspicion of proposals to vary leases shown by leaseholder respondents to Commonhold and Leasehold Reform: Draft Bill and Consultation Paper (see ch 2, n 196) – below n 56 and text thereto, and n 96.
16 Para 7.6.5.
17 Para 7.6.6. The proposal was not enacted in precisely this form, as it was proposed that there could not be a variation against the will of the landlord. This would be possible under LTA 1987, s 37 as the landlord is simply one of the 'parties concerned': s 37(6)(b).
18 This is not how the proposal was in fact enacted: see LTA 1987, pt IV. Presumably this was intended to cover the situation where flats were situated over a ground-floor shop or office unit, but it would somewhat arbitrarily have excluded any more elaborate scenarios.
(iii) It should be an object that could not be achieved without the participation of all;
(iv) The prejudice caused to a respondent should not outweigh the benefits that he would receive; and
(v) The provisions should in all the circumstances be reasonable.
An example might be the provision of a sinking fund which had not been authorised by the lease.19

(3) The court would be able to vary the lease on the application of an interested party in certain situations where there was no consensus, in such cases as where:20
(i) the lease obliged a leaseholder to pay for services, etc., but the landlord was under no obligation to provide them, or to insure;
(ii) the lease contained no express provision for such matters;
(iii) the aggregate of service charges totalled more or less than 100%.21

In the words of the Report:
The procedure should thus extend to: the repair of the structure and exterior of building, including the roof; the upkeep of safe means of access, and of escape in case of fire; maintenance and repair of the common parts; the maintenance of installations for supply of gas, electricity and sanitation; and insurance covenants to provide for full replacement cover for block as a whole. The procedure could also cover maintenance of adequate security arrangements and repair of central heating.

19 Para 7.6.7.
20 Although the James Working Party of the Royal Institution of Chartered Surveyors (Report of the Working Party on the Management of Blocks of Flats (1983) – printed as Annex 1 to the Nugee Report) had not felt able (at 7.4) to recommend that a reluctant party should be forced to go to arbitration, the Nugee Committee stated: ‘The evidence we have received on the unsatisfactory nature of some leases leads us to conclude that it should be possible in certain circumstances (which need to be carefully defined) to modify the existing terms of the lease in the interests of the well being of the block and its owners and occupants even in cases where no majority agreement can be reached. The procedure would entail application to the Court for the lease to be varied. Such intervention in by no means unprecedented in statute; for example under Section 84 of the Law of Property Act 1925.’ (para 7.6.8). Reference was also made to sch 19 of the Housing Act 1980 and its predecessors back to the Housing Finance Act 1972, dealing with service charges.
21 Para 7.6.9.
The procedure should cover essential works and services, not mere cosmetic items. The eventual legislation bears a close resemblance to these proposals. No legislation was required to permit leases to be varied by consent; parties may also submit to binding arbitration if they accept that the leases need variation, but cannot agree on precisely how this should be done. The latter would seem to be little used in practice.

1.4 The Landlord and Tenant Act 1987 (Part IV)

As there appears to be no detailed analysis of the provisions of Part IV of the LTA 1985 apart from some rather brief discussions in the major loose-leaf textbooks, they will be considered in some detail.

1.4.1 Obligatory variation

Nugee’s proposals for obligatory variation were enacted by section 35 of the LTA 1987. By an apparent oversight, section 35(4)(c) of the LTA 1987 as originally drafted covered only the case where the total service charge exceeded 100%. It was

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22 Para 7.6.10.
25 Above text to nn 20-21.
26 The section is couched in slightly broader terms than the proposals, in that it covers: ‘the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation’ (LTA 1987, s 35(2)(c)), and also ‘the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including the flat)’ (s 35(2)(d)).
27 This may not have been an unintentional oversight, but the history of this section is very odd. Part IV of the Bill, dealing with variation of leases, received very little attention in the House of Commons either on Second Reading (HC Deb vol 113 cols 763 to 806 (30 March 1987)), or on Third Reading (vol 115 cols 594-618 (5 May 1987)). It received a little more discussion in Committee (Session 1986-87, vol I, Standing Committee A, cols 53-71 (28 April 1987)), but mainly concerning abortive amendments on lease extensions and insurance. The Bill then passed all its stages in the House of Lords in one afternoon: there Lord Coleraine did not see why a lease should be varied if the landlord
amended by the LRHUDA to cover also cases where the service charge amounts to less than 100%. It has been further amended by the CLRA. It seems that the

had arranged things so that service charge contributions added up to less than 100%. ‘Where we are talking about ‘more’ we are clearly talking about tenants in the building who are obliged to pay, shall we say, 110 per cent. in aggregate of the landlord’s costs of repairing the building and providing the services....The Nugee Report states, and correctly in my view, that in those circumstances it is wrong for a landlord to recover the final 5 or 10 per cent. of the aggregate amount of the service charges. However, if we look at a case where less than 100 per cent. is recovered, we see that the landlord – for reasons of his own which are unknown to the tenants – has told the tenants individually that the percentage will be such and such a figure and those percentages do not add up to 100 per cent. For the life of me I fail to understand why in those circumstances it should be thought right for the landlord then to be able to go to court and ask for the percentages to be raised – which is what the subsection to which I have referred provides.’ (HL Deb vol 487 col 641 (13 May 1987)). Lord Coleraine was clearly under the misapprehension that the Bill followed the Nugee Report and provided for variation if the total was more or less than 100%. But, as passed, s 35(4)(c) concluded ‘...would exceed the whole of any such expenditure.’ It did not read what Lord Coleraine assumed it was saying until it was so amended by LRHUDA, s 86. It would seem that the amendment was introduced primarily to provide for service charges to be altered where individual blocks enfranchised and thus opted out of service charges covering more than one block. Contrary to the view expressed by Clarke and Shell ‘Revision and Amendment of Legislation by the House of Lords – a Case Study’ [1994] PL 409 at 425-6 it would seem that the House of Lords was aware that the amendment would be of more general application (see HL Deb vol 543 cols 972-4 (9 March 1993), esp Lord Coleraine and Lord Strathclyde).

It is submitted that the view expressed by Lord Coleraine in 1987 is misconceived: if the landlord is unable to recoup all his expenditure, he is unlikely to be able to undertake major repairs, a fortiori if the landlord is an RMC. This was the argument adopted by Baroness Hooper (replying for the Government) (HL Deb vol 487 col 650 (13 May 1987)): ‘We believe that the landlord should also be able to apply to the court to vary the lease where the service charges do not add up to 100 per cent, because we want to encourage well-maintained blocks of flats. That is in the interests of landlords and tenants, but if the landlord is to maintain the block, clearly, he must have the resources to do so.’

Arguably this might have fallen within the scope of LTA 1987, s 35(2)(e) even before s 35(4)(c) was amended by LRHUDA, s 86. Interpreting the sub-subsection to apply to ‘heads’ of expenditure would seem more controversial than interpreting so as to cover proportions. If it did cover the situation where the total contributions added up to less than 100%, ss 35(2)(f) and 35(4) would not be redundant as s 35(2)(e) could not cover the situations where the contributions exceeded 100%.

S 162(1)(2). In LTA 1987, s 35, subsection (2)(b) now refers to ‘the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii)’ instead of ‘the insurance of the flat or of any such building or land as is mentioned in paragraph (a)(ii) or (iii)’.
amendment is directed at having the whole building covered by one insurance policy; if this is the case, then it could have been expressed more clearly.

Some of the limitations of section 35 should be noted.

First - and not following the recommendation of the Nugee Committee\(^{31}\) - the situation where there is a non-residential unit in the building is not covered. If a problem in a mixed-use building can be remedied by varying only the leases of the flats, that is possible, but if the variation requires a corresponding variation of the lease of any part used wholly or partly for business purposes, this will not be possible, as under section 36\(^{32}\) only leases of other flats\(^{33}\) can be varied.\(^{34}\) This will often prevent the variation of leases in mixed-use buildings.\(^{35}\)

Second,\(^{36}\) it does not apply to any lease which ‘constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies’.\(^{37}\) This is potentially an exception of uncertain breadth, as any tenancy which combines with residential use business use which is more than \textit{de minimis} is likely to be treated as a business

\(^{31}\) Above n 18 and text thereto.

\(^{32}\) Which provides for other leases to be varied on the application of the respondent to the original application.

\(^{33}\) As defined in LTA 1987, s 60(1).

\(^{34}\) S 36(2). (These will be referred to as ‘related leases’, though this is not a term of art deployed by the LTA 1987).

\(^{35}\) Note that in LVT cases reported on the Lease website such as \textit{Madge v Stone}, Southern LVT (4 January 2005) (Lease website No 1443), or \textit{Tickmead Ltd v Interasia Worldwide Ltd}, London LVT (11 June 2004) (Lease website No 1201), adjustments were made to the proportions payable by each residential unit, whilst keeping the total proportions paid by the commercial units intact. Even a wholly residential block may present problems; in \textit{Sollershott Hall Management Ltd v The Lessees}, Eastern LVT (29 September 2004) (Lease website No 1342), the separate leases of the garages had to be varied by agreement, as they did not fall within the scope of LTA 1987, pt IV.

\(^{36}\) Both these shortcomings were identified by Lord Coleraine in proposing unsuccessful amendment No 51 to the HA 1988 (HL Deb vol 501 cols 452-4 (3 November 1988)). This amendment would have deleted subsections (6) and (7) from LTA 1987, s 35 thus allowing the amendment of any lease of a flat (as defined) even if it was a business lease under LTA 1954, pt II. It is not clear that the amendment would have been as effective as Lord Coleraine intended, as s 36(2) would still have prevented the amendment of any related shop leases.

\(^{37}\) LTA 1987, s 35(6). This exception therefore applies even if the related premises would otherwise be a ‘flat’ within LTA 1987, s 60(1).
tenancy and regulated by Part II of the 1954 Act. Whilst it may be fair that mixed-use tenancies should be treated as commercial rather than residential for the purposes of rent regulation and security of tenure, this categorisation may present difficulties when applied to mixed-use flats, as their business status will have legal implications for other units in the building which may be wholly residential. The present writer has discussed elsewhere the effect that this may have on collective enfranchisement under the LRHUDA\(^{38A}\) and the right of pre-emption under the LTA 1987.\(^{39}\) In the present context of variation of leases, any leaseholder who is entitled to use his flat for business purposes, and does in fact do so, will not therefore be entitled to apply for a variation order under section 35 of the LTA 1987.\(^{40}\) Moreover, a respondent landlord will not be able to make a cross-application under section 36 for the variation of any other lease which happens to be a business or a mixed-use lease, which may well prevent the LVT from granting the original leaseholder’s application, as the inability to vary another lease may be a reason not to vary the first lease.\(^{41}\) The present writer’s article has pointed out that the recent fashion for ‘loft apartments’ to be demised as ‘live-work’ units may have the unfortunate result that their categorisation as business tenancies gives the leaseholders rights of renewal at the end of the term.

\(^{38}\) See Royal Life Saving Society v Page/Cheryl Investments Ltd v Saldanha [1978] 1 WLR 1329 (CA).

\(^{38A}\) Pt I, ch I.

\(^{39}\) N Roberts ‘Beware of Loft Living’ [2001] Conv 387. It was expressly recognised in Tandon v Trustees of Spurgeons Homes [1982] AC 755 (HL) that the fact that a tenancy might be protected under LTA 1954, pt II would not prevent it from being enfranchisable under the LRA 1967 (per Lord Roskill at 767; Lord Bridge of Harwich and Lord Fraser of Tullybelton agreed with him). The crucial issue was whether the subject-matter of the lease was ‘a house...reasonably so called.’

\(^{40}\) Business use which is in breach of the terms of a lease will not give it the protection of LTA 1954, pt II unless the landlord or his predecessor in title consented to or acquiesced in the breach: LTA 1954, s 23(4) and Bell v Alfred Franks & Bartlett Co Ltd [1980] 1 WLR 340 (CA).

\(^{41}\) The defendant in Royal Life Saving Society v Page (above n 38) though he was entitled to make use of his flat for professional purposes, did not actually do so (save for some minimal use), and so his tenancy was not protected by LTA 1954, pt II. See further Roberts (above n 39) at 389.

\(^{42}\) By virtue of s 35(6).

\(^{43}\) s 36(2)(a) and s 35(6).

\(^{44}\) This seems implicit in LTA 1987, s 38(1)(6).

\(^{45}\) At least if the leaseholder does in fact use such a unit for a business use which takes it beyond a \emph{de minimis} commercial use.
which are irrelevant until then, while taking away present rights of pre-emption, collective enfranchisement and variation.

Third, it is far from clear what amounts to satisfactory provision for the recovery of expenditure,\(^{46}\) usually via a service charge. Subsection 35(2)(f),\(^{47}\) as defined by section 35(4), apparently deals with the specific case where the total proportions levied under a service charge do not add up to 100% \(-\) presumably because arrangements where this was exceeded or not reached might still be described as 'satisfactory'. The editors of *Woodfall* take the view that subsection (4) is an exhaustive definition of the scope of section 35(2)(f) rather than merely illustrative of it;\(^{48}\) if so, then the following examples would all fall to be dealt with under section 35(2)(e):

1. where the financial year used for the calculation of a service charge differs from that used in related leases;
2. where there is no provision for advance payment of service charges, or it is a set amount fixed many years ago;
3. where there is no provision for a sinking or reserve fund to be accumulated.\(^{49}\)

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\(^{46}\) 'satisfactory provision...for the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that party' (LTA 1987, s 35(2)(e)).

\(^{47}\) 'the computation of a service charge payable under the lease.'

\(^{48}\) Above n 24 at 28.076, n 11. This view was also argued in *Madge v Stone* (above n 35 at [22]: 'The Tribunal considered the fact that the application is made under the ground contained in section 35(2)(f) of the 1987 Act, that the leases fail to make satisfactory provision for the computation of a service charge now payable under the lease. It was argued before it that the effect of section 35(4) of the 1987 Act is that a lease can only fail to make satisfactory provision for such computation if the aggregate of the amounts that would be payable by reference to the proportions of expenditure incurred by the lessor to be repaid by the lessees would be either greater or lesser than 100% of the expenditure.' The Tribunal did not have to decide the issue because it held that it had jurisdiction in the case under the broader ground of LTA 1987, s 35(2)(e). It is not clear from *Hill and Redman* (A[4835] n 6) what view the editors take of the matter.

\(^{49}\) Baroness Hooper expressed the view that this was the sort of matter that would be dealt with under s 37 (HL Deb vol 487 cols 649-650 (13 May 1987)).
Most would agree that a mistake such as (1) can be corrected under section 35(2)(e), and probably also (2), but it is less clear that (3) falls within it. The Government in its Draft Bill and Consultation Paper of August 2000 noted that:

the existing grounds for individual application are often unhelpfully vague, so that leaseholders can be unclear over whether they would be permitted to bring a particular application forward.

It proposed that:

where a lease fails to provide for the payment and collection of service charges in advance of works (whether repairs or maintenance) being carried out, this should constitute grounds for a variation.

A question was raised on this in the consultation process. Of freeholders who responded, 89% supported the proposals, but only 17% of leaseholders. One suspects that leaseholders did not understand the issues involved in varying leases and saw the proposals as means to extract further service charge contributions from them. No guidance is given in the LTA 1987, even as amended by the CLRA, as to whether

50 Above n 46.
51 The reference to ‘the recovery... of expenditure... to be incurred’ (italics added) would imply that advance payment must sometimes be required, and could even be interpreted as requiring a sinking fund.
52 *Ashcorn Estates Ltd v Roberts*, Midland LVT (28 January 2005) (Lease website No 1483) is a fairly recent example where the LVT ordered variations under LTA 1987, s 35, which provided for a comprehensive modern service charge regime, including advance payments and a reserve fund, although it is not altogether clear what aspects of this were ultimately opposed by the respondents.
53 See ch 2, n 196; at p 181, section 4.2, para 5.
54 Ibid p 183, para 14.
55 QVOL2(a).
56 A similar question relating to interest on late payments received approval from 89% of freeholder-respondents but only 19% of leaseholder-respondents, and yet the Government proceeded with that proposal in CLRA, s 162(4). The proposal to add further grounds by regulation received approval from 81% of freeholders and only 16% of leaseholders, and yet the Government proceeded with it in CLRA, s 162(3) (Table 32 at 7.12 of *Analysis of responses to the consultation paper on Leasehold Reform* (DETR, January 2001)). Only the proposal to provide for blocks to be covered by a single insurance policy gained strong support from leaseholders (99%); this was enacted by CLRA (above n 30 and text thereto). For the proposal to transfer jurisdiction to vary to the LVT: below n 96.
issues such as these fall within the scope of section 35, and there appear to be no reported appellate decisions.\textsuperscript{57}

One gains the impression from the Consultation Paper and the Analysis of Responses that the Government has correctly understood the problems over the difficulty of variation of leases, but has simply failed to get the message across to leaseholders, because of their suspicion that this would result in higher service charges. This may indeed be true, though blocks will never be satisfactorily be maintained so long as problems such as those identified by the Consultation Paper\textsuperscript{58} are not remedied. The power to vary leases to ensure that all relevant expenditure is recoverable, by workable service charge arrangements, is particularly important for RMCs. The consultation exercise hardly gave a ringing endorsement to any of the Government’s proposals in this area, apart from its proposal in respect of insurance, which has been enacted.\textsuperscript{59} The new subsection 3A\textsuperscript{60} of section 35 gives only one specific example (i.e. payment of interest on late payments of service charge) of when variation may be ordered. But, in an area of law where there is little current authority and where Parliament seems to have difficulty in ‘getting the law right first time,’\textsuperscript{61} the Government has adopted in the CLRA the expedient of minimal intervention, allowing for any further \textit{obligatory} grounds for variation of leases to be added by regulations.\textsuperscript{62} The problems already identified can therefore be addressed later, when

\textsuperscript{57} For the total number of LVT decisions reported on the Lease website, below n 65.

\textsuperscript{58} At 182-3, paras 12-16.

\textsuperscript{59} Above n 30.

\textsuperscript{60} Inserted into LTA 1987 by CLRA, s 162(1)(4). It reads: ‘For the purposes subsection 2(e) the factors for determining in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of failure to pay the service charge by the due date.’

\textsuperscript{61} One thinks of LTA 1987, pt I, which had to be substantially re-cast by the HA 1996; \textit{Gilje v Charleegrove Securities} [2000] 3 EGLR 89 (LT) (aff’d [2001] EWCA Civ 1777, [2002] 1 EGLR 41) and \textit{R v London Leasehold Valuation Tribunal, ex p Daegian Properties Ltd} [2001] EWCA Civ 1095, [2001] 3 EGLR 28, which both prompted the enactment of CLRA, s 155 (inserting s 27A in LTA 1985); and indeed the low take-up of commonhold (see ch 1, n 6).

\textsuperscript{62} By LTA 1987, s 35(2)(g), inserted by CLRA, s 162(3). Advance payment of interim service charges, and provision for a sinking fund, could therefore be added to s 35 by this means.
the issues can be seen more clearly outside the polarised stance engendered by a consultation dealing primarily with the more contentious enfranchisement issues.

So far we have been considering the jurisdiction to vary leases in certain specified instances where the provisions of the lease are clearly unsatisfactory. ‘[A]ny party to a long lease’, who considers the lease to be defective may apply to the LVT, so the application could be made by the ground landlord, or only one of many leaseholders. The opposition of other parties – even of a majority of leaseholders to a proposed variation should not result in the dismissal of the application, although substantial opposition might amount to ‘any other reason’ under section 38(6)(b). The purpose of Section 35 is to allow leases to be varied so that they provide a legal structure that can deal with the basic running of a block i.e. making suitable provisions for the repair and insurance of the building, the provision of services which are reasonably necessary, the computation of the service charge and the recovery of expenditure. These are treated as basic rights which leaseholders (and ground landlords and management companies) can expect and which override any considerations based on the sanctity of contracts.

1.4.2 Discretionary variation on the application of a majority

While section 35 of the LTA 1987 provides for variation on the application of any one or more parties to a lease to ensure that it deals satisfactorily with certain basic issues, section 37, on the other hand, provides for variation where a majority of leaseholders wish their leases to be varied. The scarcity of any reported case-law on this section

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63 LTA 1987, s 35(1).

64 This is not necessarily a fanciful possibility. The writer has come across a scheme of leases of twelve flats set up in the 1960s where the foundations were the responsibility of the four ground floor flats and the roof was the responsibility of the four second floor flats. Most conveyancers would say that the scheme was unsatisfactory and one could justifiably argue that it should be varied under LTA 1987, s 35(2)(a) (failure to make satisfactory provision with regard to repairs). If the structure of the building was mainly in good repair, but the roof was in poor order, it is possible that the owners of the ground floor and first floor flats might short-sightedly join together to oppose the variation of the leases to the more common ‘internal box’ scheme of organising repairs.

65 Westlaw (checked 20 August 2007) cites no cases to this section (the reference to Stylli v Haberton Properties Ltd [2002] WL 347081 is incorrect as that should be a reference to the Supreme Court Act 1981, s 37, not to LTA 1987, s 37). The Lease website (checked 20 August 2007 to No 3015) gives details of nearly 60 decisions on LTA 1987, pt IV, since the jurisdiction was transferred to the LVTs;
makes it even more difficult to say with any certainty when precisely the section applies, the sort of variations which it may cover, and the principles which should govern how the LVT should exercise its discretion in granting or refusing an application.\textsuperscript{66}

The scope of the two sections may overlap in practice. If a lease fails to make provision for a sinking fund, and there are doubts as to whether this falls under section 35, than the LVT clearly can entertain an application under section 37 if the very different eligibility criteria are satisfied.\textsuperscript{67}

Second, there are the same deficiencies as with variations under section 35,\textsuperscript{68} and it is possible to vary only 'long leases of flats.'\textsuperscript{69} Further, any lease which is regulated under Part II of the LTA 1954 will fall outside the scope of section 37.\textsuperscript{70} It will therefore be difficult to vary any leasehold scheme where there is opposition to

only eight involved s 37, and only in approximately six was jurisdiction exercised under that section: \textit{Masefield Court (Barnet) Management Co Ltd v Green}, London LVT (13 July 2004)(Lease website No 1230) - below n 67 and text thereto; 63 \textit{Warrior Square Ltd v Oxenbury}, Southern LVT (11 August 2004) (No 1286); \textit{North British Housing Ltd v Woolham}, Eastern LVT (4 July 2005) (No 1694, apparently duplicated at No 2477); \textit{Sherwood (Brondesbury) Ltd v The Leaseholders of Sherwood}, London LVT (8 August 2006) (No 2273); \textit{Stooks v G & O Investments Ltd}, Southern LVT (20 November 2006) (No 2747); and \textit{Bloomfield Ltd v Lewis}, London LVT (11 January 2007) (No 3011). In some of these the decision was by consent.

\textsuperscript{66} The words of Lord Coleraine in the House of Lords debate on the Bill (above n 27 at cols 641-2) begin by being highly accurate but towards the end of the quote fall wide of the mark: 'I must confess that I am not convinced either that the Bill gives satisfactory guidance on variations of leases to the judges who will be asked to operate it, or that, with present adversarial procedures, the county court judges should be given the jurisdiction or can exercise it satisfactorily. This matter will be green fields for some years, and I fear that for some considerable time to come there will be a flood of expensive litigation, with appeals. It will for the most part be brought by landlords, because they are generally better able to afford the cost and they will, by the nature of their relationship with numerous tenants, have more at stake.'

\textsuperscript{67} This is what occurred in \textit{Masefield Court (Barnet) Management Co Ltd v Green} (above n 65), where an application for variation of the service charge provisions of the leases was treated as an application under s 37.

\textsuperscript{68} Above, text to nn 31-45.

\textsuperscript{69} LTA 1987, s 37(2). 'Flat' is defined in LTA 1987, s 60(1).

\textsuperscript{70} LTA 1987, s 35(6).
the changes either from a commercial tenant\footnote{I.e. of premises which are clearly not a flat, such as a shop or offices on the ground or lower floors of a building.} or even a long leaseholder of a flat who happens to have protection under Part II of the LTA 1954.\footnote{As to the circumstances when this is likely to apply: above, text to n 38.} Even the variation of separate leases of garages used for purely domestic purposes would seem to be excluded, as these would not be leases of flats.\footnote{As was taken to be the case in Sollershott Hall Management Co Ltd v The Lessees (above n 35).} Although one can appreciate why the legislature has avoided opening up the legal hornets’ nest of the variation of commercial leases, the omissions are unfortunate, because leasehold schemes that involve both residential and commercial elements seem quite frequently to present problems, perhaps because commercial circumstances are inherently more likely to change. It is also suggested elsewhere\footnote{See ch 4, text to nn 61-64; and nn 83-84.} in this study that, for various reasons, larger ‘mixed use’ developments are increasingly common, so it is desirable that the scope of sections 35 and 37 should be extended to cover them.

Third, one may note that the formula for deciding whether there is a sufficient majority to support an application is curious: where more than eight leases have to be varied, 75% of the parties must support the application and not more than 10% oppose it,\footnote{LTA 1987, s 37(5)(b).} percentages which are derived from the Nugee Report.\footnote{Para 7.6.6. (Although the 75% figure is derived from the Nugee Report, the proposal was slightly different: above n 17 and text thereto). In cases where fewer than nine leases are involved, the support of all, or all but one, of the parties concerned is required.} There is clearly scope for discussion as to precisely what the relevant percentages should be when a proposed amendment has less than unanimous support,\footnote{It is possible that a proposal to vary a lease may have unanimous support but still be effected most practicably by an application under s 37 rather than by ordinary conveyancing procedures. This would appear to have been the position in Sherwood (Brondesbury) Ltd v The Leaseholders of Sherwood (above n 65). The writer has come across one central London mansion block with in excess of 100 flats which even before the jurisdiction was transferred to the LVT varied its leases on enfranchisement by an unopposed application to the county court on the basis that it would be impracticable to get everyone to agree and to sign the requisite deeds of variation, given the number of leases which at any given time were being sold, were held by executors or were held by leaseholders who were abroad and could not readily be contacted.} but it is curious that the landlord...
should count as one of the parties,\textsuperscript{78} which in smaller block gives the landlord disproportionately more influence. It is difficult to see the logic behind it, other than the vague idea that the landlord's views should be taken into account. Where the reversion is held by an RMC, this rule should make it slightly easier to vary leases, because, in the case of a contested variation, if even just under 75\% of the leaseholders back it, it is likely that they will also have effective control of the RMC.\textsuperscript{79}

The section gives no real guidance on the sort of variations which may be granted by the LVT, and the factors which should guide its discretion. Whereas the 'grounds' for any application under section 35 are specified in subsection (2) and elaborated in subsections (3) to (4), the only ground for an application under section 37 is stated rather baldly to be 'that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.'\textsuperscript{80} At first sight this appears to be very wide-ranging, but on closer analysis it may not, if interpreted literally, cover many of the circumstances that one might expect. It might, for example, be used if a majority of leaseholders in a block of flats wanted to vary their leases so that they should each be given a designated parking space in the car-park, but a small minority opposed the change. A variation of this kind would require the co-operation of all the lessees, in that in order to implement the new scheme each leaseholder might be required to relinquish a general right to park in the car park.

But what is meant by the reference to an 'object [that]... cannot be satisfactorily achieved unless all the leases are varied to the same effect'? An object which involves altering the use of the common parts will clearly fall within this definition. So too, if it is not possible to vary the leases to provide for, say, the establishment of a sinking fund under section 35(2)(e), then it should be possible to do so under section 37(3), as it clearly requires the amendment of all the leases. But how would this test be applied if the proposed variation were to tighten up the lease in

\textsuperscript{78} LTA 1987, s 37(6)(b).

\textsuperscript{79} By having a majority on the board of directors (if they could muster the 75\% necessary to pass a special resolution under art 70 of Table A directing the board to support the proposal, then they would probably have sufficient support under LTA 1987, s 37, anyway).

\textsuperscript{80} LTA 1987, s 37(3).
some respect, say to ban or restrict sub-letting, or the keeping of pets? Either of these proposals might be strongly supported by some leaseholders and vigorously opposed by others. One could argue that the object to be attained (a block with restrictions on sub-letting, or no pets) could not be accomplished unless all the leases were varied. But one might alternatively argue that certain variations can be achieved 'incrementally' and that the object can be satisfactorily achieved if those who consent enter into Deeds of Variation, and the remaining leases are varied if and when the owners for the time being choose to do so. On balance this would seem not to be 'satisfactorily achiev[ing]' the object, but it is not free from doubt, and if the narrower interpretation were accepted, it would considerably restrict the scope of section 37.

1.5 General issues on variation of leases

In spite of the lack of reported appellate decisions on sections 35 and 37 of the LTA 1987, and the general impression that applications are not common, it would be wrong to underestimate the importance of the sections, especially section 35. In spite of uncertainties over its scope, the mere existence of the LVT's power to vary leases prevents a ground landlord from holding leaseholders to ransom if a lease has to be varied in order to make it mortgageable and therefore fully saleable.

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81 Prohibitions on pets can arouse strong emotions and litigation. In Sutton Housing Trust v Lawrence (1988) 55 P & CR 320 an injunction was granted to restrain a tenant with multiple sclerosis who, in breach of the terms of his tenancy agreement, kept a dog for companionship.

82 It has already been noted (above, text to n 8) that, if a covenant for 'mutual enforceability' is to be added, there is no reason why this cannot be done as and when leaseholders request it.

83 The meaning of the subsection is touched on in Bloomfield Ltd v Lewis (above n 65), where the London LVT accepted that, on aesthetic grounds, it was necessary for all the leases to be varied to provide for the landlord to repair and replace the windowframes.

84 Lord Coleraine expressed the view in the debate on the LRHUDA (HL Deb vol 543 col 974 (9 March 1993)) that no practitioners had made much use of LTA 1987, pt IV. It seems, however, that the transfer of jurisdiction to the LVT has led to applications for variation, especially under s 35, becoming more common (above n 65).

85 This was recognised by Baroness Hooper for the Government 'We believe that the existence of a statutory right to apply for the variation of a lease will, in many cases, encourage the parties to reach a satisfactory settlement out of court.' (HL Deb vol 487 col 650 (13 May 1987)). Prior to 1987 the market in reversions was partly driven by the difficulty in varying leases, so the more defective the leases held under it, the more the value of the reversion tended to increase (though this is not relevant.
Few would disagree that there should be some mechanism available to correct mistakes and defects in leases. The difficulty comes in defining terms. If the error is that the service charge contributions are less than or exceed 100%, then it is a matter which can and should be put right. A leasehold regime where the owner of each unit insures and is responsible for his own repairs will be acceptable in the case of maisonettes, but most conveyancers would say that it is unsatisfactory if applied to a block of more than two flats. Most conveyancers would say that some form of sinking or reserve fund is desirable but that does not necessarily mean a lease is unacceptable without one. Where along the continuum should one draw the line for a section 35 variation? Some problems may be masked, as many blocks with leases which are woefully defective run very well because leaseholders act co-operatively. All may be well, until some problem occurs which cannot be resolved amicably, or some new leaseholder insists upon taking a point. It is much better that a lease should contain provisions which, if necessary, can be implemented to facilitate the efficient running of the block. In assessing whether a lease is satisfactory or defective one must assume that leaseholders will operate the lease rather than come to some other, informal arrangement.

Problems over the extent to which one should be able to vary leases under section 37 of the LTA 1987 are more difficult. Such variations may tentatively be divided into three categories:

(1) variations which may be considered desirable for technical reasons but which may not fall within the closely defined criteria for varying under section 35. These would include applications to provide for sinking or reserve funds, and applications to provide for the payment of interim service charge in advance.

(2) variations which become desirable because of changing social or economic circumstances, or developments in technology. These would include providing entryphones; dispensing with porters, or limiting the portering service in some way (e.g. providing for porters to be non-resident); removing the obligation to

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when considering the workings of the RMC Leasehold system, as the leaseholders will control the reversion).

86 E F George and A George, *The Sale of Flats* (see ch 2, n 19) at 22.
87 Assuming in each case that they do not fall within s 35(2)(e).
provide communal heating systems; and providing for increased car-parking, or designated spaces.

(3) variations which are desired simply because a majority of leaseholders now oppose a policy adopted when the lease was originally drawn up, on a matter such as sub-letting, or the keeping of pets, or car parking, to take some particularly controversial issues. The line between this and the preceding category may be hard to draw, as changing circumstances may often be a factor here. But the essence of this category is a change of mind on the part of the leaseholders, or, more likely, that the current leaseholders’ views differ from those of the developer who set up the scheme.

How far the law should facilitate the variation of leases as circumstances change can be problematic. Communal heating systems offer a good example. Flats in older blocks constructed before, say, the 1960s will often have a central heating system served by a communal boiler, with heating and domestic hot water paid for out of the service charge. As the boiler requires more frequent repair, it may become desirable to dispense with a communal heating system and for each flat to have its own. The landlord will, however, be obliged to provide heating and hot water, and, so long as any leaseholder prefers the communal system, it will in practice be impossible to discontinue it, resulting in an obsolescent system being repeatedly repaired when it would be more economic to opt for individual heating systems. This sort of issue could be dealt with under section 37, if a large majority of leaseholders wants to discontinue the old system and only a small minority wants to continue with it. The existence of section 37 can be taken as a recognition that a leasehold scheme cannot be entirely static, and must, under certain circumstances be varied if sufficient leaseholders want this. The problems are (a) to define when a lease should be varied: is it sufficient that a majority of leaseholders want it, or should some other test be satisfied? and (b) to decide what degree of support a variation should require, and what level of opposition should be able to resist it. Indeed, one could argue that, as there is the safeguard that the final decision is made by the LVT, and there is the

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88 The reason for the application in Sherwood (Brondesbury) Ltd v The Leaseholders of Sherwood (above n 65), which was under s 37.
89 These will have almost certainly have been originally constructed for rental.
possibility of compensation being paid, it should not be possible for a mere 10% of leaseholders to be able, in effect, to veto any variation, and that the requirement of 75% support should be sufficient.

An issue such as abandoning communal heating may, however, be easier to resolve than others. If a communal system is discontinued, the cost of heating one’s own flat should be offset by a corresponding reduction in the service charge.\(^\text{90}\) If each leaseholder is responsible for their own heating bill it may well reduce overall expenditure. There will be winners and losers, but it is difficult to have a lot of sympathy for leaseholders who will lose out because of their hitherto extravagant use of the heating. A proposal to discontinue a service for which an individual leaseholder cannot provide a substitute may be more difficult to resolve. Several reported cases involve proposals to reduce portering services:\(^\text{91}\) to make do with a non-resident porter, or to abandon having a porter altogether. They have been reported on the correct interpretation of the lease, rather than on variation as such. If one were to attempt to vary the leases, a difficult issue would arise. Some of these leases date back to a time when a porter could be employed relatively cheaply. The cost of employing a full-time porter (especially a resident porter, when a flat has to be supplied) may have increased faster than the general cost of living. Should this count as a change of circumstances and be used to justify a variation of the lease? Or should one argue that residents knew what obligations they were taking on when their acquired their lease, and if the presence of a porter (or any other expensive service which is useful but not essential) attracted a purchaser to buy the flat, why should he now be deprived of it simply because a majority no longer wish to contribute financially? Some United States cases have attempted to set the principles that should be followed.\(^\text{92}\)

In other cases the lease may clearly impose, or not impose, a particular restriction, and a majority of residents may wish to change it. Examples of particularly

\(^{90}\) They will of course each have the capital cost of installing a new system; this may be offset by the fact that occupants may be more inclined to be extravagant with their use of heating (e.g. opening windows rather than switching radiators off) if the cost is being passed on to the service charge to which numerous others contribute.

\(^{91}\) For example, Russell v Laimond Properties Ltd [1984] 1 EGLR 37 (QB); Veena SA v Cheong, LRX/45/2000 (20 February 2003) (Lands Tribunal website).

\(^{92}\) E.g. below nn 292, 295.
controversial issues would be the keeping of pets and sub-letting of flats. Some of the issues surrounding sub-letting are dealt with elsewhere in this study.\textsuperscript{93} Pets are a difficult issue because they raise such strong feelings for and against among flat dwellers.\textsuperscript{94} If leaseholders are unanimous that they wish to change the policy adopted by the lease, there should be no problem, but how far can or should a minority be able to prevent the majority from changing the policy, on the basis that it is contained in the lease and ‘they knew what they were signing’? One may argue that one leaseholder should not be able to frustrate the wishes of a large majority, but altering a contract against the wishes of a party to it - even a party by privity of estate rather than of contract - is a serious step.

1.6 Conclusions on variation under the RMC Leasehold model

1.6.1 The transfer of jurisdiction to vary leases to the Leasehold Valuation Tribunals

As Lord Coleraine observed when the LTA 1987 was enacted,\textsuperscript{95} it gives very little guidance to judges on how it should be operated. The transfer of the jurisdiction to vary leases to the LVTs\textsuperscript{96} should allow them to make use of their specialist expertise in the area of leasehold management to build up a familiarity with dealing with these applications. The ‘no-costs’ regime, and the likelihood of lower costs, appear to be resulting in an increase in applications.\textsuperscript{97} Further, the reporting of the LVTs’ decisions on the Lease website should make practitioners aware of the issues that may arise, and the LVTs’ likely stance on them, though as yet there are only first instance tribunal decisions, with no appellate decisions from the Lands Tribunal or the Court of Appeal.

1.6.2 Issues that remain

The RMC Leasehold model of flat ownership therefore offers a highly static model of flat ownership. The relationships between leaseholders are governed by a series of contracts between each leaseholder and the RMC, and the basic assumption is that

\textsuperscript{93} See ch 2, text to nn 184-257.
\textsuperscript{94} E.g. above n 81.
\textsuperscript{95} Above n 66.
\textsuperscript{96} CLRA, s 163. Strangely, only 21% of leaseholder respondents to the August 2000 Consultation Paper supported this proposal (Table 34 at 7.16 of \textit{Analysis of responses to the consultation paper on Leasehold Reform} (DETR, January 2001)).
\textsuperscript{97} Above n 65.
they are unalterable save by the consent of all. It may well therefore be impossible to vary leases by agreement. Making no changes over the duration of a long lease is likely to be unrealistic.

The changes brought about by Part IV of the LTA 1987 have the potential considerably to mitigate the inflexibility of the RMC Leasehold model. The lack of reported cases under section 35, even in the county court, until the jurisdiction was transferred to the LVTs could suggest that the Act had been little-used, or alternatively, that its mere existence enabled variations, and any consideration for them, to be agreed by consent. The more recent increase in the number of decisions suggests an increasing awareness of the utility of section 35 applications. The continuing lack of reported cases under section 37 suggests a lack of take up; the uncertainties over the scope of the section may be having a 'chilling' effect on applications which might prove contentious. It clearly can also be a useful tool to overcome the practical difficulties in large blocks of putting into effect variations even when they have unanimous backing.

Section 162 of the CLRA belatedly recognises the need for some clarification and extension of section 35 of the LTA 1987. It is to be welcomed as enabling legislation which allows for the issues raised in the August 2000 Consultation Paper to be addressed at a later stage. It is hoped that further regulations will be made to increase the number of clearly-defined circumstances where an obligatory application for variation can be made: for example, the provision of a sinking or reserve fund, and advance interim payments.

Section 37 remains unaltered by the CLRA, although the transfer of jurisdiction from the court to the LVT seems to be leading to an increase in the

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98 It seems reasonable to assume that the lack of any reported cases in the Court of Appeal and High Court would mean that cases of interest in the county courts would have got reported in, say, Current Law or Estates Gazette.

99 And the decisions thus became available on the Lease website.

100 Above n 77.

101 That it does not go further seems due to the lack of support from leaseholders on the issue in the consultation exercise (above n 56 and text thereto, and n 96) which may in turn be due to having combined the consultation on variation with the more contentious issues of enfranchisement and Right to Manage, which engendered an attitude of suspicion.
number of applications, the decisions on which are – thanks to the Lease website – becoming more widely known, giving scope for the development of a coherent body of case-law, which should be enhanced as and when decisions are appealed to the Lands Tribunal. The requirement of the active support of 75% of the parties concerned and the safeguards of LVT approval, and the possibility of compensation being paid, should enable the principles to be applied in balancing the various issues to be addressed here. If, however, the two sections are to become a comprehensive mechanism for remedying the shortcomings of leases, it is essential that they are extended to cover leases of flats which may happen also to be business tenancies under Part II of the LTA 1954, leases of ancillary holdings, such as garages, and probably also, with certain safeguards, leases of commercial properties within the same development. The popularity of ‘live-work’ units, and the increasing complexity of mixed use developments, mean that the scope of the law will need to be broadened.

2. AMENDMENT OF THE COMMONHOLD COMMUNITY STATEMENT

2.1 The position under the Commonhold Community Statement

Matters which in leasehold developments are governed by the lease will in commonholds be governed by the CCS. This will have some obvious advantages. In a leasehold development, leases may be inconsistent with one another, due to an oversight on the part of those drafting them. Some leases may suggest, for example, that window-frames or balconies form part of the main structure whilst others imply that they are the responsibility of individual flat owners. As a commonhold development will be governed by a single CCS, such inconsistencies will not be possible. It is still possible that the total contributions to a commonhold assessment

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102 Under LTA 1987, s 38(10), to any leaseholder who suffers loss or disadvantage as a result of a variation.

103 It might be argued that the effective veto on alterations that can be exercised by 10% of the parties over-protects them: above, text follg n 89.

104 The draftsman of a leasehold scheme who finds that, after the first few leases have been granted, an assiduous solicitor for a purchaser finds mistakes that need correction is in a difficult position. Even if he offers to vary the leases that have been granted, the lessees may not wish to co-operate.
may be less or more than 100%, or that if changes are made to a commonhold, the proportions for the commonhold contributions may require revision, but as they will be set out in a single document, the possibility of drafting or clerical errors is reduced, and any mistake should be readily evident to any conveyancer who checks the figures.

Problems caused by provisions (a) being inappropriate when the commonhold is set up; or (b) becoming so, due to the passage of time, should present less of a problem with commonhold because the CCS will be readily amendable. Disputes as to whether certain works are repairs or improvements, or whether any given expenditure is within the scope of the service charge provisions will also be unlikely, as the CHA can raise funds via the commonhold assessment for any lawful purpose. This may, however, in its turn, present problems, if a majority of unit-holders wish to embark on a programme to refurbish a commonhold to a much higher standard than previously. Although the CCS forms an agreement between all the unit-holders, and between individual unit-holders and the CHA, it must contain a mechanism for its own amendment. The precise scope of this provision was not evident when the CLRA was passed, because section 33(1) provides that it should be a matter for regulations.

2.2 Amending the Commonhold Community Statement
The general rule for amendment of a CCS is that Parts 1 to 4 - the main, prescribed parts - cannot be altered, but that ‘local rules’ may be amended by an ordinary resolution, i.e., a simple majority of those present and voting at an AGM or EGM. For certain amendments to the CCS, a special resolution and/or the consent of the

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105 CLRA, s 38(2)(a), and CCS, Annex 3, para 1 make it clear that the total must come to 100%, but mistakes may possibly be made. (The model CCS is Schedule 3 to the Commonhold Regulations 2004 SI 2004/1829 (‘the Commonhold Regulations’)).
106 CLRA, s 38(1)(a) simply refers to ‘the expenses of the association’. (This is the view taken by the present author in Clarke on Commonhold, 17[2]); see ch 4, text to n 39; and in Aldridge Commonhold Law (see ch 4, n 37); Fetherstonhaugh at 2.17,18 does not mention the point).
107 See ch 4, text to nn 44-45.
108 CLRA, s 31(1).
109 CLRA, s 33(1).
110 CCS, 4.8.2.
111 CCS, 4.8.3. As to ‘local rules’: below n 228.
unit-holder (and sometimes also of any registered charge holder) are required. These provisions are set out in detail below.\textsuperscript{112}

Analysing how commonhold operates in practice is complicated because the scheme adopted for it involves a hierarchy of provisions, resulting in a structure which will not necessarily be easy to follow. Unit-holders who peruse the governing documents of the commonhold (principally the CCS, but also the Memorandum and Articles of Association of the CHA) cannot even be sure that the documents mean exactly what they appear to say. The adoption by the CLRA\textsuperscript{113} of a scheme which is based on documents which are individually-drafted, but which need to comply with regulations of general applicability, has the result - which is unlikely to arise in leasehold\textsuperscript{114} - that the CCS may appear to make certain provisions, but they will not necessarily be enforceable. Thus a CCS must be in the form of Schedule 3 to the Regulations\textsuperscript{115} and contain all the provisions of the model CCS,\textsuperscript{116} but:

(a) it is not clear how far the Land Registry will actively vet a CCS to check compliance;\textsuperscript{117}

(b) if a CCS is subsequently amended it will not take effect until the amended CCS is registered,\textsuperscript{118} but, again, it is not clear whether the Land Registry will vet it to check compliance;\textsuperscript{119}

\textsuperscript{112} Below text to nn 156-167. A discussion of them follows the text to n 167.


\textsuperscript{114} Although service charge provisions of LTA 1985, ss 18-30, will of course prevail over contrary provisions made in a lease, including the once common provision that the certificate of the Landlord’s surveyor as to the amount of any service charge should be final.

\textsuperscript{115} Reg 15(1).

\textsuperscript{116} Reg 15(2).

\textsuperscript{117} \textit{Land Registry Practice Guide 60: Commonhold} (July 2006) (at 5.2) puts the onus on the directors of the CHA to confirm that the CCS satisfies the requirements of the CLRA. Kenny (above, ch 2, n 53, at 7) regrets the absence of 'some body which had an obligation to advise on and even regulate the content of commonhold schemes.'

\textsuperscript{118} CLRA, s 33(3).

\textsuperscript{119} Again, the Land Registry places the onus on the directors of the CHA to confirm that the amended CCS satisfies statutory requirements (above n 117 at 7.2).
(c) A CCS will be treated as containing the provisions of the model CCS whether or not it does actually contain them.\(^\text{120}\)

(d) there are bound to be circumstances where because of uncertainty in the construction of a given CCS or of the model CCS, it is unclear whether there is a conflict between the given CCS and the model, or between the given CCS and Regulation 15.

2.2.1 The difficulty of standardisation of the Commonhold Community Statement

The model CCS makes no attempt to prescribe general rules for conduct within the commonhold. The October 2001 draft model CCS issued by the Lord Chancellor’s Department\(^\text{121}\) included in Section H some ‘Miscellaneous Rules’. Some of these were offered as illustrative only\(^\text{122}\) whilst others would have been prescribed.\(^\text{123}\) The difficulty, indeed, the impossibility of drafting a ‘one size fits all’ set of rules\(^\text{124}\) eventually led to the dropping of rules such as these from the model CCS, although tailor-made rules, similar to those found in leasehold schemes, will no doubt generally be added as local rules after Annex 4 to the CCS. The former Department for Constitutional Affairs has also published specimen local rules,\(^\text{125}\) which can be adopted if desired, so - it is hoped - introducing a measure of standardisation by voluntary means. By restricting the prescribed terms of the model CCS to what one

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\(^{120}\) Reg 15(2).

\(^{121}\) Dated 8 October 2001 and included as Appendix 2 to Commonhold: The New Law.

\(^{122}\) E.g. No 66: ‘No animals may be kept or brought onto the Commonhold without the written consent of the Board of Directors.’ (This was shown in italics as ‘optional...and provided by way of illustration only.’)

\(^{123}\) Compulsory provisions were shown in Roman type, e.g. No 58: ‘A Unit-holder must not, and must take reasonable steps to ensure that his invitees do not, behave in any way or create any sound or noise which causes or is likely to cause any annoyance, nuisance, injury or disturbance to other Unit-holders, or to any other person lawfully on the Commonhold, or to the occupiers of adjoining buildings or premises.’

\(^{124}\) The New Zealand Unit Titles Act 1972 retains a standard ‘one size fits all’ set of Rules, though this is currently under review: below n 284.

may term core provisions, the Department\textsuperscript{126} did not follow the Australian model whereby, under the current Regulations\textsuperscript{127} in New South Wales, one of six modules of standard by-laws may be adopted, either ‘off the shelf’, or with amendments;\textsuperscript{128} or the promoters can adopt a set of entirely custom-drafted rules. The difficulty with this would seem to be that, out of laziness, or a desire to keep down legal costs, developers might not pay attention to the specific rules which a particular strata scheme may require. Also, if one of the standard modules is adopted with amendments, there seems to be no requirement to show what may be important deviations in such a way as to alert practitioners to the divergence.\textsuperscript{129} Although proponents of commonhold have always seen standardisation of documents as one of its chief advantages,\textsuperscript{130} the CCS will not necessarily be easy to follow, and, if commonhold is to apply in diverse situations, it probably never could be.

2.2.2 Standardisation - the example of insurance arrangements

Insurance offers a good example of how difficult it is to standardise the CCS. The October 2001 draft model CCS attempted to deal with the matter by providing two options for insurance, one applicable to commonholds which included flats,\textsuperscript{131} another

\begin{footnotesize}
\textsuperscript{126} Now the Ministry of Justice.
\textsuperscript{127} In Schedule 1 to the Strata Schemes Management Regulations 1997, made under the Strata Schemes Management Act 1996.
\textsuperscript{128} The six modules cover residential strata schemes, retirement village strata schemes, industrial strata schemes, hotel/resort strata schemes, commercial/retail strata schemes, and mixed use (residential and commercial/retail) strata schemes (see A Ilkin, \textit{Strata Schemes and Community Management and the Law} (3\textsuperscript{rd} edn, Sydney, LBC Information Services, 1998) [1304]).
\textsuperscript{129} The alternative of having entirely custom-drafted rules would seem to reduce the advantage of standardisation brought by having prescribed modules of rules.
\textsuperscript{130} See, for example Aldridge 7.1-7.8, and \textit{Leaseholds - Time for a Change?} (London, Building Societies Association, 1984), para 19: ‘It [sc. the Strata Title system] is not so much a system of standardised documentation as a set of straightforward statutory rules - so, unlike English long leaseholders, strata unit proprietors in New South Wales do not have to master what is often a lengthy, complex and barely intelligible legal document.’
\textsuperscript{131} 22. ‘Every Unit-holder shall take out and maintain contents insurance, including public liability insurance, in respect of his Commonhold Unit in a form satisfactory to the Board of Directors. The Commonhold Association shall take out and maintain buildings insurance, including public liability insurance, in respect of the Commonhold Units.’
\end{footnotesize}
applicable to all others.\textsuperscript{132} If one is dealing with flats then the ‘internal box’ model of arranging repairs and insurance is by far the most satisfactory. It would have been possible to have required that the CHA would always insure the buildings of the commonhold, but with, say, a commonhold comprising only houses, perhaps a retirement complex or a ‘gated community’, and still more so with a commonhold of free-standing factory or office units, there is little to be gained from having a block insurance policy to cover the whole estate and most unit-holders would probably prefer to take out their own buildings insurance.\textsuperscript{133} To have required block insurance would have marked a difference between commonhold and ‘ordinary’ freehold, perhaps militating against the former.

To address this, the solution adopted by the model CCS is to require the CHA to take out and maintain buildings insurance in respect of the common parts.\textsuperscript{134} This insurance must be in respect of fire; other risks in respect of the common parts can be specified\textsuperscript{135} as a local rule. An earlier draft of the model CCS\textsuperscript{136} required the CHA to take out public liability insurance in respect of the commonhold\textsuperscript{137} but this was subsequently dropped. Any duty on the part of the CHA to insure the units is now covered by a local rule.\textsuperscript{138} The model CCS does not require the unit-holder to take out contents insurance.\textsuperscript{139} The Regulations now permit the CCS to be drafted so that each

\begin{itemize}
\item \textsuperscript{132} 22. ‘Every Unit-holder shall take out and maintain buildings and contents insurance, including public liability insurance, in respect of his Commonhold Unit in a form satisfactory to the Board of Directors. Any building insurance which is in a form satisfactory to the mortgagee of a Commonhold Unit shall be deemed to be in a form satisfactory to the Board of Directors.’
\item \textsuperscript{133} Insurance premiums on an industrial estate would no doubt be heavily weighted if a particularly hazardous activity were being undertaken on one of the units.
\item \textsuperscript{134} CCS, 4.4.1.
\item \textsuperscript{135} CCS, Annex 4, para 5. One would expect most commonholds to take out insurance ‘against all usual risks’. However, to have insisted upon this would have placed CHAs in an impossible position in areas where, say, insurance against subsidence, or against flooding, was hard to obtain or prohibitively expensive. It would effectively have ruled out the use of commonhold for such developments.
\item \textsuperscript{136} The draft of 24 July 2003.
\item \textsuperscript{137} Ibid rule 16.
\item \textsuperscript{138} CCS, 4.4.6 and Annex 4, para 6. As to when this may be appropriate: below, text to n 149.
\item \textsuperscript{139} Cf rule 22 of the October 2001 draft. It seems in principle inappropriate to require a freehold owner to do this, though contents insurance generally includes occupier’s liability insurance, and the CHA
\end{itemize}
unit includes the main structure of the building containing the unit, and for the CCS to require each unit-holder to repair the building. Such freestanding, or vertically-divided, commonhold units may, it seems, be separately insured by the unit-holders. This model would be appropriate for a commonhold which consisted of, or included, detached houses or a terrace of vertically-divided units; or indeed a commercial commonhold of free-standing factory buildings. It cannot, however, be used for blocks of flats because of the requirement for the definition of a commonhold unit to exclude the structure and exterior where there is more than one unit in any self-contained building or part of a building. 'Self-contained building' is defined in terms borrowed from section 3 of the LRHUDA - an established definition which seems to have been the subject of little litigation, suggesting it is tolerably clear. Relying on the definition of the 'common parts' to demarcate insurance responsibilities raises some tricky and possibly doubtful issues. Although the ‘internal box’ method of division of responsibilities is prescribed as the norm for

may have some interest in unit-holders holding this. It can be difficult to determine whether any given item is a fixture, and thus insurable as part of the building, or a chattel, and thus insurable as contents.

Reg 9.

The effect of CLRA, s 14(2) would seem to be that the CCS must require that such units be insured by either the CHA or the unit-holders.

Or indeed maisonettes, should one set up a commonhold for two maisonettes, or perhaps a group of maisonettes and their communal grounds; or for horizontally-divided or interdependent commercial developments, such as a building divided into office suites or workshops, or shops in a mall.

Reg 9(1): In defining the extent of a commonhold unit a commonhold community statement—

may exclude, from the definition, the structure and exterior of a self-contained building, or of a self-contained part of a building, which only contains one commonhold unit or part of one commonhold unit; and

must exclude, from the definition, the structure and exterior of a self-contained building, or of a self-contained part of a building, in any other case.

Reg 9(2).

The first reported case to have considered the definition in LRHUDA, s 3, is Oakwood Court (Holland Park) Ltd v Daegan Properties Ltd (Lawtel, 18 December 2006) (CC), though Holding & Management (Solitaire) Ltd v 1-16 Finland St RTM, LRX/138/2006 (Lands Tribunal website) has since considered the identical definition in CLRA, s 72.

Some of its concepts may, however, be difficult to apply. For guidance as to what would amount to a 'significant interruption' in the provision of relevant services, see now Oakwood Court (above n 145).
flats, it acknowledges that it is possible that structural parts may be contained within a commonhold unit: for example, in a building of traditional construction, a load-bearing wall may lie within a unit. It may not always be immediately obvious, however, whether an internal wall is part of the structure, and thus part of the common parts, or non-structural, and thus part of the unit. The division provided for by Regulation 9 would mean that the CHA would not be obliged to insure parts of the building which are neither the ‘exterior’ nor the ‘structure’. The Act itself requires that the CCS must impose duties in respect of the insurance of each unit. Rather than allowing any discretion here, the Regulations require that, in the case of a building containing flats, the CHA must insure the whole building, although this raises the issue of whether the CHA has an insurable interest in non-structural parts of units. If a commonhold contains both houses and flats, it will probably be essential for the CHA to insure the houses as well. The complexity of this discussion of insurance shows that we have come a long way from the aspirations of the Building Societies Association in 1984, or even from the proposals of the Aldridge Committee in 1987, for standardised simplicity.

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147 The same problem could, of course, arise within a leasehold development, in demarcating repairing responsibilities. The problem would be less acute in defining (a) the terms of the demise and (b) insurance responsibilities, as a structural internal wall could, in a leasehold property, be included in a demise and yet it remain the responsibility of the ground landlord to insure them.

148 CLRA, s 14(2).

149 Reg 15(7): ‘Where, by virtue of regulation 9(1)(b), in defining the extent of a commonhold unit, the commonhold community statement excludes the structure and exterior of a self-contained building, or a self-contained part of a building, the commonhold community statement is treated as including provision which imposes a duty on the commonhold association to insure the whole of the self-contained building, or self-contained part of a building.’

150 The view of Clarke on Commonhold (7[36], n 3) is that the requirement to insure imposed by reg 15(7) and CLRA, s 14(3) would be sufficient to give the CHA an insurable interest in parts of the building that were within a unit but did not form part of the main structure i.e. non-load-bearing internal walls. Demarcation problems of this kind would not arise in leasehold developments as the lessor would also have an estate (in reversion) in any parts of the building ‘owned’ by (i.e. demised to) the lessee, and thus still have an insurable interest.

151 Because of the difficulty of having a ‘divided assessment’: see ch 4, text to nn 56-84.

152 Above n 130, in each case.
2.3 Provisions of the Commonhold Community Statement as to its amendment
Apart from its core provisions, therefore, the CCS will be freely amendable. Whilst it remains difficult, probably too difficult, to vary leases, amending the CCS seems to have gone to the opposite extreme. The procedure to amend the CCS is part of the model provisions, and therefore has to be included in any CCS. The general rule is that Parts 1 - 4 of the CCS cannot be amended, but that any local rules can be added, deleted or amended by an ordinary resolution passed at a General Meeting of the CHA. There are some exceptions to this:

(1) Certain amendments can be effected by ordinary resolution, but require the prior consent in writing of the unit-holder and of the proprietor of any registered charge over that unit:
   (a) An amendment which alters the rights granted to, or over, a unit.
   (b) An amendment which deprives a unit-holder of the right to use a limited use area.

(2) Other amendments require a special resolution and also require the prior consent of the unit-holder:
   (a) An amendment which redefines the extent of a commonhold unit; such an amendment also requires the consent of the proprietor of any registered charge over that unit.
   (b) An amendment which transfers land from a commonhold unit to the common parts; this also requires the consent of the proprietor of any registered charge over that unit.

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153 CCS, 4.8.1 - 4.8.16. By CLRA, s 33, regulations must require a CCS to make provision about how it can be amended.
154 Reg 15(2). The regulation provides that the CCS ‘will be treated as including those provisions.’
155 Below n 228.
156 CCS, 4.8.3 (this provision is expressed to be ‘except where this CCS provides otherwise and subject to the Companies Act 1985’: reference not yet amended to refer to the Companies Act 2006).
157 CCS, 4.8.5. Here, and in 4.8.8, the inclusion in the model CCS of the safeguard of requiring the consent of the unit-holder would seem to meet the objections voiced by Kenny (see ch 2, n 53, at 8).
158 CCS, 4.8.6.
159 CCS, 4.8.8 (and see above n 157).
160 CCS, 4.8.9. This would seem to be encompassed in the preceding, but is included, presumably ex abundantia cautelae.
(c) An amendment to the permitted use of a unit.\textsuperscript{161} This does not, surprisingly, require the consent of the proprietor of a registered charge, although it might well affect the value of the unit as a security.

(3) Finally, other amendments require a special resolution, but no individual consents are required:

(a) An amendment to record a change in the boundaries of the commonhold, a commonhold unit, or the common parts.\textsuperscript{162} As any change to the boundaries of an individual unit will require the consent of the unit-holder affected,\textsuperscript{163} a special resolution alone will suffice only when the external boundaries of the commonhold are being altered, and land is being added to or taken from the common parts. As a ‘limited use area’ is a specialised part of the ‘common parts’,\textsuperscript{164} and not a distinct concept, it would seem that if an area is transferred from ‘limited use’ to the (general) common parts, or vice versa, this is an amendment of a local rule only and can thus be achieved by ordinary resolution.

(b) An amendment to the percentage of the commonhold assessment or levy allocated to a commonhold unit, or to the number of votes allocated to a member, will also require a special resolution.\textsuperscript{165} The consent of a unit-holder who is adversely affected is not required, but the CCS gives a right to challenge any unfair alteration.\textsuperscript{166} The same applies, mutatis mutandis, to an alteration of the number of votes allocated to a member.\textsuperscript{167}

These provisions will be considered in turn, as some may have unexpected and anomalous consequences.

\textsuperscript{161} CCS, 4.8.7.
\textsuperscript{162} CCS, 4.8.10.
\textsuperscript{163} Under CCS, 4.8.8 and/or 4.8.9. It will also require the consent of the registered proprietor of any charge on the unit.
\textsuperscript{164} CLRA, s 25(2).
\textsuperscript{165} CCS 4.8.11, amending Annex 3, paras 1, 2 or 3.
\textsuperscript{166} CCS 4.8.12: quoted below, text to \textsuperscript{n} 219.
\textsuperscript{167} CCS, 4.8.13.
2.3.1 An amendment which alters the rights granted to, or over, a unit

Although the CLRA and the CCS do not use the terminology of easements, many of the rights would fall into the category of easements in an ordinary freehold or leasehold development. It is understandable that rights should not be granted over a unit without the consent of the unit-holder, and that he should not be deprived of rights against his wishes; it is less easy to see why rights should not be granted to a unit-holder even though he may not actively want to use them.169

Whilst clearly the consent of the unit-holder should normally be required before rights can be granted over a unit, the legislation as enacted is rather more inflexible than would be the position under either RMC Leasehold or commonhold as envisaged by Aldridge, and proposed in the 1990 and 1996 draft Bills. Say, for example, the leaseholders under RMC Leasehold wanted to provide for a new facility, such as a satellite TV system, or a video-entryphone, and as it was not practicable for the cables to be installed through the common parts, it was necessary to pass them through individual units. Alternatively, some desirable modifications could require that unit-holders give up certain rights granted by the CCS:170 e.g., the right to use storage cupboards in the hallway. Under the leasehold model, it would, in the last resort, and with sufficient support, be possible to vary the leases under section 37 of the LTA 1987. Under the Aldridge proposals, it would have been possible to vary the Commonhold Declaration171 with an 80% majority, and the approval of the court. Under commonhold as enacted, unit-holders apparently have an absolute right of veto over changes of this kind, which seems self-evidently too inflexible.172 A court173

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168 CCS, 4.8.5.
169 A possible argument might be that, if rights to use new facilities are granted to the unit-holders generally, all unit-holders will have to pay for them through the commonhold assessment.
170 If a CCS should impose an obligation on the CHA to provide a communal heating and hot-water system, perhaps as part of some energy-saving scheme, it would prove impossible to change it without absolute unanimity, as any amendment would require that each unit-holder give up rights granted by the CCS.
171 As the CCS was then called.
172 The point about the lack of the facility to go to court to override objections will be developed later: below, text to nn 274-283.
173 Or the LVT, or some other designated tribunal within the Residential Property Tribunal Service.
should be able to balance the relevant issues, if necessary making its approval of any proposal conditional upon the payment of compensation\textsuperscript{174} to those adversely affected. Insistence on the consent of the unit-holder, and the apparent desire to keep disputes out of the courts,\textsuperscript{175} has, in this case, made the system too inflexible, though fortunately this shortcoming could be remedied by amending the model CCS by regulation, rather than requiring an amendment to the CLRA.

\textbf{2.3.2 An amendment which deprives a unit-holder of the right to use a limited use area}\textsuperscript{176}

At first sight the provisions made for limited use areas would appear to give unit-holders satisfactory protection, but on closer inspection they would appear to be potentially vulnerable. Section 25(1) of the CLRA defines the common parts as:

\begin{quote}
    every part of the commonhold which is not for the time being a commonhold unit in accordance with the commonhold community statement
\end{quote}

so it must follow that a ‘limited use area’ is technically part of the ‘common parts’. Subsection (2) goes on to define a ‘limited use area’ as ‘a specified part of the common parts in respect of which the CCS restricts (a) the classes of person who may use it; (b) the kind of use to which it may be put.’ It seems that these must be read as alternative, rather than cumulative, requirements,\textsuperscript{177} but then ‘limited use areas’ may embrace some rather disparate concepts. If part of the common parts is designated as a ‘visitors’ car parking area’ (rather than an area in which children may play ball-games) does that make it a ‘limited use area’? On the definition in section 25 it would seem to be so.\textsuperscript{178} All the unit-holders may therefore be shown in paragraph 4

\textsuperscript{174} As is possible with leaseholds under LTA 1987, s 38(10), and would have been possible under the 1990 draft Bill, cl 32 and sch 1, para 5(4)&(5); and under the 1996 draft Bill, cl 15(11) and sch 2, para 7(4)&(5).
\textsuperscript{175} See ch 3, text to nn 236-249.
\textsuperscript{176} CCS, 4.8.6.
\textsuperscript{177} This is the view taken by Commonhold: Non Statutory Guidance on the Commonhold Regulations 2004 (Department for Constitutional Affairs, July 2004) at para 181 (hereafter ‘Notes for Guidance’ – available at www.dca.gov.uk and in Clarke on Commonhold at 25[1]-[8]) and by Guidance on the drafting of a CCS (above n 125) at para 67 – though it is difficult to see why, if this meaning was intended, ‘or’ was not inserted between (a) and (b).
\textsuperscript{178} Guidance on the drafting of a CCS (above n 125) includes some rather disparate examples following para 67. One would question whether it is really necessary to specify e.g. who may enter the

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in Annex 4 as the ‘authorised users’ of a limited use area, viz. a residents’ parking area, with local rules to allocate spaces.\(^{179}\)

An area may, however, be designated as a ‘limited use area’ not so as to limit the use to which it can be put, but to restrict those who may use it to certain unit-holders. In order to preserve residents’ privacy, it may be convenient to provide that a patio area should be used by, say, the two ground floor flats that abut it, but not by the unit-holders generally. This, it would seem, was the original intention of the concept. But as Clarke points out,\(^ {180}\) it may be convenient to make a balcony \textit{used by only one flat} a limited use area, rather than part of a unit, so that it can be treated as part of the ‘common parts,’ the responsibility for repairing it (and, if appropriate, of decorating it) falling on the CHA rather than the unit-holder.\(^ {181}\) As a limited use area is only a specialised area within the common parts, it is not protected by the safeguards that apply to the adjustment of boundaries of individual units.\(^ {182}\) If a patio area such as that described above had been divided between the two units that abut it, half forming part of each, it would not be possible to alter the arrangement without the consent of the unit-holders. But if it is a limited use area, the transfer of land from it into the (general) common parts would not involve a ‘change in the boundaries of the commonhold, a commonhold unit or the common parts’, and so a special resolution would not be required. An \textit{ordinary} resolution therefore suffices to make an amendment to the CCS which has the effect of transferring land from a limited use area to the (general) common parts or vice versa.

\(^{179}\) ‘manager’s office’ or the ‘oil storage area’ if, as will usually be the case, unit-holders have not been given a general right to enter the common parts.

\(^{180}\) Alternatively, and especially if there are sufficient parking spaces, each space could be designated as a limited use area, with only one unit-holder allowed to use it. Retaining the parking spaces as limited use areas within the common parts, rather than having them as separate units, or including them in units comprising flats would have the advantage that the resurfacing and maintenance of the parking area would automatically remain the responsibility of the CHA (much as with the balcony example: below n 181).

\(^{181}\) In many cases, especially with taller buildings, it would be quite impracticable for a balcony to be repaired by the unit-holder who used it. Although in practice forming part of a unit, they would need to be repaired and probably decorated at the same time as the remainder of the exterior: above n 179.

\(^{182}\) CCS, 4.8.8 and 4.8.9.
The model CCS acknowledges the potential importance of the limited use area and attempts to protect its status by requiring the prior written consent of a unit-holder before an amendment can be made to deprive him of the use of a limited use area.\textsuperscript{183} So, to take the shared patio example again, it would not be possible to amend the CCS so as to allocate it to only one of the units unless the other unit-holder consented. But it is submitted that these provisions give inadequate protection and that there are two potential loopholes here.

First, although an amendment cannot \textit{stop} a unit-holder from using a limited use area without the consent of that user, there is nothing to prevent other users from being \textit{added to} those entitled to use a limited use area. An ordinary resolution would therefore suffice to convert the patio area into an area that all unit-holders could use. If the members of the CHA attempted to get rid of the limited use area entirely, so that it formed part of the (general) common parts, this would seem to engage the relevant paragraph\textsuperscript{184} and so would require the consent of the unit holder and the registered proprietor of any charge.\textsuperscript{185} But the majority of members of the CHA could circumvent this requirement by retaining it as limited use area – designating it, say, for ‘sunbathing’ – but amending the CCS so that \textit{all} unit-holders were added to the list of authorised users.

Second, the apparent safeguards in the CCS could also be circumvented by a majority who wished a facility to be available for all rather than for a few unit-holders because \textit{to alter the boundaries} between a limited use area and the (general) common parts requires only an ordinary resolution. To return again to the example of the shared patio: instead of allowing all unit-holders to use a patio area intended for the use of one or two unit-holders, alternatively a simple majority could alter the

\textsuperscript{183} CCS, 4.8.6: ‘An amendment to remove a reference to a unit-holder in the column headed “Authorised users” in Annex 4, para 4 cannot be made unless the unit-holder and the registered proprietor of any charge over his commonhold unit have consented in writing to the proposed amendment before it is made.’

\textsuperscript{184} Ibid by ‘remov[ing] a reference to a unit-holder in the column headed “Authorised users” etc…’

\textsuperscript{185} CCS, 4.8.6.
boundaries between the limited use area and the (general) common parts to make the limited use area very much smaller.\footnote{Clarke on Commonhold 7[22] accepts that the model CCS may give insufficient protection to unit-holders who are expecting to have exclusive use of a limited used area (or use shared with only a few others). The authors suggest that it may be appropriate to amend the CCS to require that the consent of the unit-holders concerned should be required for any amendment which reduces the extent of the limited use area, or allows other unit-holders to use it.}

It is difficult to avoid the conclusion that the precise role to be played by limited use areas in commonhold has not been fully thought through. The concept was not to be found in the original Aldridge proposals\footnote{Aldridge (7.12) seems to have assumed that any common facilities would be available for all unit-holders.} or in the 1990 or 1996 draft Bills. The concept seems to have been imported from United States condominium law by Rosenberry in her unpublished submission\footnote{KN Rosenberry Issues Raised in the Creation and Operation of Commonhold Communities Law (privately obtained from a member of the Commonhold Working Party).} to the Commonhold Working Party which, with slight revisions, was subsequently published.\footnote{KN Rosenberry Commonhold Law: Problems and potential solutions (see ch 4, n 62).} There it is described as ‘Exclusive Use Common Area’ and is defined as ‘a portion of the common area allocated in the Commonhold Community Statement for the exclusive use of one or more but fewer than all of the units’,\footnote{Ibid at 19.} so excluding areas which can be used by all unit-holders but which can be put only to certain designated uses.\footnote{Cf CLRA, s 25(2).} It is submitted that Rosenberry’s definition is a more logically coherent concept. If it is necessary to provide that different parts of the common parts may be used only for certain designated purposes, this can still be provided for in the CCS.\footnote{I.e. in Annex 4, para 3, as has been done in Guidance on the drafting of a CCS (above n 125) following para 66.} The requirement that only certain unit-holders should be able to use a limited use area should have been a necessary part of its definition, whether or not the CCS also restricts the use to which it may be put. A developed system of commonhold law is likely to need as a component the concept of the ‘limited use area’, although it does not sit easily with
the principle – which can be traced back to the Aldridge Report, and was to be found in the 1990, 1996 and 2000 draft Bills - that every part of a commonhold which is not designated as part of a unit is automatically part of the ‘common parts’. This definition is clearly convenient, and avoids the possibility of a CCS being drafted so that a given area is included in neither. It does, however, then have to follow that ‘limited use areas’, as they cannot form part of a unit, have to fall within the common parts. It is submitted that it would be preferable if Section 25(2) of the CLRA were amended so that a ‘limited use area’ was a part of the common parts subject to a restriction as to which unit-holders could use it. The model CCS could then be amended so as to provide that any reduction in the area of the limited use area, or any addition to those entitled to use it, should require the consent of those unit-holders currently entitled to use it. It is submitted that it would be desirable for such an amendment to be made by Regulation to the model CCS itself.

2.3.3 An amendment which redefines the extent of a commonhold unit

Similar comments could be made here as were made in respect of amendments to alter the rights granted to, or over a unit. The wish to assimilate commonhold units to ordinary freeholds may well have been taken too far. If, for example, parking spaces have been made part of the units, and it is desired to reorganise the parking area, in an RMC Leasehold model this would be possible with a 75% majority and the consent of the court under section 37 of the LTA 1987; under the original commonhold proposals of Aldridge, and the 1990 and 1996 draft Bills, it would have been possible to effect

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193 The definition of ‘common parts’ in the Glossary in Pt III was ‘all those parts of the property within the commonhold which do not form part of a unit.’ The Aldridge Report also recommended (at 5.6) that there should be a presumption as to what the boundaries between the units and the common parts should be, though this would have been rebuttable by express provision in the Commonhold Declaration.

194 CI 2(3).

195 CI 4(3).

196 CI 19(1).

197 I.e. CLRA, s 25(2)(b) should have been omitted.

198 And the registered proprietors of charges over those units.

199 This would in effect entrench the safeguard, so that it could not itself be amended.

200 CCS, 4.8.8.

201 Above, text to nn 168-175.
such a change with an 80% majority and the agreement of the court. In either case the payment of compensation to those adversely affected could have been part of the arrangement. Under commonhold nothing short of unanimity on the part of those affected (and a special resolution passed by all members) would seem to suffice.

2.3.4 *An amendment which transfers land from a commonhold unit to the common parts*  
There would seem to be no good reason, other than an abundance of caution, why this provision has been included in the CCS, as such a change would inevitably fall within the previous provision.

2.3.5 *An amendment to the permitted use of a unit*  
Such an amendment does not, surprisingly, require the consent of the proprietor of a registered charge, although it could affect the value of the unit as security. A unit which can be used for incidental professional purposes - for example, as an occasional consulting room - may be more valuable than a unit which can only be used for residential purposes. Although perhaps unlikely that a unit-holder would consent to a change of use which would reduce the value of his unit, it is possible, if the amendment is part of a ‘package’ of amendments which is attractive to the unit-holder, but does not necessarily increase the unit’s market value.

Although this provision protects the individual unit-holder from being oppressed by the majority, the majority might still be able to oppress the minority here. Say a commonhold has a strictly worded ‘Use Clause’ permitting only residential use and with no business use allowed. A unit-holder might seek to his unit for some business use - for example, for occasional healthcare consultations – which either does not amount to a material change of use for planning purposes, or for which planning permission has been obtained. It seems potentially unjust that the immediate

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202 Above n 174. This might, perhaps, be used to compensate unit-holders who, as a result of the changes, would overlook a car-parking area rather than garden.

203 The point about the lack of the facility to go to the court or a tribunal to override objections will be developed later: below, text to nn 274-283.

204 CCS, 4.8.9.

205 CCS, 4.8.8.

206 CCS, 4.8.7.

207 As a Local Rule it will be in Annex 4, para 2.
neighbours who would be most affected might oppose the change, but the requisite 75% majority could be garnered from other unit-holders who might be the ones least affected by the change; in a large commonhold they might even live in different blocks.

It is unlikely that such a problem would arise in RMC Leasehold, as any variation of the user clause, if not dealt with by agreement, would require an application under section 37 of the LTA 1987, and it is likely therefore that the LVT would be entertaining an application to vary all the leases. Those who formed part of the minority opposing the change would still be heard, and there would be the option of paying compensation\textsuperscript{208} to any who were adversely affected.

Again, under the original Aldridge proposals, and the 1990 and 1996 draft Bills, such a change would either have required unanimity, or an 80% majority and the approval of the court,\textsuperscript{209} again with the possibility of the payment of compensation.\textsuperscript{210}

\textbf{2.3.6 An amendment to record a change in the boundaries of the commonhold, a commonhold unit, or the common parts}\textsuperscript{211}

As any change in the boundaries of an individual unit will, in addition, require the consent of any unit-holder affected,\textsuperscript{212} the requirement that a special resolution be passed ‘to record a change in the boundaries of the commonhold, a commonhold unit, or the common parts’\textsuperscript{213} will apply in this basic form only when land is added to, or taken out of, the common parts. Thus a special resolution would be required before land forming part of the common parts could be sold off; land could be purchased for addition to the common parts, or - a scenario which is increasingly common\textsuperscript{214} - a

\begin{footnotesize}
\begin{enumerate}
\item LTA 1987, s 38(10).
\item The point about the lack of the facility to go to the court or to a tribunal to override objections will be developed later: below, text to nn 274-283.
\item Above n 174.
\item CCS, 4.8.10.
\item CCS, 4.8.8.
\item Above n 211.
\item Devonshire Reid Properties Ltd v Trenaman [1997] 1 EGLR 45 (LT) is an example of a ground landlord wishing to do this. Although most such developments are initiated by OGLs, RMCs
\end{enumerate}
\end{footnotesize}
vertical addition could be made to the land by adding additional storeys to an existing building.

Again, one may note that, provided the CHA can assemble the necessary 75% majority to pass a special resolution, the majority can have their way and add additional storeys in the face of opposition from a substantial minority, possibly including those on the top storey who might be most adversely affected. The facility - which existed under the Aldridge proposals, and the 1990 and 1996 draft Bills - for the court to sanction such developments, but subject to the imposition of conditions, including the payment of compensation to those who will be most inconvenienced, seemed an appropriate one.

2.3.7 An amendment to the percentage of the commonhold assessment or levy allocated to a commonhold unit, or to the number of votes allocated to a member

The CCS does not require that the consent of a unit-holder who is adversely affected be obtained to an amendment to the percentage of commonhold assessment or levies, or votes, allocated to a member. At first sight this may seem extraordinary, but it would presumably have been pointless to include a provision requiring consent as almost inevitably some unit-holders will lose out on any revision and so it is unlikely that they would have consented. Instead the CCS gives a unit-holder:

the right not to have the percentage of the commonhold assessment or levy allocated to his, or any other, commonhold unit altered if the effect of the alteration, taking into account all the circumstances of the case, would be to allocate a significantly disproportionate percentage of the commonhold assessment or levy to his commonhold unit.

occasionally wish to embark on such developments: see Hannon v 169 Queen's Gate Ltd [2000] 1 EGLR 40 (Ch).

215 Above n 174.

216 The point about the lack of the facility to go to court to override objections will be developed later: below, text to nn 274-283.

217 CCS 4.8.11, amending paras 1, 2 or 3 in Annex 3.

218 Unless one is correcting an error, or land containing a unit or units is being added to the commonhold.

219 CCS, 4.8.12.
The same applies, mutatis mutandis, to an alteration of the number of votes allocated to a member. 220

These provisions could well give rise to litigation as to the precise meaning of what is ‘significantly disproportionate’ and what are relevant as ‘all the circumstances of the case’. Experience with leasehold service charges suggests that there should be some provision to vary the percentages of commonhold assessments. Units may be amalgamated or sub-divided, or their boundaries changed, former common parts which were occupied by a porter or used as storage or office space may be converted into units, and units may be added by acquiring further land or by adding extra storeys. In some cases the test of whether a share is ‘significantly disproportionate’ should not be too difficult to apply. If, in a development of holiday cottages, some have to be demolished for a road scheme, then clearly the shares of the commonhold contributions paid by the remaining cottages should be rateably increased. So too, if the CHA of a block of flats decides to add an additional storey to the building, all existing unit-holders can expect to see a rateable reduction in their contributions. The provisions, however, offer no guidance where the original CCS has been calculated on one basis, and the proposed amendment envisages some other. Say, for example, a commonhold consists of flats of differing sizes. In the interests of simplicity, the developer has drafted the CCS so that all units pay the same share. No change is made to the physical layout, but, after a few years, the majority, comprising the owners of the smaller flats, propose that in future the contributions should be allocated in proportion to floor area. Although such an allocation would not be ‘significantly disproportionate’, the owners of the larger flats might argue that the CCS did not originally take the floor area of each unit into account, and so account should now be taken of this as one of ‘the circumstances of the case’. But the proposed new allocation is clearly not in any literal sense ‘disproportionate’: the CCS might have been clearer if it had referred to an allocation as ‘unfair’. 221 One may also speculate on whether a re-allocation of assessments could be the more easily justified if it were

220 CCS, 4.8.13.

221 One might, on the other hand, argue that ‘disproportionate’ must mean something other than ‘disproportionate’ in a strictly arithmetical sense, as otherwise the reference to ‘all the circumstances of the case’ can have little relevance.
coupled with a corresponding re-allocation of voting strength, or vice versa. It would seem likely that congruence between the two would be one of the relevant 'circumstances of the case'.

The provision as enacted is also open to objection, in that it allows for amendments to be made to the CCS, and registered at the Land Registry,\(^{222}\) and thus apparently accepted as valid, which may subsequently be challenged by a unit-holder.\(^{223}\) The equivalent procedures under the earlier draft Bills, or indeed under section 37 of the LTA 1987, would ensure that any change that might be challenged could not be effective until the court had adjudicated upon it.

Putting the onus of objecting on the unit-holder who claims to have been adversely affected, also raises difficulties as to limitation. A unit-holder might not to seek to challenge at the time such an amendment to the CCS, but to wish to do so subsequently. ‘Not to have a disproportionate percentage of the commonhold assessment or levy’ (or of the votes) is expressed rather curiously as a right, so the ordinary limitation period of six years\(^ {224}\) would apply to an action based on its breach.

2.4 The possibility of entrenching provisions under commonhold

As we have seen, under RMC Leasehold an application to vary the terms of leases (unless within the scope of section 35 of the LTA 1987) would require 75% support,\(^ {225}\) with a right of veto by at least 10% of leaseholders, and the safeguard of an application to the LVT\(^ {226}\) before the minority can be overridden; compensation can be

\(^{222}\) It is not clear how far the Land Registrar is expected to police amendments to these provisions of the CCS and to decline to accept and register any which appear to contravene CCS 4.8.12 or 4.8.13 (above n 117). Rule 13 of the Commonhold (Land Registration) Rules 2004 is not specific.

\(^{223}\) Clarke on Commonhold, 18[6] points out that an attempt would first have to be made to resolve the dispute by the internal dispute resolution procedures set out at CCS 4.11.2 - 4.11.9 unless the unit-holder declined to pay the higher contribution, in which case as a dispute involving payment of money the matter could go straight to court (CCS, 4.11.3).

\(^{224}\) Limitation Act 1980, s 19A, inserted by CLRA, sch 5, para 4.

\(^{225}\) Though not exactly: the landlord is treated as one party for the purposes of LTA 1987, s 37. In an RMC Leasehold development, the majority is likely to be able to bring the landlord 'on board' as one of the applicants: above n 79 and text thereto.

\(^{226}\) Jurisdiction transferred from the court to the LVT under CLRA, s 163, brought into force in England from 30 September 2003 by the Commonhold and Leasehold Reform Act 2002 (Commencement No 2 and Savings) (England) Order 2003.
awarded if appropriate. Under commonhold, on the other hand, the basic position is that many of the equivalent terms contained in the CCS except those for which special provision is made can be amended with a resolution passed by a simple majority of votes cast at a general meeting. So rules on important or emotive issues such as lettings, or the keeping of pets, could be altered very easily.

Entrenching rules on such issues would be possible, as there would appear to be nothing in the model CCS to prevent a further ‘miscellaneous rule’ from requiring more than a simple majority to amend all or some of the miscellaneous rules (including that rule itself), and indeed paragraph 4.8.3 would seem to permit it. It would not, however, be possible to make any rule unalterable, as the CLRA requires a CCS to make provision about how it can be amended. Regulation 15 makes no provision on the amendment of the CCS, but the CCS has statutory effect as Schedule 3 to the Commonhold Regulations. In principle, however, it would seem that a (miscellaneous) local rule could require a special resolution, an even higher majority, or even unanimity, to amend another miscellaneous rule.

Although it would thus seem possible for miscellaneous rules to be entrenched in some way, if it is not included originally, there may be a logical difficulty in

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227 Under LTA, 1987, s 38(10).
228 ‘Local Rules’ will include provisions which must be included but which are specific to the commonhold (i.e. the blanks to be completed in Annexes 1-4; curiously, Annex 4 is itself headed ‘Local Rules’!), and those that are added as ‘Miscellaneous Rules’ - see Clarke on Commonhold 7[1], 7[40]. It is argued later (below, text to n 291) that these categories are fundamentally different and it causes confusion for the CLRA to apply the same terminology to them and to treat them in the same way.
229 Except those for which special provision is made: above, text to nn 157-167.
230 CCS, 4.8.3.
231 The position is not absolutely clear, as CCS 4.8.3 begins ‘Except where this CCS otherwise provides...’. This could be read as referring only to the specific provisions contained in Part 4.8, but there would seem to be no particular reason so to restrict it.
232 CLRA, s 33(1): ‘Regulations under section 32 shall require a commonhold community statement to make provision about how it can be amended.’
233 Which deals with the content of the CCS.
234 To require unanimity would still seem to be ‘to make provision about how it can be amended’ in order to comply with CLRA, s 33(1).
235 This would seem to be the view in Clarke on Commonhold 18[2], n 5.
whether an ordinary resolution can both add a further miscellaneous rule (e.g. to ban the keeping of pets entirely) and add another provision requiring that the rule will require some higher majority to be amended. Indeed, it could be seen as anti-democratic to allow a higher threshold to be imposed during the lifetime of a commonhold, especially if it is itself not adopted by the required ‘super-majority’.

The lack of express provision on entrenchment leads to the conclusion that the policy of the legislation is that requirements for amendment of local rules should not be more onerous than those included in the model CCS, and those drafting the CCS will probably not wish to include restrictive provisions. Indeed, the writer would go further and argue that the whole concept of ‘Local Rules’ has not been well thought through in the CLRA.

The position under the CLRA may be contrasted with the position under the Aldridge proposals, and the 1990 and 1996 draft Bills based upon them. The Aldridge Report was more concerned with the basic case for commonhold and its overall structure, than with the finer details. No draft bill was appended to it, and it was assumed that most of the detail would be contained in Regulations, providing for a high degree of standardisation. It was, however, recognised that Regulations would not be able to cover everything, and that the promoter of a commonhold would want and need to add regulations which were specific to it to the Commonhold Declaration. It is clear that the authors of the Report were thinking here of what in the 2002

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236 The problem is reminiscent of the debate in constitutional law as to whether an Act of Parliament could require some special majority for its repeal, as exemplified by cases such as *A-G for New South Wales v Trethowan* [1932] AC 526 (PC), which are discussed in texts on Constitutional Law.

237 Notes for Guidance (above n 177) would support this view. Para 151 reads: ‘Local rules can, in general, be amended by a simple majority of the members voting at a general meeting.’ No indication is given that a more restrictive procedure can be adopted.

238 Below, text to n 291.

239 I.e. in secondary legislation, rather than local rules drafted *ad hoc*.

240 *Aldridge* 7.1 - 7.8.

241 *Aldridge* 7.19: ‘In spite of what we said above about keeping the regulations to a minimum, we recognise that in some commonholds additional regulations will be required to ensure that they are used for the purpose envisaged, to maintain the value of units or for the general convenience of owners and occupiers. Because these will not be matters needed in the majority of cases, it is not appropriate that they should be included in regulations which have general application. They may be added to the
scheme Clarke refers to as ‘miscellaneous rules’ and not just the ‘blanks to be completed’ in Annexes 1 to 4.

What is then perhaps surprising is that the Report seems to envisage that adding to, repealing or amending these rules would require precisely the same procedure for amendment as matters such as the extent of a unit, or the allocation of the service charge, namely ‘qualified unanimity’ - unanimity, or the support of 80% and an application to the court to discount the opposition of the remainder.

The matter was not discussed in detail in the 1990 and 1996 Reports and draft Bills, but it seems that they would have followed Aldridge, and made no distinction between modifications to the local rules and other permitted amendments to the Commonhold Declaration.

Local rules, even if ‘by-laws’, formed part of the Commonhold Declaration, and apparently could be amended only by qualified unanimity.

To return to the 2002 scheme: although there is some justice in allowing a bare majority of unit-holders to determine the content of the CCS at any time, there is an alternative argument, which is essentially the same that is deployed in respect of leases, namely, if purchasers buy a unit in a commonhold, the CCS of which suggests that it has a stance on a particular issue (be it sub-letting, or the keeping of pets), they should expect to be bound by it, and not to change the rules of a club as soon as they have joined it. The difficulty of entrenching miscellaneous rules in the CCS - and,
in general, the ease with which mandatory rules may be amended - may be seen as a shortcoming of commonhold as enacted; though, on the other hand, the impossibility of overriding a unit-holder’s objections to changes in boundaries, or of rights granted and excepted, is too rigid.

2.4.1 An argument from ‘fraud on the minority’?

The CLRA does not contain any overriding requirement of good faith in amending the CCS. Now that the CHA is governed by company law, this raises the possibility that issues of ‘fraud on the minority’ might be argued. This concept is difficult to apply here, as it generally concerns financial matters. For example, case law has established that, for a shareholder to found an action based on unfair prejudice,

he must show that the value of his shareholding in the company has been seriously impaired as a consequence of the conduct of those who control the company in a way that is ‘unfair’.

If the directors so conduct the company so that it adversely affects the shareholder in some indirect way, e.g. by affecting the value of another asset owned by him, then this would not count as unfair prejudice. The example was given of a member opposing a development by a company of which he is a member, which would adversely affect the value of some land in the vicinity which is owned by him.

Aldridge takes the view that this might apply in commonhold, if a decision of the CHA might affect the value of the unit, but Clarke takes the view that the cases are distinguishable, arguing that the unit-holder’s membership of the CHA has no real value: the substance of the member’s interest in the commonhold is his ownership of the unit. It would be difficult to apply these principles to changes of a non-financial nature to the CCS which were resisted by a minority.

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247 This example, given by the judge, is - superficially at least - very similar to the scenario that might arise under commonhold, if the unit-holder’s interest in his own unit is viewed as ‘land in the vicinity’.

248 Aldridge, Commonhold Law 3.7.12.

249 Clarke on Commonhold 19[12].

250 E.g. prohibiting or allowing the keeping of pets.
2.5 Why has the 2002 legislation moved so far from Aldridge on amendment?

2.5.1 Comparison with Aldridge and the LTA 1987 (Part IV)

The ease with which the CCS can be amended under the CLRA marks a sharp contrast with the position proposed under earlier commonhold proposals. The Aldridge Report\(^{251}\) proposed that alterations to what was then termed the ‘Commonhold Declaration’ should require ‘qualified unanimity’ and requiring what was termed a ‘Class 1 resolution’. ‘Qualified unanimity’ was explained\(^{252}\) as being either a unanimous resolution, or a resolution supported by at least 80% of those eligible to vote, coupled with an application to the court to discount the votes of the non-supporters. These provisions were repeated in the draft Bills in 1990\(^{253}\) and 1996.\(^{254}\) Under the 1990 and 1996 draft Bills the court would have been able to consent subject to conditions, including the payment of compensation.\(^{255}\) On a ‘Class 1 Resolution’ mortgagees would have been entitled to cast a unit-holder’s votes on his behalf.\(^{256}\)

It may firstly be noted that the 80% requirement derived from Aldridge was of those eligible to vote, and so was considerably more stringent than the 75% of those present and voting\(^{257}\) at a quorate AGM or EGM required by the CCS under the Commonhold Regulations to pass a special resolution. It should also be noted that under Aldridge and the 1990 and 1996 draft Bills the requirement of ‘qualified unanimity’ would have covered the sort of important changes which under the CLRA require a special resolution, but the procedure for all changes, no matter how trivial, to the Commonhold Declaration would have been more stringent than for those

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\(^{251}\) 7.5.

\(^{252}\) Aldridge 13.18.

\(^{253}\) Cl 50(4) (qualified unanimity required to amend Commonhold Declaration); and cl 32(8) (definition of ‘qualified unanimity’).

\(^{254}\) Cl 17(3) (qualified unanimity required to amend Commonhold Declaration); and cl 15(8) (definition of ‘qualified unanimity’).

\(^{255}\) 1990 draft Bill, sch 1, para 5(4) and (5) - para 3.12 of the Summary (p 8); and under 1996 draft Bill, cl 15(11) and sch 2, para 7(4)&(5). There are clear parallels here with LTA 1987, s 38(10). No reference to the power to impose conditions is contained in the Aldridge Report.

\(^{256}\) Aldridge 11.14 - 11.17; 1990 Consultation Paper, para 33.6, and 1990 draft Bill, cl 33; 1996 draft Bill, cl 17(3).

\(^{257}\) In person or by proxy.
matters requiring special resolutions under the law as enacted, in that any change to the Commonhold Declaration would have required the support of 80% of those entitled to vote,\textsuperscript{258} and (unless unanimous) it would then have been necessary to obtain the approval of the court to the changes. The authors of the 1990 Consultation Paper clearly thought that the interests of the majority and minority required careful balancing.\textsuperscript{259} It was not until the 2000 draft Bill that the amendment of the CCS\textsuperscript{260} was relegated to delegated legislation, so enabling the method of amendment to be varied, depending on its gravity. Whilst the principles behind these changes would seem desirable, there is a lack of clarity in how the principles of amendment have been set out, and it is submitted that overall it has been made substantially too easy to amend the CCS.\textsuperscript{261}

2.5.2 Adoption of the Company Law model

One reason why amendment of the CCS has been made too easy seems to be because the CLRA\textsuperscript{262} departs from the proposals in Aldridge and the 1990 and 1996 draft Bills in having the CHA as a company registered under the Companies Acts rather than a \textit{sui generis} corporate body.\textsuperscript{263} It becomes a necessary importation from company law - unless one introduces the complication of further categories - that resolutions will be ordinary, special or extraordinary, and that the ‘super-majority’ for a special resolution will be 75% and not 80%.\textsuperscript{264} Opinions will differ as to the merits of making the ‘super-majority’ necessary for significant changes 67% or 90% or any percentage 

\textsuperscript{258} Rather than the 75% of those present and voting (in person or by proxy) at an AGM or EGM required to carry a special resolution of the CHA.

\textsuperscript{259} ‘The provision for discounting the votes of up to 20% of the members is designed to ensure that a small minority cannot unfairly obstruct reasonable changes, albeit that those changes might have some effect on their individual rights.’ (3.12).

\textsuperscript{260} CI 26(1): ‘regulations under section 25 shall require a commonhold community statement to include provision about how it can be amended’.

\textsuperscript{261} It has nevertheless been argued here that it has been made too difficult to amend the CCS in two respects – alteration of rights over or appurtenant to units (text to nn 168-175), and alteration of boundaries of units (text to nn 200-203).

\textsuperscript{262} And the abortive Bill in 2000-01.

\textsuperscript{263} See further ch 6, text to n 13, and to nn 29-36.

\textsuperscript{264} But note that the requirements of the original Aldridge proposals have been retained for the voluntary winding up of the commonhold: below, ch 6, text to nn 256-258.
in-between, and whether this should be of those who are eligible to vote or those who actually do so. Although Aldridge\textsuperscript{265} proposed 80\%, 75\% has the advantage of following the Companies Acts, so that the same majority is required to amend the CCS as to amend the Memorandum and Articles of Association of the CHA,\textsuperscript{266} and also, incidentally, follows Part IV of the LTA 1987.\textsuperscript{267} But this adoption of the company law model has eliminated three further safeguards which were an important part of the Aldridge proposals,\textsuperscript{268} namely:

(a) the requirement that the consent of the court be obtained to discount the views of the minority if an 80\% majority is obtained;\textsuperscript{269}

(b) the possibility of consent being granted subject to conditions, including the payment of compensation to those adversely affected by the change;\textsuperscript{270} and

(c) the provision for mortgagees to exercise voting rights on behalf of unit-holders\textsuperscript{271} (although the consent of the proprietor of a registered charge is still required to certain changes).\textsuperscript{272}

All these safeguards would not fit easily with the company law model, though it is submitted that they could be accommodated.\textsuperscript{273}

\textsuperscript{265} And the 1990 and 1996 draft Bills.

\textsuperscript{266} As these documents are separate from the CCS it would be inconvenient and highly confusing if different majorities applied for amendment of the CCS and the Memorandum and Articles of Association. This would not have arisen if the body corporate were \textit{sui generis} and itself regulated by statutory regulations and the Commonhold Declaration.

\textsuperscript{267} Though not exactly: above n 225.

\textsuperscript{268} And of the 1990 and 1996 draft Bills.

\textsuperscript{269} Above nn 251-252 (Aldridge); n 253 (1990 draft Bill); n 254 (1996 draft Bill).

\textsuperscript{270} Above n 174.

\textsuperscript{271} Cf above n 256.

\textsuperscript{272} I.e. to deprive a unit-holder of the right to use a limited use area (CCS, 4.8.6), to redefine the extent of a unit (CCS, 4.8.8) or to transfer land from a unit to the common parts (CCS, 4.8.9). Curiously, the consent of the proprietor of a registered charge is not required if there a change in the permitted use of a unit (CCS, 4.8.7).

\textsuperscript{273} Below, text to nn 288-290.
2.5.3 *The apparent reluctance for disputes to go to court*\(^{274}\)

At the time of the Aldridge Report, and when the 1990 and 1996 draft Bills were published, the Government appeared to accept that disputes would arise under commonhold, which might require resolution through the court system. It was accepted that unanimity would generally be required to amend a Commonhold Declaration, but this would not always be achievable, so there should be some mechanism for allowing change which had widespread but not unanimous support. As this would sometimes involve striking a difficult balance between competing interests, it was assumed that the court should resolve these issues. *Aldridge* considered the recommendations of the National Consumer Council and the Welsh Consumer Council that an equivalent of the ‘Strata Title Commissioner’ in New South Wales should be adopted,\(^{275}\) but came down in favour of these matters being resolved in general through the ordinary court system. The 1996 draft Bill\(^{276}\) would even have given a unit-holder a general right to apply to the court on the grounds that the affairs of the commonhold were being conducted unfairly and in a manner which prejudiced him.

By the time commonhold was back on the political agenda, the climate was against resorting to litigation,\(^{277}\) and so the CLRA\(^{278}\) goes to great lengths to steer CHAs and unit-holders away from the court system. Alternative dispute resolution

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\(^{274}\) A similar transition can be detected in the change in the policy towards enforcement of negative and positive obligations, both by the CHA against individual unit-holders, but more particularly in the potentially fraught area of actions by one unit-holder against another (see ch 3, text to nn 236-249).

\(^{275}\) See ch 3, text to nn 243-245.

\(^{276}\) Cl 43.


\(^{278}\) And its predecessor, the abortive 2000 Bill.
and the use of an Ombudsman were the preferred methods of resolving disputes. With this in mind, the Government favoured mechanisms which would attempt to balance the wishes of the majority and minority without involving the courts, such as by:

(a) having absolute rules that require that certain changes cannot be made without the consent of those affected (even if the deleterious effect would be minimal and a monetary payment would provide adequate compensation);\(^{279}\)

(b) allowing for a special majority,\(^{280}\) or even a simple majority,\(^{281}\) to hold sway even if it prejudices the minority;

(b) where it is unlikely that unanimity will be obtained,\(^{282}\) providing a general - and it is submitted rather vague - principle, in the hope that alterations which may contravene it will not be challenged. This also has the unfortunate result that amendments to a CCS may be registered with the Land Registry, and successfully challenged later.\(^{283}\)

2.6 Suggestions to reform the amendment provisions of commonhold

It seems a characteristic of strata-title legislation that after an initial attempt at legislation, there subsequently has to be an amending statute.\(^{284}\) It was possible that

\(^{279}\) I.e. alteration of rights over or appurtenant to units (text to nn 168-175), and alteration of boundaries of units (text to nn 200-203).

\(^{280}\) I.e. in permitting changes to the permitted use of a unit (above, text to nn 206 – 210).

\(^{281}\) I.e. in permitting changes to those who may use limited use areas (above, text to nn 185-185), or reducing the size of such areas (above, text to n 186).

\(^{282}\) I.e. variations involving the commonhold contributions or voting rights (above, text to nn 217 –221).

\(^{283}\) Above, text to nn 222-224.

\(^{284}\) For example, in New South Wales, the original Conveyancing (Strata Titles) Act 1961 was superseded by the Strata Titles Act 1973, which made substantial amendments. There have been further modifications of the scheme, and the 1973 Act is now designated the Strata Schemes (Freehold Development) Act 1973, and is supplemented by other Acts, including the important Strata Schemes Management Act 1996, which replaces some of the provisions formerly found in the 1973 Act with more detailed provisions. The Singapore Land Titles (Strata) Act was supplemented in 1999 by the Singapore Land Titles (Strata) (Amendment) Act permitting a collective sale of a strata development (Clarke on Commonhold 22[2], n 1). In New Zealand the Unit Titles Act 1972 is felt to be inadequate to deal with certain problems and is subject to extensive review; see, e.g. Preliminary Paper 35: Shared Ownership of Land (Wellington NZ, Law Commission, 1999) and Review of the Unit Titles Act 1972 - A discussion document <http://www.dbh.govt.nz/unit-titles-review/contents.html> accessed 24 August 2005. Proposals include that there should no longer be a ‘one size fits all’ set of rules for the body
England and Wales might have been an exception to this rule, partly because commonhold had been under consideration for so long, and partly because many details are delegated to secondary legislation. This hope would seem to have been misconceived, as the extremely low uptake of commonhold suggests that there are some serious defects to be remedied. Although other defects offer the principal reasons why commonhold has not been more widely adopted, it would be desirable for the following points within the scope of this chapter to be amended:

(a) the whole concept of limited use areas needs re-visiting. As the problems, it is submitted, derive from the presence of sub-sub-clause (b) in CLRA, section 25(2), it is likely that primary legislation will be required to repeal this.

(b) greater use needs to be made of a tribunal to ‘hold the balance’ when controversial amendments are being proposed. Unanimity should be required for major amendments to the CCS, with the alternative that, if it is passed by a special resolution, the CHA can then apply to the tribunal to override the objections of the dissentients. This goes some way to restore the principle of ‘qualified unanimity’, but in the Company Law context now applicable to the CHA. The tribunal should be able to allow the amendment subject to conditions, including the payment of compensation. This revised ‘qualified unanimity’ procedure should apply to changes to the following:

(i) the allocation of commonhold assessments (and levies) and voting rights;
(ii) the permitted use of any unit; and
(iii) the boundaries of a unit or to the rights enjoyed by or over a unit.

See ch 1, n 6.

Principally doubts as to whether mortgagees’ securities are fully protected (see ch 6, text to nn 272-279; the probable lack of the facility for a ‘divided assessment’ (see ch 4, text to nn 56-84); and the difficulty of accommodating ‘Islamic mortgages’ and shared ownership leases (see ch 2, text to n 221).

Above, text to nn 197-199.

The LVT, or another tribunal constituted within the Residential Property Tribunal Service, would seem to have the relevant expertise, and therefore to be more appropriate than the county court.

The requirements would be less onerous in that (i) the majority required for ‘qualified unanimity’ would be 75%, not 80%; and (ii) this would be of those present and voting, not of all the membership.

This latter change would be a liberalisation, rather than a tightening, of current requirements.

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(c) A distinction should be drawn within the category of ‘local rules’ between the local application of the mandatory parts of the CCS - the blanks to be filled in Annexes 1 to 4 - and the ‘miscellaneous rules’. The revised ‘qualified unanimity’ principle should apply to the former. The latter should require a special resolution rather than an ordinary resolution to be added and for their subsequent amendment. Although Aldridge would apparently have required qualified unanimity even for a change in the rule on pets or a change in the hours when the communal swimming pool was open, this seems too onerous. And yet some safeguard seems to be required. The expectations of someone who has purchased a flat expecting that pets will be allowed or a porter will be employed should not be disregarded. The Florida appellate court has addressed this issue, and accepted that reasonableness is not the appropriate test to apply to provisions that are contained in the association’s original constitution, but instead:

[The original] restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed...

The test is a good one, it can be applied both to the presence and absence of restrictions in the CCS, and should be adopted by English Law.

A possible middle way might be to allow amendments to miscellaneous rules to be made by special resolution, but with the right for any dissentient to lodge a formal objection to the change. This would then delay the implementation of the change by, say, one month, during which the dissentient could apply to the tribunal for the amendment to be annulled, on the basis that it was oppressive of the minority and/or deprived them of their legitimate expectations. This would provide a

291 Above n 228.
292 In Hidden Harbour Estates, Inc v Basso 393 So 2d 637, 640 (Fla Dist Ct App 1981)
293 The passage continues: ‘[A]lthough case law has applied the word ‘reasonable’ to determine whether such restrictions are valid, this it not the appropriate test, and to the extent that our decisions have been interpreted otherwise, we disagree. Indeed, a use restriction in a declaration of condominium may have a degree of unreasonableness to it, and yet withstand attack in the courts. If it were otherwise, a unit owner could not rely on the restrictions found in the declaration of condominium, since such restrictions would be in a potential condition of continuous flux.’
294 Not by ordinary resolution, as at present.
mechanism to deal with a dispute such as an attempt to change the policy on lettings, or on keeping pets. It would also prevent the unfortunate state of affairs which can now arise, where the CCS is formally amended, the change is recorded at the Land Registry for prospective purchasers to see, but is subsequently annulled on an application to the court.

Overall such a scheme would combine the high level of protection given to leaseholders, where a lease cannot be altered unless one can satisfy section 37 of the LTA 1987, with a somewhat easier procedure to amend miscellaneous rules. It would also have the advantage over RMC leasehold that considerably less bother is involved in amending a CCS than multiple leases.

3. CONCLUSIONS

It was suggested in the first part of this chapter that the regime for varying the terms of leases was too restrictive, in that there were technical reasons which could preclude the possibility of effective variation. This needs statutory amendment. Further specific grounds for the obligatory variation of leases should be added to section 35 of the LTA 1987, and it could be made clear that section 37 bears the broader meaning that was argued for. The principles to be applied on applications to vary could then be allowed to develop on a case by case basis. It is submitted, however, that the principles for varying leases are otherwise sound: i.e. that, if a lease is defective, any party should have the right to have it amended, but, in all other cases, there should be a substantial majority in favour of altering it, but the decision should ultimately lie with the LVT, and there should be provision to impose conditions, including the payment of compensation those adversely affected.

Compared with the variation of leases, the amendment of commonholds is much more straightforward. If a commonhold should contain units which are not

295 As in e.g. Winston Towers 200 Ass’n v Saverio 360 So 2d 471 (Fla Dist Ct App 1978) (unsuccessful attempt to change covenants so as to ban dogs).
296 Relying upon CCS, 4.8.12 or 4.8.13 (‘significantly disproportionate’ allocation of contributions or votes respectively).
297 Under LTA 1987, s 35 and s 37.
298 Above, text to nn 31-35, and text to nn 36-45.
299 Above, text to nn 81-83.
residential, this is not a bar to amending the CCS. If circumstances change, it will prove easier to amend the CCS than to vary leases. It is submitted, however, that, as things stand, it has been made too easy to amend the CCS, and, indeed, a lot easier than was ever intended in the Aldridge proposals. In many respects a degree of flexibility is desirable, but the result of the 2002 scheme is that, after one had acquired a unit, the character of the commonhold could be changed in important respects at the behest of a bare majority – possibly even a temporary majority – with no possibility of recourse to the courts. Further, the provisions for the amendment of the CCS in certain respects give insufficient regard to the rights of the unit-holder, though in a couple of instances\textsuperscript{300} they are not sufficiently flexible, and might allow an obdurate unit-holder to hold out against the reasonable wishes of the majority. In both cases, a return to a modified form of qualified unanimity would be preferable, coupled with the safeguard of the possibility of applying to the LVT to overrule objections: the LVT might then allow the amendment, but subject to conditions, including the payment of compensation. The reason why CLRA does not address both these issues would seem to be a desire on the part of the Government to set up procedures for amendment which keep these possibly contentious matters out of court (or the LVT).

As things stand, Leasehold RMC will be preferable if a flat-owner is concerned that the character of the block, or other matters of concern to him, may be changed against his wishes. Commonhold really has the advantage only of convenience in amending the CCS.

It is further submitted that, if the amendments proposed in this chapter were made, the provisions both for the variation and leases and the amendment of the CCS would be improved.

\textsuperscript{300} Above n 261.
Chapter 6: The Structure of the Corporate Vehicle

(including Insolvency and Termination)

1.1 Introduction

1.1.1 The need for a body corporate

In any system of strata title or condominium ownership, there will be a need for some corporate body to represent the interests of the unit-holders as a group. Its functions will include:

(a) to organise the insurance and repair of the block, and the provision of common services;

(b) to represent the interests of the community of unit-holders in its dealings with the unit-holders as individuals. Thus it will be the body corporate that organises the funding of communal expenses, and also enforces other duties contained in the CCS, or its equivalent, if necessary by legal proceedings.

(c) to represent the interests of the community of unit-holders in its dealings with third parties: these may be the owners of adjacent plots, in the event of neighbour disputes; the suppliers of the multifarious common services necessary for the upkeep of a block (e.g. builders, cleaners, gardeners, and insurance companies); or others who come into a legal relationship with the community, such as the visitor who is injured whilst on the development, or the neighbour who persists in parking a vehicle there without permission. The body corporate may become involved in legal proceedings with any of these.

It is possible to conceive in theory of a system of communal ownership existing without the interposition of a body corporate: for the unit-holders to form only an unincorporated association.1 Many small leasehold blocks which acquire their freehold elect to form an RMC, but some small blocks, usually those comprising four or fewer flats, choose to have up to four of the leaseholders holding the freehold upon

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1 'An unincorporated association exists where two or more persons are bound together for one or more common purposes by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules identifying in whom control of the organisation and its funds is vested, and which can be joined or left at will' (Conservative & Unionist Central Office v Burrell [1982] 1 WLR 522 (CA)).

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trust for all. This can operate satisfactorily, but in practice if there are more than four flats it is likely to be much more convenient for the community of unit-holders to have separate legal personality as a body corporate.

A further two points may be made at this stage:

(a) Once one sets up a corporate body to represent the interests of the unit-holders as a community, it will be convenient for this body also to constitute the forum in which are made the multifarious decisions affecting the community: e.g. the hours when communal facilities are available, how the grounds are to maintained, etc. Having different organisations to deal with different matters is likely to cause confusion.

(b) The key requirement for the body corporate to fulfil administrative functions is that it has *separate legal personality*, not *limited liability*. Although there seems to be a popular misapprehension among the general public that these are both essential characteristics of companies registered under the Companies Acts, this is not of course the case. A company which is registered with *unlimited liability* has a separate legal personality, but its members are jointly and severally liable for its liabilities. The distinction between separate corporate personality and members’ liability of members needs always to be borne in mind when discussing the various forms that the ‘corporate vehicle’ may take, whether one is considering RMCs, the CHA as enacted, or previous proposals made as commonhold has evolved. All of these enjoy, or would have enjoyed, corporate personality: it is the extent to which liability is limited which has differed.

These factors are likely to be common to any system of communal ownership, at least, within a common law system. In English Law, however, a body corporate is also needed to facilitate the shared ownership of the common parts. In all other common law systems, a legal estate may be owned in undivided shares, so an

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2 These considerations will not necessarily apply to housing co-operatives in the United States, or company title schemes in Australia, where the whole building is vested in a company, the flat owner owns a share in that company, and also acquires a licence to occupy his flat; but as owners do not have a proprietary interest, such schemes usually have difficulties in accommodating security interests, so obtaining mortgages is difficult.
unlimited number of unit-holders may jointly own the common parts. In England and Wales, however, as a result of section 34 of the LPA 1925, a tenancy in common may not exist at law at all, and the legal estate in the reversion (including the common parts) may be vested in no more than four persons. For this reason English Law was unable to evolve a system of ‘cross-leases’ such as evolved in New Zealand, this would have permitted the use of leases for the enforcement of positive covenants, without the need for either an OGL or an RMC to hold the freehold reversion (including the common parts). It will be argued that the fact that English Law happened to adopt a system of flat ownership in which the freehold, if acquired by the unit-holders, was held through the medium of a limited liability company, would have important implications when commonhold came to be considered.

1.1.2 The choices to be made in respect of the body corporate

Given that in any system of communal ownership of land a body corporate will be needed to fulfill the functions that have been described, and also (in English Law) to hold the common parts, choices then have to be made as to its structure: (a) should it be registered under existing legislation, such as the Companies Acts, or should it be a sui generis body corporate? (b) Should it have limited or unlimited liability, or - if it is feasible - some intermediate position?

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3 See OCBJ at 387. In certain strata title and condominium systems, the common parts are vested in the unit-owners as tenants in common, even if there is a body corporate to manage them: above, ch 1, para 1, text follg n 28; cf ibid para 3.

4 See OCBJ at 386-7 for an explanation of this scheme.

5 One may speculate on whether, if there had been no restriction on the number of legal owners of land, English Law would have developed a similar system of cross-leases (with joint ownership of the reversion), or whether the well-established tradition of leasehold tenure would have meant that reversions continued to be owned by OGLs.

6 Below, text to nn 244-249.

7 It would not be quite correct to say that English Law adopted this ‘by chance’, because it was as a direct result of the non-availability of a legal tenancy in common; on the other hand, the full consequences of adopting a limited company to hold the reversion would seem neither to have been foreseen nor thought out.

8 ‘Communal’ here is used in the limited sense that it is used in OCBJ at 378-81, and is not intended to imply ‘communal living’ in its more far-reaching sense.

9 Including, in any system where the units are held on leases, the reversion to those leases.
(c) If it is to be a company registered under the Companies Acts, should it be limited by shares or by guarantee?

(d) Whether it is a limited company, or a *sui generis* body corporate, should its promoters have a free choice in its constitution, or should the opportunity be taken for there to be a greater or lesser degree of standardisation, and for the Memorandum and Articles of Association (or the equivalent with a *sui generis* body corporate) to follow some standard pattern?

It should be noted that whatever choices one makes between these various alternatives may limit or even preclude other choices, both within those outlined above, and in working out their subsequent implications. Some apparently desirable objectives will be mutually inconsistent. Having a heavily standardised constitution will be at the cost of flexibility. Other conflicts are less obvious. If the body corporate has unlimited liability, it can never become insolvent, so it will not be necessary to provide for its winding up, nor, importantly, for how the system of communal ownership might function if that body should cease to exist. If, on the other hand, one provides for the body corporate to have limited liability, it may become insolvent, so provision will have to be made for its winding up, and either this will result in the sale of all the units in the community, or provision may have to be made for how the system is to function without the original body corporate. There are sometimes no obvious or easy answers.

1.1.3 Should the body corporate follow an existing structure or be *sui generis*?
The Aldridge proposals, the 1990 draft Bill, and the 1996 draft Bill all envisaged that the body corporate - which was to be called the ‘commonhold association’ (‘CHA’) - would be a *sui generis* body and not regulated by the Companies Acts. Under each proposal the CHA unequivocally had separate legal personality, with a standardised constitution based upon Regulations. In other respects, the 1990 and 1996 draft Bills

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10 One also occasionally comes across an RMC which is registered under the Industrial and Provident Societies Acts. These will not be discussed separately, as they are uncommon, and do not raise substantially different issues.

11 As would have been the case under the 1990 and 1996 draft Bills: below, text to nn 87-93.

12 As is the case under the ‘successor association’ provisions of the CLRA, ss 51-3: below, text to nn 106-110.
differed from the Aldridge proposals,\textsuperscript{13} although this difference and its implications have not been generally recognised.

The Aldridge Committee thought that the corporate vehicle should be a \textit{sui generis} body corporate. Its reasons can be taken as the classic objections to relying upon the Companies Acts:

(1) It should not be possible for the CHA to be wound up during the subsistence of the commonhold with which it was linked;

(2) The detailed regulations that were required for trading companies would not be appropriate for a CHA; and

(3) It would not be reasonable to expect CHAs to comply with the requirements as to returns and accounts applicable to trading companies.\textsuperscript{14}

In this \textit{Aldridge} followed the original New South Wales model of strata title legislation:\textsuperscript{15} it had set up the body corporate\textsuperscript{16} as a \textit{sui generis} body, not subject to the general law applicable to companies. Although the CHA was to be a body corporate,\textsuperscript{17} instead of being established under the Companies Acts,\textsuperscript{18} it was simply to be registered at the Land Registry.\textsuperscript{19} It should also be noted that \textit{Aldridge} proposed that it should not be possible for a CHA to be wound up during the subsistence of the commonhold with which it was linked.\textsuperscript{20} This proposal would inevitably be incompatible with limited liability.

What became of the proposal for a \textit{sui generis} body corporate is not altogether clear. There are indications that the Department of Trade was uneasy at the prospect

\textsuperscript{13} Below, text to nn 67-68.

\textsuperscript{14} \textit{Aldridge} 8.12: ‘We are informed that the equivalent companies, formed of long leaseholders, which at present run leasehold developments, tend to be lax in filing returns and complying with other Companies Act duties.’

\textsuperscript{15} Which had also been followed by other Australasian jurisdictions: the other Australian states, and also New Zealand and Singapore.

\textsuperscript{16} Now renamed, in New South Wales, the ‘owners corporation’ under the Strata Schemes (Freehold Development) Act 1973 (as the Strata Titles Act 1973 was itself renamed in 1996).

\textsuperscript{17} \textit{Aldridge} 8.7; 1990 draft Bill, cl 3(1)&(5); 1996 draft Bill, cl 1(5).

\textsuperscript{18} \textit{Aldridge} 8.12.

\textsuperscript{19} \textit{Aldridge} 3.35; 1990 draft Bill, cl 23; 1996 draft Bill, cl 8.

\textsuperscript{20} It should be noted that this meant that there was no need for Aldridge to propose legislation to deal with the insolvency of commonholds.
corporate bodies existing outside its jurisdiction; and that the Land Registry was not happy with its proposed registration role, its procedures being designed to respond to applications from outside, rather than to monitor compliance with any requirement to submit regular returns.\(^{21}\) There were suggestions that the Land Registry's stance varied depending upon whether its general workload - which fluctuates widely with the state of the property market - would accommodate an expansion of its activities.

1.1.4 How far should liability be restricted?

Tellingly, in all three earlier proposals, the *quid pro quo* for no registration with the Companies Registry, and very light regulation by the Land Registry, was the concept of 'restricted liability'.\(^{22}\) This brings us back to the point that corporate status and limited liability are not synonymous. Although the CHA would have had separate legal personality, in its liability to third parties it would have occupied an uneasy status between limited and unlimited liability, to which *Aldridge* gave the title of 'restricted liability'.\(^{23}\)

Under *Aldridge*, and the 1990 and 1996 draft Bills, the principle of restricted liability was essentially one of *proportionate* liability: that, in the event of the CHA incurring liabilities, each unit-holder should be personally liable for a proportion of the debt, based on the unit-holder's share of the service charge.\(^ {24}\) *Aldridge* rejected the possibility of the CHA having limited liability,\(^{25}\) on the basis that it was essential that the CHA should always exist, and, if a creditor could not put a CHA into liquidation, 'it seems proper that the members should back it up'.\(^{26}\) It rejected unlimited liability, on the basis that 'those with greater resources could find themselves in the position of subsidising less well-off members', which would be unfair, especially as unit-owners would have no control over the identity of their fellow members. *Aldridge* conceded that debt enforcement against the unit-owners

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21 Or even with the 'shuttle' system introduced more recently by the Companies Registry.

22 *Aldridge* 8.10, 8.11; 1990 draft Bill, cl 83(3)-(9); 1996 draft Bill, cl 38 and sch 10.

23 Although the principle of restricted liability was continued in the 1990 and 1996 draft Bills, in those Bills its mechanics differed from the original Aldridge proposals: below, text to nn 59-80.

24 At the time the term 'service charge' was still used for what was in the CLRA to be called the 'commonhold assessment'.

25 8.11.

26 Ibid.
within a commonhold would be more troublesome than normal, but considered the proposal a reasonable compromise.

1.1.5 The conundrum of liability

It is appropriate to reflect here that there is no self-evidently fair or reasonable solution to the conundrum of unit-holders’ liability for the acts or defaults of the body corporate. Owners of ‘standard’ freehold properties who fail to pay contractors, or to insure against occupiers’ liability, and have to pay damages, may become personally bankrupt, and cannot shelter behind limited liability. But such owners generally have control over the state of repair of their properties, can choose with whom they contract, and can ensure that they, as owners and occupiers, have taken out public liability insurance. It can be argued that, if they fail to act prudently, they are then responsible for any liability that they incur. In any form of communal ownership, however, it is unavoidable that owners will, to some extent, be dependent upon the choices made by others on their behalf, and affected by their acts and omissions. There may therefore be a case for some form of restriction of liability. Any solution will have to attempt to balance these factors.

1.1.6 A company limited by shares or by guarantee?

If a sui generis body corporate had been adopted, then it would not have been necessary to choose between the Company Law models of the company limited by shares and the company limited by guarantee, but clearly if the body corporate operates within the Companies Acts a choice has to be made. The CLRA has opted for the company limited by guarantee; if one is setting up an RMC then the choice is still available.

Although the CLRA provides for the CHA to be an ordinary company limited by guarantee, there are certain modifications. Like any company, the CHA is governed by a ‘Memorandum and Articles of Association’, but the desire for

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27 Possibly the closest parallel with communal ownership - but within a very much narrower compass - is where, say, the owners of a pair of semi-detached houses jointly contract with a builder for repairs to their chimney, or for the construction of joint extension; or where the owners of a private driveway all jointly contract for it to be resurfaced.

28 Usually the directors of the body corporate.

29 The terminology has been retained, although it is hardly ‘user friendly’ as far as the average layperson is concerned.
standardisation - which has always been seen as one of the advantages of commonhold - is met because they take a prescribed form. The Companies Acts in their entirety apply to the CHA, with the exception of certain provisions contained in Schedule 3 to the CLRA. One of the few amendments that recognises the special nature of the CHA is the disapplication of section 22(2) of the Companies Act 1985, which requires persons to agree to become a member of a company. By disapplying this, the CLRA enables the model Articles of Association to make provisions for membership which allow and indeed require a unit-holder to be entered in the register of members without requiring any act on the part of the unit-holder, beyond the acquisition of a unit. Further, the CLRA provides that someone who ceases to be a unit-holder ceases thereby to be a member of the CHA, but that one may not otherwise resign from it.

With RMCs, on the other hand, Articles of Association may provide that the directors shall have power (in the case of a company limited by guarantee) to terminate a member’s membership of the company if he should cease to own a relevant lease, or (in the case of a company limited by shares) to transfer shares from a member who ceased to be a leaseholder to the new owner. It would not, however, seem possible to insist that an incoming leaseholder should become a member against his wishes, though well-drawn Articles of Association may provide that a

30 See ch 1, n 25 and text thereto; ch 5, n 130.
31 CLRA, s 34; CLRA sch 3; Commonhold Regulations 2004, regs 13, 14 and schs 1 and 2.
32 Applied by CLRA, s 34.
33 By CLRA, sch 3, para 11 and para 15(2). The reference is still to the Companies Act 1985. The corresponding section of the Companies Act 2006 (‘CA 2006’) is s 112(2).
34 Model Articles of Association (Commonhold Regulations, sch 2) arts 2-4.
35 CLRA, sch 3, para 12(a).
36 CLRA, sch 3, para 13. An exception is made in the case of the original subscribers to the Articles, who can resign: ibid.
37 Because of Companies Act 1985 (‘CA 1985’), s 22(2); now CA 2006, s 112(2).
38 Some leasehold schemes which are set up with an RMC from the outset may attempt to ensure that leaseholders become and remain members of the RMC by e.g. making consent to assign conditional upon this; or by making the entitlement to easements conditional upon the leaseholder being a member of the RMC.
member might not resign so long as he retains a legal estate in the dwelling. All in all, the CHA has some minor advantages here over the RMC.

With an RMC, on the other hand, the promoters of the company - the original developers, or the leaseholders following a voluntary enfranchisement - will have a choice as to whether the company should be limited by shares, or by guarantee, and as to the wording of the Memorandum and Articles of Association. The first edition of one of the earliest guides on the subject referred only to companies limited by shares, as the more common, and did not discuss those limited by guarantee. Another similar publication was written mainly from the perspective of the company limited by shares, as the form more often encountered, but did mention the alternative. Discussions of their pros and cons tend to revolve around the following issues:

(a) the company limited by shares is a more familiar concept to most lay people, and also to their legal advisers.

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39 See e.g. NG Cox, *Running a Flat Management Company* (1st edn, Bristol, Jordans, 1991) art 6 in the specimen Articles of Association, at 119.

40 In the future, if the enfranchisement is under LRHUDA, pt I, ch I, then, by virtue of CLRA, ss 121, 122, it will be necessary for leaseholders to enfranchise using a ‘Right to Enfranchise’ (RTE) company, the Memorandum and Articles of Association of which will be prescribed by regulation. This section has not, however, yet been brought into force, and it is apprehended that considerable difficulties have been encountered in drafting regulations which require leaseholders who indicate a desire to participate in the enfranchisement to make their financial contribution when required to do so. At least one commentator has suggested that because of this, and other difficulties, it would be better if the sections were never brought into force: D Greenish, ‘Rain clouds gather over the ODPM’s parade’ [2004] 08 EG 124. It seems unlikely that they will be brought into force.


42 *Running a Flat Management Company* (above n 39).

43 It is notable that leading works on Company Law e.g. G Morse (princ ed), *Palmer’s Company Law* (25th (looseleaf) edn, Sweet and Maxwell, London, 1992 - ) devote comparatively little space to it (the majority of the references in the Index are to sections 2.008 – 2.013). Although this is larger than the equivalent section devoted to companies limited by shares (2.006 – 2.007.2), a discussion of ‘share capital’ occupies a whole Part of the work, and ‘shares’ another. Student texts also devote comparatively little space to the form (e.g. B Hannigan, *Company Law* (London, LexisNexis Butterworths, 2003): at 17-19). E West, *Companies Limited by Guarantee*, (Bristol, Jordans, 2000) would seem to be the only text devoted to it, and that largely deals with companies other than RMCs.
(b) the company limited by shares copes more easily with the payment of dividends if
the RMC should have income to distribute e.g. from lettings of leisure facilities;
or the proceeds of the "sale" by new lease of a forfeited flat.

(c) the company limited by guarantee is easier to operate as no share certificates need
be issued, which is more convenient when outgoing lessees fail to transfer their
shares, as there is no need to cancel certificates and issue new ones;

(d) the company limited by shares allows more easily for differential voting, as
leaseholders can be allotted different numbers of shares to allocate voting strength
in accordance with the size of the flat and the allocation of the service charge.

The differential voting point raises another feature of the company limited by
guarantee, though whether it is an advantage will depend upon one’s viewpoint. Most
Articles of Association of companies limited by guarantee seem to allocate votes on
the basis of ‘one member, one vote’. This may make flats within an RMC limited by
guarantee less attractive to investors who intend to purchase several flats in a block,
with a view to sub-letting them, as, if the right to vote is based on membership, the
Articles will generally give each member only one vote, regardless of how many flats
they own. This can be viewed as unfair to them, but it may prevent the imbalance
where one person controls a block of votes, and can even be seen as discouraging the
‘buy to let’ investor.

Although the Articles of Association of most RMCs limited by guarantee
would seem to be drafted on the basis of ‘one member, one vote’, this certainly does
not automatically follow with this model, as the model CCS and Articles of
Association for commonholds provide (a) for the allocation of votes to differ, if

43 Some companies limited by guarantee nevertheless issue ‘certificates of membership’ to their
members. By virtue of CA 1985, s 22(2) (above n 33, and text thereto; now CA 2006, s 112(2)) it
would seem necessary for a member to sign either the company’s register of members, or else an
application for membership.

44 See, for example arts 3 to 7, and 11, in the model Articles of Association in NG Cox, Running a Flat
Management Company (above n 42). As Jordans, its publishers, are also company registration agents,
it is likely that many Articles will follow this precedent.

45 It would of course be possible for a ‘buy to let’ investor to ensure a full quota of votes by setting up
a pattern of nominee ownership, but it seems unlikely that many would go to this trouble.

46 See Re NFU Development Ltd [1972] 1 WLR 1548 (Ch), 1551F, where differential voting was
allowed in certain circumstances.
required, as between different units;\textsuperscript{49} and (b) for unit-holders to exercise on a poll the number of votes allocated to them by the CCS, those owning more than one unit exercising the total number of votes allocated to their units.\textsuperscript{50} This could equally well be done with any RMC limited by guarantee, although in practice this has rarely been done, and ‘one member, one vote’ seems the norm.

1.1.7 Standardisation

Although there are many precedents in use for RMCs, and most would seem adequate for their purpose,\textsuperscript{51} the fact that they may be drafted or amended \textit{ad hoc} means that sometimes they may not be suitable. Even where a standard precedent has been used, it will be necessary for the conveyancer to check the Memorandum and Articles of Association to ensure that any variations are appropriate, and (unlike with commonhold\textsuperscript{52}), there is no precedent set as normative, so that departures from that standard can easily be identified. That one can be sure that the constitution of the body corporate will be satisfactory has been put forward, with justification, as an advantage of commonhold.

The variability of the Memorandums and Articles of Association of RMCs, and the distinction between companies limited by shares, and those limited by guarantee, makes it difficult to compare the structure of the corporate vehicle of the RMC with that used for commonhold, viz the CHA. Nevertheless companies limited by shares and those limited by guarantee do not operate in practice very differently from one another, and so a properly set-up RMC can be compared with a CHA. In terms of structure, there is not a lot to choose between them. The CHA has some minor technical advantages,\textsuperscript{53} and the standardisation makes it is easier to be sure that the structure is satisfactory. On the other hand, it is possible for an entirely satisfactory Memorandum and Articles of Association for an RMC to be drafted, and the minor technical disadvantages are not serious ones. If it is desired to inhibit one ‘buy-to-let’ investor from attaining dominance of the corporate vehicle, or even to

\textsuperscript{49} CCS, Annex 3, para 3.

\textsuperscript{50} Model Articles of Association (Commonhold Regulations, sch 2), art 28(b).

\textsuperscript{51} A few RMCs set up in the 1960s and 1970s, before they became common, have Articles which are modelled on private trading companies, and they may not be so suitable.

\textsuperscript{52} Above n 31.

\textsuperscript{53} Above, text to nn 33-36.
discourage ‘buy-to-let’ in general, then the RMC will have a slight advantage over the CHA.

The standardisation is, however, achieved by requiring that the Memorandum and Articles of Association of a CHA comply with the Regulations.\(^4\) This would seem to have the effect that, if the standard Articles are amended by statutory instrument,\(^5\) this will have the effect \textit{ipso facto} of amending the Articles of all existing CHAs.\(^6\) Whilst conscientious CHAs will amend their Articles, many will not, so that their printed Articles, which are distributed to present and prospective unit-holders, will no longer be the up-to-date governing instruments. This is likely to cause confusion.

What is most striking is that the CLRA has resulted in a corporate vehicle for commonhold which is considerably closer to the typical RMC than would have been the case had the earlier proposals for commonhold been enacted.\(^7\)

\textbf{1.2 The limiting of liability}

The reason why the CHA under the CLRA has evolved into a corporate structure very close to the RMC is undoubtedly because it was assumed that the RMC delivered full limited liability to the leaseholders, and that anything less would be less attractive to prospective unit-holders and their advisers, and so would militate against commonhold being accepted as a superior form of tenure. Ironically, however, doubts have been expressed as to whether commonhold as enacted does deliver full limited liability to unit-holders; and even whether such limited liability is indeed enjoyed under RMC Leasehold.

\(^{4}\) Commonhold Regulations, regs 13, 14; schs 1 and 2.

\(^{5}\) Such an amendment is, for example likely to be needed to ibid, sch 2, art 5, which provides ‘Subject to the provisions of the Companies Act, the commonhold association must hold an annual general meeting’. Now that the Companies Act 2006, s 336 is in force, only \textit{public} companies are \textit{required} to hold an AGM.

\(^{6}\) It may be noted by way of contrast that, when the model Tables (e.g. those in the Companies Acts of 1929 and 1948, and those made by the Companies (Tables A to F) Regulations 1985 (SI 1985/805) under the Companies Act 1985) have been updated, this has not amended the Articles of those companies that had adopted them, so the Articles of some companies will still incorporate the 1929 or 1948 tables. The Companies Act 2006 provides (s 20) for default application of model articles, which have not yet been prescribed.

\(^{7}\) Below, text to n 99.
1.2.1 Restricted liability - the original Aldridge version

In order to analyse whether commonhold as enacted and RMC Leasehold do offer the flat-owner limited liability, it will be helpful to trace how the concept of the limiting of liability developed as the commonhold proposals evolved. Under the original Aldridge proposals the liability of the CHA to third parties was characterised as ‘restricted liability’. Although the *principle* of restricted liability was continued in the 1990 and 1996 draft Bills, the *mechanics* of restricted liability differed in those draft Bills from those in the original Aldridge proposals.

It is when one considers the winding-up of the CHA that one sees the divergence of position between *Aldridge*, and the 1990 and 1996 draft Bills. The Aldridge Committee resisted any possibility that the CHA could be wound up at all. It accepted the need for *termination* for other reasons, e.g. redevelopment, but stuck to the view that:

> it should not be possible for an association to be wound up whilst the commonhold with which it is linked continues.

Because creditors would not have been allowed to put the CHA into liquidation, it would have been necessary to allow creditors to enforce judgments against the members. Accordingly, it was envisaged that, if the CHA’s own funds were insufficient to meet any judgment, the judgment creditor would have been able to enforce the balance of the judgment against each individual owner in the same percentage as he contributed to service charge contributions. Such a solution would, as *Aldridge* intended, have obviated the need to provide for the insolvency of the association, and thus the need to provide for any form of ‘successor association’, but it would have been very cumbersome indeed for judgment creditors to have enforced a judgment against a large commonhold, as it would have involved separate

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58 This would have involved each unit-holder being liable for a proportionate share of the debts of the CHA: above, text to n 22.

59 This divergence does not seem to have been widely remarked. It is not, for example, mentioned in L Crabb, ‘The Commonhold Association – As you like it’ [1998] Conv 283, where she treats the 1996 proposals as having ‘emerged’ from the ‘Aldridge brief’ without identifying the differences.

60 *Aldridge* pt XIV.

61 *Aldridge* 8.12.

62 *Aldridge* 8.11.

63 As has been provided for in commonhold as enacted: see CLRA, s 51.
enforcement against dozens - or in some cases, hundreds - of individual unit owners.\(^\text{64}\) *Aldridge* is silent on the precise mechanics of this: it is not clear how it would have been established that the CHA was unable to pay its debts,\(^\text{65}\) so that the whole or the balance of an unpaid debt then became subject to the restricted liability regime. By some procedure a single debt owed by the CHA would have had to be transformed into a multitude of debts owed by the unit-owners in proportion to their liability to contribute to the service charge. Presumably if the individual debts then remained unpaid, the judgment creditor would have had to enforce against each unit-owner individually, perhaps by obtaining a charging order against each, and ultimately an order for sale. The very impracticality of this would suggest that the interests of judgment creditors of CHAs would have necessitated either following the route followed in the 1990 and 1996 draft Bills, or else reverting to the original Australian concept of straightforward *unlimited* liability. The latter would perhaps have been more acceptable to judgment creditors because a system of joint and several liability, whereby creditors could enforce against any one or more unit-holders, would have put the onus on those to obtain contributions from the others; but it would have been highly unpopular with unit-holders, especially those who might expect to be particularly vulnerable\(^\text{66}\) in the event of a judgment being entered against the CHA. Restricted liability was likely to be quite unviable without some provisions to convince judgment creditors that the enforcement of judgment debts would be orderly and effective, and unlimited liability would be seen as inequitable by unit-holders.

\(^{64}\) It must, however, be conceded that this system does appear to work in the United States, and it is the system adopted by the Uniform Common Interest Ownership Act 1994 ("UCIOA 1994") (published by the National Conference of Commissioners on Uniform State Laws, and available at <http://www.law.upenn.edu/bll/ulc/fiact99/1990s/uciao94.pdf> (accessed 29 August 2007); see esp s 3-117, and Comment thereon, esp 1 and 2 – quoted below as text to n 214).

\(^{65}\) Presumably one could have introduced a provision that, if a judgment debt against a CHA remained unsatisfied for, say, 14 or 28 days, the judgment creditor might proceed to enforce against the unit-holders, though this would be unnecessarily cumbersome if, say, a third party debt (formerly garnishee) order against the CHA's bank account would be effective.

\(^{66}\) I.e. because they owned their unit free from mortgage, or appeared or were known to have readily realisable assets.
1.2.2 Restricted liability under the 1990 and 1996 draft Commonhold Bills

By the time the 1990 draft Bill was drafted the shortcomings of the original Aldridge scheme must have been evident, so whilst the Bill preserved the principle of what was still termed ‘restricted liability’, it became possible to wind up the CHA. Given that it would still have been a sui generis body corporate, this had the important practical result that it became necessary to include detailed winding-up provisions in the draft Commonhold Bill. Aldridge, by proposing that a judgment creditor should take enforcement proceedings against all the unit-owners, had not needed to make any provision at all for the insolvency of the CHA, but in the 1990 draft Bill no less than 52 sections and three schedules were devoted to provisions on administration orders and winding up. In the 1996 draft Bill the number of sections devoted to these matters fell to 14, but this was at the expense of having no less than five schedules to deal with these matters. In each case these would have been supplemented by commonhold insolvency regulations. Commentators questioned whether it was necessary to have such an elaborate insolvency scheme. Clarke complained of the 1990 draft Bill:

One of the most striking aspects of the 1990 Bill is the space taken up by the proposed provisions relating to winding up. These occupy as much space as all the other details combined and are responsible for much of the criticism that ‘the bill has grown to the size of a telephone directory’. The length is also excessive when compared with legislation overseas and the more modest proposals of Aldridge.

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67 1990 draft Bill, cl 83(3)-(9).
68 The reasons for this are not discussed in detail in the 1990 Consultation and Draft Bill. The note to cl 65 simply states: ‘This clause, and clauses 66 and 69, make further provision, not included in the Commonhold Report, which the Government considers should be included to provide creditors and others with some additional protection, particularly in the light of the restricted liability rule…’
69 Cls 51-102.
70 Schs 4, 5 and 6.
71 Cls 28-41.
72 Schs 7-11.
73 1990 draft Bill, cl 102; 1996 draft Bill, cl 41. Significantly, the Regulations would have been made jointly by the Lord Chancellor and the Secretary of State (1990), or by the Lord Chancellor, with the concurrence of the Secretary of State (1996).
74 DN Clarke, ‘A Prospect of Promise’ (1995) 58 MLR 486, 502. See also OCBJ at 404: ‘The necessity for some provision for what should happen if the building is destroyed and the commonhold
Clarke has a point, but he does not identify that, by now making provision for the winding-up of the CHA, ‘restricted liability’ meant something slightly different in the 1990 draft Bill from what it had involved in Aldridge; nor does he consider whether Aldridge would have proved practicable when it came to enforcing judgment debts against members of the CHA. It has been suggested that the indications from overseas were that insolvency of equivalent bodies corporate was rare or non-existent. Rosenberry has stated that:

it is unnecessary to create a separate body of law for commonhold community insolvencies…in the 20 years I have specialised in this field I have never heard of a single case of insolvency in U.S. or Australia.  

On the other hand, Crabb has consistently disagreed with these views. In an influential and often-cited article she argued that it was important to get this aspect of the proposals right. Addressing the criticism that the proposals on insolvency were too long, she responded: ‘They are long, but that is because they are a sensitive, meticulous and fair response to the Aldridge brief.’ She makes the point that one cannot directly compare the provisions of one country’s strata title legislation with

wound up can easily end up with a wholesale adoption of existing insolvency provisions which could be argued to be far too detailed for this purpose.’ The present writer would argue that the commonhold may also become insolvent for other reasons and provision needs to be made for e.g. the catastrophic uninsured loss scenario (below n 85).

And in the 1996 draft Bill.

Commonhold law: Problems and potential solutions (see ch 4, n 62) at 7. It will be suggested later in this chapter (text to nn 231-240) that there is a fundamental failure by Rosenberry to recognise that whether or not a CHA is likely to become insolvent depends entirely upon whether its members do or not enjoy fully limited liability; and then whether it is possible for debts of the association to be met by special levies either by (a) a liquidator or (b) an administrator (e.g. 1990 draft Bill, cls 51-61; 1996 draft Bill, cls 29-31) or (c) by the directors under direction of the court (referred to in UCIOA, s 3-117, Comment 4, at 166). If the members do not enjoy limited liability then the association will not become insolvent; even if they do, the association need not become insolvent if it can make supplementary levies (discussed below, text to nn 180 – 205).

Above n 59.

Ibid at 286. One may observe that, as outlined above (text to n 75), the 1990 and 1996 proposals in fact dealt with a modification of the ‘Aldridge brief’, the original proposals not requiring any provisions for insolvency, but (the present writer would argue) on that account being impracticable.
another’s. There is also some evidence that the question of the insolvency of the corporate vehicle is one which other jurisdictions have tended to ignore, and have had to deal with either by judge-made law, or by passing supplemental legislation.

1.2.3 How might a CHA or RMC become insolvent?

It is worth pausing here to consider what would be the typical circumstances in which a body corporate – a CHA or an RMC - would be threatened with insolvency. A body corporate might, for example, fail to put in hand a regular programme of repair and redecoration, and thus be faced with a large bill for repairs, particularly if the failure to carry out repairs timeously considerably increased the cost, but this is unlikely to precipitate insolvency. It is more likely that the more thoroughgoing repairs would not be carried out, and the body corporate would make do with ‘patching’. If the body corporate is unlikely to be able to recover contributions from unit-holders, it is unlikely to incur the expenditure in the first place. A claim which precipitates insolvency is more likely to be unexpected. Two of the most likely causes for a claim being made against a body corporate which would have the necessary element of surprise would be (a) a substantial order for costs arising out of an unsuccessful claim against a contractor, or a neighbour dispute; or (b) an uninsured claim by a visitor to the common parts in respect of a catastrophic personal injury. The more likely and more serious of these would be the latter.

79 She points out (ibid at 286) that ‘in Singapore, failure on the part of a lot owner to pay levies is a criminal offence, punishable with a hefty fine, and further daily fine, and this can be expected to reduce default’, citing the Land Titles (Strata) Act, Cap 158, s 42(11).

80 Below n 253, and text thereto.

81 It is not suggested that this is a prudent course of action, simply that insolvency seems unlikely, except in an extreme case.

82 E.g. a boundary or other dispute with the owner of a property adjacent to or near the block.

83 Or underinsured: below n 85.

84 Or indeed by a unit-holder, leaseholder or tenant.

85 See Body Corporate Strata Plan No 4303 v Albion Insurance Co Ltd [1982] VR 699 - a case from Victoria, but similar principles apply in NSW – where a body corporate was insured only to $500,000, leaving a shortfall of $76,000 to be met by the body corporate, which would have to be met by the body corporate levying contributions on the owners. Following this case, s 87(2) of the Strata Schemes Management Act 1996 requires each ‘owners corporation’ (the new term for ‘body corporate’) to hold insurance of a minimum of $10 million. It is clear from A Ilkin, Strata Schemes and Community Management and the Law (see ch 5, n 128) at [1101] that failure to insure can still result in the owners

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1.2.4 The mechanics of insolvency under the 1990 and 1996 draft Bills

Under the 1990 and 1996 draft Bills, therefore, it was likely to be rare for a CHA to become insolvent, though it was possible, and 'restricted liability' would then have applied. Although their underlying principle - the proportionate liability of all members of the CHA for its debts - was exactly the same as that proposed by Aldridge, the 1990 and 1996 draft Bills applied it differently, by providing for the more orderly enforcement of debts. They maintained the Aldridge principle that it should not be possible for the CHA to be wound up during the subsistence of the commonhold with which it was linked, but the insolvency of the CHA could have resulted in the entire commonhold being sold, and the unit-holders losing their units. In order to ensure that creditors could not resort too easily to attempting to wind up a CHA, they would not have been able to petition directly for this; instead they would have had to apply for a 'commonhold administration order.' The commonhold administrator would take over the affairs of the CHA, replacing the functions of both the association and of any management committee. It was intended that, in most cases, the administrator would ensure that service charges were levied so as to meet corporation being liable, and personal liability falling then on the individual owners. Seden v The Proprietors 'Tyalla Court' [1978] Qd R 53 is another example, this time from Queensland, of an owner suing the body corporate, though this, like the Albion case cited above, is reported on the point that an owners corporation is liable in negligence to its own members, and it is unclear from the report whether it was insured. It seems inevitable that sooner or later a CHA will either fail to insure, or will prove to be uninsured because the insurance can be avoided on some technical point (e.g. non-disclosure), or will be underinsured. There seems no way around this unless failure to insure becomes so prevalent, and the consequences to the general public sufficient of a problem, that something corresponding to the Motor Insurers' Bureau is set up, which seems unlikely. An example from the US of a visitor to the common parts sustaining a catastrophic personal injury is Ruoff v Harbor Creek Community Association 10 Cal App 4th 1624, 13 Cal Rptr 2d 755 (Cal App 1992). (Dutcher v Owens 647 SW 2d 948 (Texas 1983) involved a catastrophic loss through fire, rather than personal injury).

86 Based on the experience in Australia and the United States (above n 85).

87 The 1990 and 1996 draft Bills, unlike the CLRA, contained no provision for a 'successor association'.

88 1990 draft Bill, cl 51(3)(a); 1996 draft Bill, cl 30(1).

89 I.e. the association in General Meeting.

90 1990 draft Bill, cl 53; 1996 draft Bill, cl 29 (as the CHA would not have been registered under the CA 1985, it would not have had a board of directors).
the liabilities of the commonhold. Only the commonhold administrator\(^91\) could petition for the winding up of the CHA, and only if it was ‘irretrievably insolvent’\(^92\) i.e. there was no prospect of the CHA being able to pay its debts by the levying of service charges. Winding-up would have resulted in the sale of the entire commonhold. If there was then a deficiency during the winding-up, each member would have been liable for his proportionate share of any shortfall, but no more.\(^93\)

1.2.5 Crabb’s criticisms of restricted liability

Crabb, however, in her influential article,\(^94\) pointed out that this could have meant that, if the CHA had become badly insolvent, unit-holders might lose all the equity in their units. In effect restricted liability would mean that there would be a charge of indefinite scope over all commonhold units;\(^95\) and, indeed, unit-owners’ other assets would also have been at risk.\(^96\) Restricted liability could have proved not so restricted after all. She came to the conclusion that, with the threat of the possible loss of one’s home and other assets if the CHA became badly insolvent, RMCs, with their limited liability, would be considerably more attractive than commonhold. Her concluding recommendation was for the CHA to be an ordinary limited company, with a specialised constitution, and concessions on disclosure and audit requirements.\(^97\) This is, in fact, very much what has been enacted by the CLRA.\(^98\) Crabb’s proposal, as it stood, however, did not address the difficulty foreseen by Aldridge: if the CHA is an ordinary limited company, then it must be possible to wind it up; and how does one then ensure that there is always a body corporate to carry on its functions?

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\(^{91}\)The Secretary of State would in addition have had a residual power to petition for the commonhold to be wound up if it were in the public interest: 1990 draft Bill, cl 65(1)(a); 1996 draft Bill, cl 32(2)(a).

\(^{92}\)1990 draft Bill, cl 69; 1996 draft Bill, cl 32(2)(a).

\(^{93}\)1996 draft Bill, sch 10.

\(^{94}\)Above n 59.

\(^{95}\)Ibid at 301.

\(^{96}\)Ibid at 301, n 54; a possible scenario, if a unit-holder’s proportionate share of the debt exceeded the equity (if any) in the unit. This could also have arisen in similar circumstances under the original Aldridge proposals.

\(^{97}\)Ibid at 302.

\(^{98}\)Though the concessions on disclosure and audit are those granted to all small companies, rather than specific to RMCs. The Companies Act 2006, when in force, will increase this trend.
1.3 The successor body corporate

The 2000 draft Bill for the first time proposed that the CHA should take the form of an ordinary company, registered under the Companies Acts, and limited by guarantee, conferring what was assumed to be full limited liability. A high degree of standardisation was adopted, by providing that the Memorandum and Articles of Association of the CHA would have to follow prescribed Regulations. As already noted, some special provisions were made in respect of the membership of the CHA. The disadvantage, however, of providing that the CHA should be governed by the Companies Acts was that a CHA could be wound leaving a commonhold development without a CHA.

The intention seems to have been to deliver full limited liability for unit-holders, and so ensure that, in this crucial area, commonhold was not less attractive than RMC Leasehold. Whether commonhold as enacted has effectively delivered this is doubtful. There would appear to be three distinct ways in which the limited liability of commonhold may prove to be less limited than at first appears:

1. The threat of withholding a succession order might be used as a lever to require further contributions from the unit-holders to make up any shortfall;
2. The same threat might be used to require the unit-holders to disgorge any value represented by separately saleable parts of the common parts, such as the grounds, or leisure facilities, or to require more intensive development on the site;
3. It might also be possible for the liquidator to continue to demand commonhold contributions, whether or not a successor CHA had been set up (this is termed 'indirect liability' in this study).

These will be examined in turn. Additionally, it appears that on the liquidation of an RMC, service charge funds would enjoy a protected status that commonhold contributions would not enjoy. This will also be discussed.

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99 Above nn 32-36 and text thereto.
100 It could be seen as a countervailing advantage that, although the CHA could be wound up, there would be no need to make special provision for the insolvency of the CHA, so reducing the size of any Commonhold Bills, and avoiding the criticisms of the 1990 and 1996 draft Bills (above, text to n 74).
101 The problem identified by Crabb (above n 59) meant that restricted liability was likely to be unpopular with prospective unit-holders and their legal advisers.
1.3.1 The consequences of not having a successor CHA

The consequences of having a commonhold development which ceases to have a CHA and thus ceases to be a commonhold would be extremely serious, and are described in Clarke on Commonhold.102 All entries in the Land Registry relating to the commonhold would be cancelled.103 The unit-holders would retain their commonhold units as ordinary freeholds. If the liquidator was unable to dispose of the freehold of the common parts, he might disclaim them,104 whereupon they would escheat to the Crown. If the liquidator did not disclaim them, then, on the eventual dissolution of the CHA, the common parts would pass to the Crown as bona vacantia.105 The unit-holders would thus be left with flying freeholds, and no legal structure within which to enforce repairing and insuring obligations. They would be in an even worse position than owners of flying freeholds which had been deliberately created, as then some attempt would have been made to set up an appropriate structure including restrictive covenants and cross-easements. In a commonhold, these matters would have been covered by the CCS, which creates sui generis obligations. When land ceases to be commonhold land the CCS is of no effect, so the unit-holders would be left with seriously defective flying freeholds which would be wholly unmortgageable.

In order to reduce the possibility of this occurring, section 51 of the CLRA provides for the court, on the hearing of a winding-up petition, to entertain an application for a ‘succession order’: an order entitling a new limited company, set up as a CHA, to be registered as the proprietor of the common parts and providing for the new CHA to undertake the responsibilities of the old. Indeed, section 51(4) provides that:

The court shall grant an application under subsection (1) unless it thinks that the circumstances of the insolvent commonhold association make a succession order inappropriate

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102 CLRA, s 54(2)(c)-(f).
which seems to imply a bias in favour of making a succession order unless the conduct of the former CHA has been particularly reprehensible.

1.3.2 Could the provisions for a successor CHA undermine limited liability?

Providing for a ‘successor association’ \(^{106}\) - and making a presumption that there should be one - is sensible, but it could be interpreted in such a way as to undermine the very concept of limited liability. No guidance is given as to how culpable the original CHA would have to be for the court to refuse to make a succession order. *Clarke on Commonhold* suggests that:

> It may be that the court would take into account the magnitude of any liabilities and the likelihood of their being discharged, the prospects of sound management and the ability of the unit-holders to co-exist peacefully in the future.\(^{107}\)

Presumably a successor association might not be appointed if the original CHA had conducted its affairs in a highly irresponsible manner, or there was no prospect of the unit-holders being able to co-operate to run the successor association. But section 52(4)(d) provides that in any succession order the court ‘may make supplemental or incidental provisions’, and *Clarke on Commonhold* suggests that the provision might be widely interpreted so as to impose a condition that the unit-holders should pay the debts of the insolvent association in full.\(^{108}\) This does not seem consistent. If a successor association should not be appointed unless the unit-holders have made provision to pay off the debts of the original association in full, there would be no point in having the facility of a successor association. The repercussions of not having a successor association\(^ {109}\) are so serious that, if refusal of a successor association is used as a lever to force the original association to pay its debts in full, limited liability becomes entirely illusory. This is therefore the first of the scenarios which may mean that the liability of a CHA is not as limited as may appear.

If the CHA had become insolvent through ordinary commercial incompetence, and its debts were not particularly high, then clearly it might not be fair for it to be wound up as a way of discharging its debts, and then for a successor association to be

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\(^{106}\) Sometimes referred to as a ‘phoenix association’.

\(^{107}\) 22[21].

\(^{108}\) Ibid: ‘It is suggested, therefore, that it would be inappropriate to make a succession order unless the unit-holders have, via additional assessments, provided for the payment of creditors in full.’

\(^{109}\) Above, text to nn 102-105.
appointed as a matter of course. On the other hand, if there were a truly catastrophic uninsured claim against the association, there would seem little point in not making a succession order. But this could mean that the more spectacular the insolvency, the greater the likelihood of a succession order. It is likely to require case law, or possibly Commonhold Insolvency Regulations, to clarify the position.

1.3.3 The successor RMC

Although no specific statutory provision applies if an RMC should become insolvent, as the RMC is not linked to the property in the same way as is a CHA, the original RMC can be replaced by another under the general law. If an RMC were to become insolvent, the freehold reversion is clearly an asset of the company. Its value, particularly if the leaseholders have taken the opportunity to grant themselves extended leases, possibly of up to 999 years, will be limited, and may well be no more than the capitalised value of the ground rents. If these are nil or peppercorn rents, the value of the freehold reversion may be negligible. In any event, the rights of pre-emption under Part I of the LTA 1987 will apply, so, if the leaseholders can match the price that an investor will pay for their freehold, they can set up a new company and buy it back from the liquidator. In effect, on the insolvency of the RMC, the leaseholders may be required to contribute to the insolvency no more than the value of the reversion. Unlike with the successor CHA, this must apply regardless of how culpable the original RMC had been for its insolvency.

111 Although the writer has not come across any case where a successor RMC was set up on the insolvency of a previous RMC, he is aware of several instances where an RMC has been struck off for failure to make returns, and it has been deemed easier and cheaper to set up a new RMC to acquire the freehold from the Treasury Solicitor than to apply to the court for the restoration of the original RMC.
112 Various measures included in the CLRA have made reversions less attractive to investors: the easing of restrictions on collective enfranchisement (ss 115, 119, 120); the abolition of marriage value in certain cases (ss 127, 128); the restrictions on forfeiture (ss 167-171), making windfall gains less likely; and the Right to Manage (ss 71-113).
113 If there is scope for further development within the title - either by selling off land for further development, or by adding additional storeys to a building - the freehold reversion may be more attractive to investors, and may have a more substantial value.
Although no case law on the position of a ‘successor RMC’ has come to light, this is hardly surprising. First, the effects of the pre-emption provisions of Part I of the LTA 1987 are hardly novel or controversial. Second, for reasons which will appear later, it is quite possible that creditors would see little point in incurring the expense of putting an insolvent RMC into liquidation. Thus although no formal provision is made for a ‘successor RMC’, the position of the RMC here would seem to be more secure. Given the doubts as to what conditions may be imposed on the making of an order for a successor CHA, the position of an RMC is no worse than that of the CHA; possibly it may be substantially better.

1.3.4 The commonhold or RMC with saleable common parts

1.3.4.1 The successor CHA

In most cases of insolvency it will not be possible for any of the common parts to be sold separately. There is no saleable value in staircases and landings. In some cases, however, the liquidator of a CHA may seek to maximise the dividend for the creditors by attempting to sell some of the common parts to a developer or other outside purchaser. Thus if a CHA owned extensive grounds, on which it was possible to erect further buildings, the liquidator might wish to sell off some land separately, before any succession order was granted; likewise, if a large development had leisure facilities that could be realised separately. Cases such as these are likely to be rare. More commonly there may be scope to add further units, either by adding further storeys, or by creating units in attic roof-space, or even to produce income by leasing the airspace above a building for the erection of a telecommunications mast. Clarke suggests that saleable value in the common parts should not be ‘ring-fenced’ from creditors without express authority in the CLRA, whilst conceding that the CLRA ‘does not facilitate the transfer of a portion only of the common parts.’ Although the sale of part of the common parts may require substantial amendments to the

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114 Below, text to nn 159-169.
115 E.g. a health club or fitness suite.
116 Clarke on Commonhold 22[21].
117 Ibid citing CLRA, s 52(2).
CCS, as the court has power to impose conditions for the making of a succession order, the threat of not making one at all would afford a powerful lever to ensure that the saleable value in any common parts was disgorged by the unit-holders to the liquidator for the benefit of the creditors.

1.3.4.2 The successor RMC

It was suggested previously that the effect of the pre-emption provisions in Part I of the LTA 1987 would be that, if an RMC became insolvent, the leaseholders would be able to re-acquire the freehold reversion at its value to an outside investor. If this included separately saleable common parts, one might expect that the leaseholders would have either to allow such parts to be sold separately, or else to increase their offer price to take account of such value. If this were the case, then the position of the successor RMC would seem to be very similar to that of the successor CHA. In practice, however, the RMC would seem to be in a stronger position here. First, the consequences of there not being a successor RMC would be less serious than of there not being a successor CHA. Second, with an insolvent RMC, even if the liquidator wishes to sell off those common parts separately - or to ensure that their value is reflected in the price paid for the reversion by the new RMC - their value will inevitably be diminished by the existence of leaseholders’ rights over them. To sell any part of the common parts at anything like its full value, each and every leaseholder would have to agree to relinquish their rights over it; and there is no incentive for them to do so. Under RMC Leasehold, therefore, leaseholders stand a

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118 E.g., to provide that unit-holders have the use of a smaller garden, or no longer have the use of a fitness suite; or that the proportions of the commonhold contributions be amended to allow for additional units.

119 This is elaborated below, text to nn 125-131.

120 They may in practice even be unsaleable for this reason. It would seem impossible, for example, to sell off garden land or leisure facilities over which the leaseholders had recreational rights. Adding additional storeys i.e. making use of airspace may be more possible, depending of course on the structure of the building. Kenny (see ch 2, n 53 at 6) makes the point – in a slightly different context – that leasehold entrenches flat-owners’ rights to use communal facilities more effectively than does commonhold.

121 It might be possible to achieve this with less than unanimity by a majority of leaseholders making an application under s 37 LTA 1987, but there would seem to be no incentive for any of the leaseholders to facilitate the sale of common parts by such an application.
greater chance of retaining communal facilities - leisure facilities and extensive grounds - which would enhance the value of their units. Only if the existing leases were compatible with e.g. additional flats being added would the liquidator be able to ensure that value was disgorged from the value of the freehold reversion, by requiring that the price paid by the leaseholders matched the ‘hope value’ reflected in the market price; or that the new flats were sold on new leases before the freehold reversion was sold back to the leaseholders.

1.3.5 The effect of selling off part of the common parts

Discussion of flat-owners relinquishing rights over the common parts suggests at first sight that, in disposing separately of the common parts, the liquidator is extracting value from them, rather than from the individual units. On reflection this will be seen not to be the case, as the value of the common parts - be they facilities or extensive grounds - will be reflected in the value of each individual unit. Selling off part of the common parts is likely to depreciate the value of the units. Only the realisation of value by the addition of further storeys is likely to have little or no effect on the value of the other units.123

The extent to which flat-owners would be prepared to submit to the extraction of value from the common parts will depend on how far the value of their flats would be affected. We have seen already that, with commonhold, if the court were to be minded to impose conditions before a successor association could take over, the outcome for unit-holders of not co-operating in that process would be extremely serious.124 There would be little point in standing out against e.g. the sale off a fitness suite - which might have only a minor effect on the value of a flat - if the consequences of not selling it were that the flat could continue to use it, but had lost a

122 Adding additional units might well require that the leaseholders agree to a reduction in the proportion of the service charge their units bore, to accommodate the new units. Assuming that the units could be constructed, the leaseholders would clearly have every incentive to agree to a reduction in their service charge proportion, and indeed it seems likely that any leaseholder or the ground landlord (including a liquidator) could force the issue by making an application under s 35 LTA 1987 for all the leases to be varied: see ch 5, text to nn 25-64.

123 Commonsense would suggest that, if the value of any flats were to be adversely affected by the addition of further storeys, those chiefly affected would be those on the former top floor.

124 Above, text to nn 102-105.
substantial part of its value because it had become a flying freehold, was entirely unmortgageable and thus barely saleable.

With RMC Leasehold, the consequences of there not being a successor RMC would be much less serious. In essence there would be two alternatives scenarios. The first is that the freehold would pass to an OGL. Although it was suggested at the beginning of this study that ‘ordinary leasehold’ is a less attractive form of tenure than ‘RMC Leasehold’ it remains acceptable and is clearly better than the unsatisfactory flying freehold which would result from the winding up of a CHA without a successor association. At some future date the leaseholders would still be able to acquire the freehold, either by collective enfranchisement, or by exercising the right of first refusal if and when the freehold was again sold.

Alternatively, the second scenario is that if no buyer is found - say if there is no realisable value in the common parts, and the leases are 999 year leases at peppercorn rents - then the freehold reversion would pass to the Crown. As the landlord’s covenants would not be binding on the Crown, the leaseholders would be in difficulties, as they would not be able to look to the Crown to undertake repairs, to insure, or to levy a service charge, but they would be able to mitigate these difficulties by applying to the LVT, under Part II of the LTA 1987, for the appointment of a manager and receiver to manage the block. The leaseholders might alternatively set up an RTM company to manage the block. They would still be able to acquire in the future the freehold reversion from the Crown, and thus

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125 See ch 1.
126 A well-drafted lease in an RMC development should ideally be drafted in such a way that it remains a satisfactory form of tenure (and thus a satisfactory security) even if the RMC should cease to exist and the development should revert to ordinary leasehold. Of course, if the development originally had an OGL the leases should be satisfactory if the RMC ceases to exist.
127 I.e. under LRHUDA, pt I, ch I.
128 Under LTA 1987, pt I.
129 Since CLRA, s 172 came into force, pt II of the LTA 1987 applies to Crown land.
130 Under CLRA, pt 2, ch 1, which applies to Crown land by s 108. This would mean that the leaseholders would incur the cost of setting up the RTM company, and of taking control, but they would not have to pay anything for the privilege of resuming management.
131 Although not bound by the LRHUDA, pt I, ch I (LRHUDA, s 94), the Treasury Solicitor will sell a freehold on equivalent terms to a leaseholders’ company set up for that purpose.
restore the block to RMC Leasehold. All in all, where the intended structure breaks down due to insolvency, RMC Leasehold seems a far safer option to commonhold.

1.4 What assets of the CHA or RMC devolve upon the liquidator?

So far we have considered how far the value of the common parts may be available to creditors on the dissolution of the CHA or RMC. We now need to turn to the broader issue of what other assets of the CHA or RMC devolve upon the liquidator and may potentially be available to the creditors of an insolvent body corporate. In the case of the CHA these will be the balances in the accounts holding the commonhold assessment, and any reserve fund levies. In the case of an RMC these will be the balances in the accounts holding the service charges, including any reserve or sinking funds.

1.4.1 The position under commonhold

The position with regard to the dissolution of a CHA seems straightforward. In the event of a winding-up order being made in respect of any CHA, then all moneys held by the CHA will vest in the liquidator. As the commonhold assessment is not held in trust, any balance will vest in the liquidator. The CLRA also specifically provides that any reserve funds will become generally available, regardless of the purpose for which they were set up.

1.4.2 The position under an RMC

Although this is rather an unexplored area of law, the position with regard to the insolvent RMC would seem rather different. Although there will be exceptions, it has been suggested that in most cases an RMC will be unlikely to own beneficially anything besides the freehold reversion to the leases, the common parts, and any balances which have accrued from such miscellaneous sources as receipts of ground

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132 The CHA or RMC may also own chattels such as furnishings in the common parts, cleaning and gardening equipment, but these are unlikely to be of significant value: if they are, then there would appear to be no difference in their treatment between CHAs and RMCs.

133 See ch 4, n 47, for any possible distinction between these terms.

134 See ch 4, n 227 and text thereto.

135 CLRA, s 56, disapplying s 39(4); see ch 4, text to n 233.

136 Cf ch 4, text to nn 231-232.

137 E.g. the RMC which is the landlord of commercial units, perhaps on the ground floor, or the RMC which has effected a successful forfeiture.

138 See ch 4, n 218.
rents, and administration charges. What are usually seen as the main assets of an RMC - the service charge balances, and in particular any reserve or sinking funds - will be subject to the statutory trusts under section 42 LTA 1987 and will not therefore belong beneficially to the RMC at all. As with all funds on a corporate insolvency, legal title would remain with the company in liquidation. The position of the limited company as trustee is not explored to any great extent by the textbooks on trusts. Most corporate trustees will be trust corporations, and therefore unlikely to become insolvent. But in principle any limited company may be a trustee. Most student texts barely mention the possibility of companies, other than trust corporations, being trustees. The coverage in more detailed practitioner textbooks is also scanty. The reference in Snell’s Equity is very brief, but Lewin goes into rather more detail:

Neither an individual trustee who is adjudged bankrupt nor a corporate trustee which goes into liquidation is thereby deprived of the trusteeship unless the trust instrument so provides: both remain trustees until retirement or removal (or dissolution, in the case of a corporate trustee). Indeed, bankruptcy is not a disqualification from becoming a trustee. But a bankrupt trustee may be ‘unfit to act’ with section 36(1) of the Trustee Act 1925, and a new trustee may therefore be appointed out of court in his place; the same no doubt applies to a corporate trustee in insolvent liquidation. Section 41(1) of that Act expressly empowers the court to

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139 For such matters as the registration of assignments, licences to make alterations and the provision of copy documents.

140 Subsection 42(3) of the LTA 1987 reads as follows:

‘The payee shall hold any trust fund -

(a) on trust to defray costs incurred in connection with the matters for which the relevant service charges were payable (whether incurred by himself or by any other person); and

(b) subject to that, on trust for the persons who are the contributing tenants for the time being.’

141 Cf the position with the bankruptcy of individuals, where assets normally vest in the receiver, but this does not apply to assets held in trust: s 283(3)(a) of IA 1986.

142 ‘A corporation may be a trustee of pure personalty, and of land also, the former requirement of either statutory authority to hold land or a licence in mortmain has now gone.’ J McGhee (ed), Snell’s Principles of Equity (30th edn, London, Sweet and Maxwell, 2000) (hereafter ‘Snell’) 10-02.
appoint a new trustee in substitution for a bankrupt or a corporation which is in liquidation or has been dissolved.\textsuperscript{143}

This does not, however, answer the point as to whether the liquidator is entitled to exercise the powers vested in the company in liquidation as trustee. The editors go on to consider this:\textsuperscript{144}

A liquidator of a corporate trustee apparently has power to conduct a trusteeship vested in the company.\textsuperscript{145} The reasoning may be questionable, as the liquidator’s duty is to get in and distribute the company’s own assets among its creditors and contributories,\textsuperscript{146} but the convenience of the result is obvious. If the trust requires nothing more than a distribution of the trust assets to the beneficiaries, it will be simplest to leave that task to the liquidator, and not to appoint a new trustee.\textsuperscript{147} If such an appointment is desirable, and the power of appointing new trustees is vested in the company, there seems to be no reason why the liquidator should not make the appointment.\textsuperscript{148}

There would seem therefore, according to \textit{Lewin}, to be doubt as to whether the liquidator of an RMC would be entitled to act as trustee of the service charge funds.

\textsuperscript{143} J Mowbray and others (eds), \textit{Lewin on Trusts} (17\textsuperscript{th} edn, London, Sweet and Maxwell, 2000) (hereafter ‘\textit{Lewin}’) 22-01. The reference to the Trustee Act 1925, s 36(1) is not relevant if the landlord is the sole trustee, which is likely with a trust under I TA 1987, s 42.

\textsuperscript{144} 22-03.

\textsuperscript{145} \textit{Lewin’s} footnote 4 reads: ‘The proposition seems to have been assumed in Re Berkeley Applegate (Investment Consultants) Ltd [1989] Ch. 32 (earlier proceedings at (1989) 4 BCC 274) and Re William Makin and Son Ltd [1992] PLR 177, [1993] OPLR 171 (Ch), (but contrast Mettoy Pension Trustees Ltd v Evans [1990] 1 WLR 1587 at 1616-1617). It has been decided in Australia: Re Crest Realty Pty Ltd [1977] 1 NSWLR 664, a decision about a liquidator in a voluntary winding up, whose function under the relevant Australian legislation was substantially identical to that imposed by the IA 1986, s.91(1). For the function of a liquidator in a compulsory winding up, see ibid s 143(1).’

\textsuperscript{146} \textit{Lewin’s} footnote 5 reads: ‘See n.4.’

\textsuperscript{147} \textit{Lewin’s} footnote 6 reads: ‘Note, however, that there may be difficulty in providing for the liquidator’s remuneration and other costs and expenses: see 22-06 to 22-07.’

\textsuperscript{148} \textit{Lewin’s} footnote 7 reads: ‘Compare Re Crest Realty Pty Ltd [1977] 1 NSWLR 664 (power of liquidator to apply to court for appointment); but contrast Sjoquist v Rock Eisteddfod Productions Pry Ltd (1996) 19 ACSR 338 at 342. In the context of pension trusts, see Pensions Act 1995, ss.22-25.’
Underhill and Hayton\textsuperscript{149} does not deal specifically with whether a limited company can be a trustee, but this is implicit in its discussion of the position on insolvency.\textsuperscript{150} It is less equivocal than Lewin on the position of the liquidator:

A liquidator of a corporate trustee in liquidation...has the power to conduct a trusteeship vested in the company, and the power of the company to appoint new trustees is exercisable by the liquidator.\textsuperscript{151}

The case cited in support\textsuperscript{152} involved the amendment of the Trust Deed of a pension scheme and the appointment of new trustees, and part of the reasoning involved acceptance that the running of a pension scheme was part of the ‘affairs’ of a company under section 14(1) of the IA 1986, which would not necessarily be determinative of whether an RMC should remain as trustee of a service charge fund when it was run by a liquidator. The present writer would suggest that, if an RMC became insolvent and there was any uncertainty as to whether service charge trust funds should be available to creditors or not, it might be appropriate for the court, upon the application of any leaseholder, as a potential beneficiary of the fund, to exercise its power under section 41(1) of the Trustee Act 1925 and to appoint a new trustee, rather than to leave the liquidator with this potential conflict of interests.

1.4.2.1 Does the service charge fund become available on insolvency?

Who should be the trustee of the service charge trust if a landlord becomes insolvent is an intriguing question, but of greater practical importance is how far the fund would be available in the insolvency of the RMC, or indeed of any other landlord. Crabb\textsuperscript{153} notes that, in the case of RMCs,\textsuperscript{154} creditors would be entitled to petition for winding-up,\textsuperscript{155} and would thus gain access to their assets, including the freehold reversion on the units and the freehold ownership of the common parts, but, understandably, she does not discuss the service charge funds, because the point that

\begin{footnotesize}
\begin{itemize}
\item[150] Art 43, at 461.
\item[151] Ibid at 462.
\item[152] Denne v Yeldon [1995] 3 All ER 624 (Ch).
\item[153] Above n 59 at 291.
\item[154] She refers to them as ‘flat-management companies’.
\item[155] Under s 122(1)(f) of the IA 1986.
\end{itemize}
\end{footnotesize}
she is making is that creditors would not be able to touch the leaseholders' equity in their flats,\(^{156}\) or any other assets of theirs.

The general position with regard to the liability of trustees for the costs of a 'third party dispute' (i.e. an action which does not involve the subject matter of the trust, or a dispute between beneficiaries and trustees\(^{157}\)) is complicated,\(^{158}\) but tolerably clear. The difficulty in applying these principles to claims involving\(^{159}\) an RMC is in establishing whether the claim is against the RMC itself, or against the RMC \textit{qua} trustee of the service charge fund.\(^{160}\) In principle, the legal status of the service charge trust fund should be the same whether the ground landlord is an RMC or an OGL.

The two most likely ways in which a large claim might arise against an RMC and precipitate its insolvency were described earlier.\(^{161}\) If the claim were an order for costs against the RMC and arose out of, say, a dispute relating to building works at the property, it seems likely that the order for costs would be held to be 'costs incurred in connection with the matters for which the relevant service charges were payable',\(^{162}\) though this is arguable.\(^{163}\) But what of the catastrophic personal injury scenario? The result would seem to depend upon the meaning to be attributed to the words quoted. One could argue that the service charges were payable for, inter alia, the repair and upkeep of the common parts, and the RMC has failed to achieve this, so any award of damages is a cost 'incurred in connection with the matters for which

\(^{156}\) She does, however, overlook the point that, if the RMC is required to dispose of parts of the common parts, it may well affect the value of the flats (above, text to n 123).

\(^{157}\) The threefold division of disputes was drawn by Lightman J in \textit{Alsop Wilkinson v Neary [1996]} 1 WLR 1220 (Ch).

\(^{158}\) See, e.g., \textit{Lewin 21-41 - 21-51}.

\(^{159}\) The two most likely scenarios were described above, nn 82-86 and text thereto.

\(^{160}\) Disputes on this may involve a reversal of the usual arguments employed in disputes involving a third party dispute with trustees, as with an RMC, the RMC, as trustee, may wish to argue \textit{for} its personal liability (and against the outside claimant having any claim against the trust fund), on the basis that, if the trustee is personally liable, it is likely to become insolvent, and that will in practice be the end of the adverse claim.

\(^{161}\) Above nn 82-86 and text thereto.

\(^{162}\) LTA 1987, s 42(3)(a).

\(^{163}\) The position of a claim, being an order for costs arising out of a neighbour dispute, is possibly even more doubtful.
the relevant service charges were payable.' But it seems more reasonable to argue that the quoted words should be construed in accordance with the terms of the lease, which provided for the service charge to be expended on repairs, not on the payment of damages. This might, however, have the unsatisfactory result that whether such an award of damages were recoverable from the trust fund would depend on the precise terms of the service charge provisions in the relevant leases. The broader the wording of the service charge provisions, the more likely that a claim would succeed - in practice, the success of a claim might well depend on whether those provisions contained a broadly-worded 'sweeping up' clause.

The courts would also have to consider the implications for blocks where the freehold was not owned by an RMC. If a commercial OGL failed to arrange third party liability insurance for the block, and then failed to secure the safety of visitors, it seems quite inequitable that the OGL should be able to pay the claim out of any reserve fund, or to add the claim to the service charge account. As we have seen in the context of the construction of service charge provisions, and the application of the test of reasonableness, in theory it ought to make no difference whether the landlord is an OGL or an RMC, but it is hard not to make this distinction in practice. We have seen that, in commonhold, it is uncertain whether a claim relating to one reserve fund activity can be enforced by execution against a reserve fund maintained to finance a different activity. No such restriction would apply in the case of a claim against a service charge reserve fund, provided that it is in respect of something which could properly be payable out of the service charge. So if an RMC sued a contractor in respect of repairs to the common parts, the claim was dismissed, and it was ordered to pay costs, the claim for costs would lie against the service charge trust fund. Execution could be levied against a reserve fund even if it had been set aside to meet a completely different contingency e.g. the replacement of a lift. Under RMC Leasehold, even if reserve funds are kept separately for convenience, they would all

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164 Which might also apply in the case of, say, an order for costs made against the RMC in respect of an unsuccessful neighbour dispute.
165 See ch 4, text to nn 26-32.
166 See ch 4, text to nn 93-117.
167 See ch 4, text to n 232; but all reserve funds would become available if the commonhold association were in liquidation: see CLRA, s 56, and above, text to nn 135-136.
be available to meet any claim payable out of the service charge fund, all being subject to the same trust. Neither the ordinary service charge funds, nor any reserve funds, however, would be available as part of the assets of an insolvent RMC where the claim did not relate to activities which were recoverable via the service charge fund.

All this may present problems for those dealing with an RMC. The visitor who sustains injuries on its premises will have no choice as to who is his defendant. If the RMC is insured, there should be no problem, but, if it is uninsured, or underinsured, he will have to take his chance on what assets would be available if the RMC were put into liquidation. We have seen already that the value of the reversion may be limited, and it is uncertain how far the RMC can, in effect, be made to disgorge any separately saleable parts of the common parts. It also seems uncertain how far, in the event of the insolvency of the RMC, the liquidator would have access to the service charge funds. Whether they are available would seem to depend upon the terms of the leases under which the funds were contributed. At best any claim might involve protracted and uncertain litigation.

Those who have a choice as to whether to enter into legal relations with an RMC - for example, the intending contractor - may assume that it is prudent to check the accounts of the RMC. On the basis of the view taken in this study, the prospective contractor should be more concerned with the size of the service charge funds, and even with the terms of the leases, than with the financial strength of the RMC. It is hardly surprising that contractors have been known to ask for personal guarantees from the directors of the RMC before undertaking major works.

1.4.3 Comparison of commonhold and RMCs

How far the need for a successor body corporate can be used to require unit-holders or leaseholders respectively to disgorge any value bound up in the common parts has already been compared. On this, the position of leaseholders under RMC Leasehold would seem to be more protected than that of unit-holders under commonhold. So too, when considering the funds representing the commonhold contributions, and the service charge funds under leasehold, the interposition of the statutory trust under the latter would seem to afford a degree of protection which is simply absent with

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168 Above, text to nn 119-122.
commonhold. It is difficult to take a definitive view in the absence of any case-law on the subject, but the level of protection afforded by the statutory trust is rather uncertain, and would seem to depend upon the precise wording of the lease. This does not seem a very satisfactory state of affairs.

We have so far considered what assets are available to and realisable in a liquidation: whether it is possible for any of the common parts to be sold separately, and whether the service charge funds (or their equivalent under commonhold) are available to the liquidator. As all might have an adverse affect on the value of a flat, to this extent they undermine limited liability, in a manner which affects the CHA more than the RMC. It is, however, possible that the limited liability of the CHA is undermined in an even more fundamental way, and even that similar arguments may undermine the presumed limited liability of the RMC.

1.5 An ongoing liability - limited liability further undermined?

Having the CHA governed by the Companies Acts means, as Crabb indicated,\(^{170}\) that no special legislation is required to regulate either its operation or the position on its insolvency. The CHA is simply a sub-species of the company limited by guarantee, so ordinary company law and the relevant provisions of the IA 1986 will apply, subject to a few specific variations.

On the issue of insolvency, Crabb states ‘The Act [i.e. the CLRA] wisely assumes that a commonhold can become insolvent and provides for its winding up.’\(^{171}\) It has always been the case that an RMC may be wound up, though probably without such serious effects as on the winding up of a CHA.\(^{172}\) But whilst Crabb\(^{173}\) thought that the adoption of full limited liability for CHAs would ensure that RMCs did not hold the advantage, she seems far from clear that the CLRA has delivered full limited liability to unit-holders. But, along with this, detailed consideration of the position on insolvency seems to be raising doubts as to whether the liability of the RMC is as fully limited as has hitherto been thought to be the case - though it must be

\(^{169}\) See LTA 1987, s 42(3): above n 140.

\(^{170}\) Above n 59.

\(^{171}\) In her contribution to Clarke on Commonhold at 22[7].

\(^{172}\) Above, text to nn 125-131.

\(^{173}\) Above n 59.
said that Crabb appears to entertain more serious doubts on this latter point than does
the present writer.

1.5.1 Has full limited liability been achieved?

It has been noted that, under the Aldridge proposals, and under the 1990 and 1996
draft Bills, it would have been possible by means of ‘restricted liability’ for unit-
holders to be made liable for debts incurred by the CHA. This form of direct liability
is clearly not possible under the CLRA, as the CHA follows the RMC in enjoying full
limited liability. On the face of it the liability of the unit-holder on the insolvency of
the CHA is restricted to the guarantee of a nominal one pound, much as would be the
case with an RMC.\textsuperscript{174} Although the CLRA is posited on the basis that the CHA does
have true limited liability,\textsuperscript{175} Crabb has more recently questioned whether it has in
fact been attained.\textsuperscript{176} It must be conceded that members will not at be liable
qua members\textsuperscript{177} - what one may term ‘direct liability’.\textsuperscript{178} But since the CLRA was passed,
Crabb has for the first time drawn the distinction between the status of the unit-
holders qua members of the company and qua unit-holders within the commonhold.
She draws an analogy to the position of members of a mutual insurance company,
who as members are liable to contribute only up to the limit of their guarantee, but

\textsuperscript{174} This would also be the usual amount of the guarantee if an RMC were limited by guarantee; if an
RMC were limited by shares, the shareholders’ liability would be nil, unless the shares were not fully
paid up: the latter would be very unusual.

\textsuperscript{175} One may note in passing that the Opposition at the instigation of the Law Society supported an
amendment during the passage of the Bill that would have restored a (different) form of restricted
liability by allowing a court to make an order to the effect that members would be required on
insolvency to contribute up to their proportionate share. This was rejected by the Government, on the
basis that contractors would not be worried about dealing with limited liability companies as they do so
all the time (HC Deb vol 381 col 642 (11 March 2002).

\textsuperscript{176} ‘While provisions for the operation of the commonhold association in the course of liquidation have
not been clarified, it seems unlikely that unit-holders will have limited liability in the fullest sense.’
(\textit{Clarke on Commonhold 22}[5]). See also the conclusion to her article, L Crabb, ‘Commonhold
Associations and their Creditors’ (2002) 6 \textit{Insolv Lawyer} 204.

\textsuperscript{177} Except for the nominal one pound that each member must contribute on the insolvency of the CHA
(Commonhold Regulations 2004, sch 1, cl 5).

\textsuperscript{178} This term does not, to the writer’s knowledge, appear elsewhere, but will be used in this study to
describe this form of liability.
may also be liable contractually under the Articles of Association to meet their share of insurance losses.179

1.5.2 An indirect liability as unit-holders?

Crabb’s argument runs that, although unit-holders qua members of the company will not be liable to contribute on insolvency more than the sum of one pound that they have guaranteed, there is no reason why the liquidator - who would take over the responsibilities of the directors during the course of the winding-up, and can carry on the business of a company so far as necessary for its beneficial winding up180 - should not attempt to recover any shortfall by raising assessments on the unit-holders qua unit-holders. This one may term the ‘indirect liability’181 of members. The provisions in the CCS for additional182 and emergency183 assessments could well be relevant here, and there seems to be no restriction on the liquidator continuing to make assessments on the unit-holders, even if a successor association has been set up,184 or if there will be none.185 In either case the liquidator could obtain judgments and then charging orders in respect of unpaid assessment against each unit-holder’s equity in the individual units, or indeed enforce the assessment against the unit-holder personally in any other way.186 If this assumption is correct, then the ‘limited liability’ provided for by the CLRA will be no more favourable to the unit-holder than the ‘restricted liability’ provided for by the 1990 and 1996 draft Bills: in the case


180 See IA 1986, ss 165, 166 and sch 4, pt II, para 5. There may be scope for argument as to whether carrying on the functions of a commonhold is ‘carrying on the business of the company’ within the meaning of the IA, but it seems likely that it would be. Crabb would prefer that, if it is so intended, it should be put beyond doubt: Clarke on Commonhold 22[5] n 6.

181 This term does not, to the writer’s knowledge, appear elsewhere, but will be used in this study to describe this form of liability (cf above n 178).

182 CCS, 4.2.1, 4.2.4, 4.2.15.

183 CCS, 4.2.5, 4.2.15.

184 A point made by Crabb in her article, above n 176 at 210.

185 See Clarke on Commonhold 22[22].

186 E.g. by levying execution against goods, an attachment of earnings order, by a third party debt order (formerly a garnishee order), by a charging order against other property; or indeed ultimately by making the unit-holder personally bankrupt.

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of a shortfall, the unit-holder would be liable to contribute to the debts of the CHA, to
the extent of the proportion of the commonhold assessment that he is obliged to
pay, even if, in an extreme case, such assessment exceeded the value of the equity in
the unit.

Crabb is alluding to what is here termed ‘indirect liability’ when she states:

It seems that the liquidator can adopt a similar practice [i.e. to make ‘additional’ or
‘emergency’ estimates] to deal with a deficiency which becomes apparent in the
course of winding up,

and she cites in support of this the view taken by another Government Consultation
Paper. This may not be the only conclusion to be drawn from the paper. The
relevant section reads:

All other assets and liabilities, which relate to a period prior to the winding-up
order, remain with the insolvent commonhold association and as such, it will retain
the ability to pursue the unit-holders for deficiencies in assessments, for which they
are liable under the CCS.

By ‘deficiencies in assessments’ are the authors of the paper thinking of failure to
levy sufficient assessments, or merely of arrears owed of commonhold assessments
already validly made? Crabb is right to raise the issue, although either conclusion
seems possible from the paper. Taken to its logical conclusion, the broader meaning
which Crabb favours would make the provisions in the CLRA for successor
associations redundant, or at least seldom relevant. A liquidator would simply
continue to make further assessments until all the debts of the CHA were met.

1.5.3 Liability under RMCs

When Crabb makes the point that the liquidator may have power to continue to raise
commonhold contributions from unit-holders, she also makes the point that the
analysis that the members of the CHA are also recipients of its services applies
equally to leaseholders under RMC Leasehold. She suggests that it may well also be

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187 Regardless of the source of the claim, the proportion would appear to depend on the proportion
payable of commonhold assessment, not of any reserve fund levy.

188 Clarke on Commonhold 22[5].

189 Ibid at n 3, The Termination of a Commonhold: A Consultation Paper, issued by the Department of

190 CLRA, s 51. This may itself be a reason to argue for a narrower view of the law.

191 Above n 176 at n 90 and text thereto.
possible for a liquidator of an RMC\textsuperscript{192} to continue to levy service charges on the
leaseholders in order to meet any shortfall in the company's ability to meet its
liabilities.\textsuperscript{193} This possibility has not been well-explored. The position with an RMC
may be less clear than Crabb suggests, as one needs to take into account factors that
she has not addressed. The implications of the service charge funds being held on
trust, and therefore not available to the liquidator, have already been considered,\textsuperscript{194}
but in addition, one needs to work through the implications of the fact that the
liquidator, in running the RMC, remains bound by the terms of the lease and can
therefore levy a service charge only for expenditure which falls within the scope of its
service charge provisions. If the shortfall therefore arises due, for example, to a
catastrophic personal injury claim, or a large order for costs being made against the
RMC as a result of a neighbour dispute, it is far from clear that the liquidator would
be able to recover the shortfall by means of the service charge: the liquidator cannot
be in any better position than that of the company whose affairs he is running. Service
charges that were recovered would not belong beneficially to the RMC and, for the
reasons stated,\textsuperscript{195} might well not be available to the liquidator to meet the claim.
Furthermore, leaseholders may be able to invoke the protection of the strict time
bar\textsuperscript{196} against the liquidator's claims. There is no parallel provision in the CLRA.

It is not clear therefore that there would in general be any point in a creditor
putting the RMC into liquidation if its claim related to the service charge fund. By
doing so the creditors would be able to have a liquidator appointed who would
probably\textsuperscript{197} assume \textit{de facto} control of the service charge funds, but they would
remain trust funds. Even if the liquidator was able - as the person in control of the

\textsuperscript{192} Or an RTE or RTM company under the CLRA.

\textsuperscript{193} Above n 188, at n 7. This would seem to mark a divergence from the conclusion of her article
(above n 176, at 211), where she implies that a leaseholder under an RMC Leasehold would be in a
better position.

\textsuperscript{194} Above, text to nn 153-169.

\textsuperscript{195} Above nn 163-164, and text thereto.

\textsuperscript{196} LTA 1985, s 20B requires that costs shall not be taken into account if incurred more than 18 months
before the demand for the service charge is made, unless within that time limit the leaseholder is
notified in writing that the costs had been incurred, and a demand in respect of them might
subsequently be made.

\textsuperscript{197} Previously discussed: above, text to nn 137-152.
RMC - to levy service charges, they could be levied only for purposes within the scope of the terms of the lease. The liquidator of the CHA would seem to be in a clearer position and could clearly issue demands for commonhold contributions to meet any of the liabilities of the CHA.

1.5.4 Taking indirect liability further - ‘secondary indirect liability’

Discussion so far has been restricted to ‘indirect liability’, but this may possibly take two forms. The form considered by Crabb\(^{198}\) seems to be based purely on the principle that the liquidator of a CHA may continue to levy commonhold assessments on its members \textit{qua} unitholders (though not \textit{qua} members of the CHA) until the winding-up is complete regardless of whether there is a successor association, or even if there is none. For the purposes of this discussion this will be termed ‘primary indirect liability’.\(^{199}\) The present writer would suggest, however, that if such primary indirect liability exists, it may also be possible for indirect liability to operate at another level and take the form of what will be termed \textit{secondary indirect liability}.

This is in essence the possibility that a further ‘wave’ of assessments may be made in order to cover shortfalls in collecting earlier assessments from other unit-holders.

As previously noted,\(^{200}\) assessments can be raised ‘to meet the expenses of the association’,\(^{201}\) which was assumed to have a wide meaning. This probably therefore extends to meeting the expenses of the CHA, \textit{if and insofar as other unit-holders are unable to meet their own allocations}.\(^{202}\) Clearly there will be occasions when it is impossible to recover some or all of the commonhold contributions from a unit-holder, and all or part of such debts will have to be written off. But once the principle

\(^{198}\) Above n 188 and n 184.

\(^{199}\) Again, the terms ‘primary indirect liability’ and ‘secondary indirect liability’ do not, to the writer’s knowledge, appear elsewhere, but will be used in this study to describe these suggested variants of indirect liability.

\(^{200}\) See ch 4, n 37 and text thereto.

\(^{201}\) CLRA, s 38(1)(a).

\(^{202}\) \textit{Commonhold Proposals for Commonhold Regulations: A Consultation Paper}, issued by the Lord Chancellor’s Department in October 2002 seems to make this assumption (at para 165 and Q 127), although it could also be read as assuming that unpaid contributions will eventually be paid, which is surely an unduly optimistic assumption; the Government, however, has tended to play down possible shortcomings of commonhold, including the likelihood that contributions will occasionally prove uncollectable, as they surely will.
is conceded that unit-holders may become subject to commonhold assessments to meet the liabilities of others which have been written off, this could have dramatic results when coupled with indirect liability. As and when unit-holders failed to meet their assessment to primary indirect liability, further assessments could be made by the liquidator, so giving rise to secondary indirect liability. But if the liquidator has the power to continue to make assessments, and to include in those assessments balances which have not been recovered from other unit-holders, then, taken to its logical conclusion, the liquidator could in theory carry on making assessments, and the unit-holders with the deepest pockets might be required to continue to make contributions until the debts of the CHA were paid off. Only when the last unit-holder was personally insolvent would it be necessary to wind up the CHA. It remains to be seen what further insolvency regulations, if any, are made to resolve this problem, and to restrict the scope for a liquidator to continue to raise assessments until the CHA’s debts are cleared. Crabb seems to argue or at least fears - that if nothing is done to clarify this then unit-holders would be no more protected by notionally limited liability under the CLRA than under the restricted liability of the 1990 and 1996 draft Bills. But this assumes that only primary indirect liability should be permitted. If secondary indirect liability were allowed, and a liquidator could carry on making assessments to make up for shortfalls which cannot be recovered from other unit-holders, the position of unit-holders is in fact worse under the CLRA than it would have been under the 1990 and 1996 draft Bills, or under the Aldridge proposals, as they made it clear that, in the event of insolvency, each unit-holder should be responsible only for the share of any shortfall allocated to him in the same proportion as his share of the service charge: ‘restricted liability’ would have been proportionate liability. But if the liquidator can continue to make assessments on a diminishing group of unit-holders, this amounts not to restricted liability, but to unlimited liability. The position should be clarified so that a liquidator should not be able to make any further assessments in respect of the uncollectable contributions of other unit-holders, and thus there should be no ‘secondary indirect liability’.

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203 Above n 188 (conclusion).
204 Explicitly under the 1990 and 1996 draft Bills, but implicitly also under Aldridge.
205 As the ‘commonhold contributions’ were then known.
206 Presumably by Commonhold Insolvency Regulations.
1.5.5 ‘Secondary indirect liability’ with an RMC

It seems highly unlikely that secondary indirect liability could ever apply in the case of an RMC: the liquidator would be restricted to levying service charges for the purposes set out in the lease; any moneys raised would be subject to the statutory trust and would not belong beneficially to the company in liquidation; and most service charges are drafted so that each leaseholder is bound to contribute only a fixed proportion. Some leases provide that the service charge may cover charges which cannot be recovered from other leaseholders, and in that case secondary indirect liability would seem a theoretical possibility. But secondary indirect liability would be dependent upon establishing primary indirect liability, and the difficulty of establishing the latter would seem to preclude the possibility of the former. Further, the ‘chilling effect’ of the uncertainties surrounding RMCs on insolvency would militate against any creditor seeking to pursue a claim so fraught with complications. So, to sum up, the limited liability of the RMC would exclude the possibility of direct liability; primary indirect liability would seem unlikely, and secondary indirect liability even less likely.

Unless and until the points about direct and indirect liability (both primary and secondary) is clarified either by case law or by Commonhold Insolvency Regulations, the unavoidable conclusion must be that, although the CLRA was intended to deliver full limited liability equivalent to that given by the RMC, and thus to meet Crabb’s criticisms of restricted liability, the individual leaseholder would appear to be considerably better protected from liability for the debts of the RMC than is the unit-holder under commonhold.

2. THE LIABILITY OF COMMONHOldS - COMPARISONS WITH OTHER JURISDICTIONS

Having devoted a good deal of attention to the potential liability of unit-holders on the insolvency of the commonhold, it may be appropriate at this point to digress and consider why this issue has attracted what some commentators say is a disproportionate amount of interest in England and Wales compared with common law jurisdictions which have had strata title or condominium regimes for some time. It has already been noted\(^\text{207}\) that Rosenberry claims never to have come across a

\(^{207}\) Above n 76 and text thereto.
single case of insolvency, and that Clarke complained\textsuperscript{208} of the amount of space devoted to insolvency in the 1990 draft Bill. Paddock, a South African expert, and writer on Sectional Titles there, commented to the writer when comparing the proposals in England and Wales with the provisions in South Africa, NSW, Alberta, and the US:

It certainly seems that this aspect [sc. insolvency provisions] has received far more attention in the English drafts than in any of the other jurisdictions that I have mentioned.\textsuperscript{209}

Authors from other jurisdictions do seem to play down the importance of having provisions for insolvency. But before deciding that they are unnecessary, one should consider in detail the crucial point of the status of the body corporate, which has important practical implications.

\textbf{2.1 The position in Australia}

In New South Wales and Victoria\textsuperscript{210} a system of unlimited liability applies, where calls can be made on members until any deficiency is met.\textsuperscript{211} It is therefore hardly surprising that cases of insolvency of the corporate body are not encountered in Australia. A corporation with unlimited liability can never become insolvent.

\textbf{2.2 The position in the United States}

The position in the United States would seem particularly complicated. As the commentary on the UCIOA 1994\textsuperscript{212} states: ‘The issue is not free from difficulty.’\textsuperscript{213} As it goes on to explain:

Presently, in most States, if the association is organized as a corporation, the unit owners are likely to receive the insulation from liability given shareholders of a corporation, so that the judgment lienholder can satisfy his judgment only against

\textsuperscript{208} Above n 74. Clarke on Commonhold now accepts the possible risk of insolvency in a commonhold: see 22[4]-[7].

\textsuperscript{209} Private communication.

\textsuperscript{210} And, it would seem, also in Queensland.

\textsuperscript{211} Ilkin (above n 85) 305-6 is quite unequivocal on this, so it is difficult to see why Crabb in Clarke on Commonhold 22[6] n 2 is not more definite. Examples from Australia and the United States of catastrophic claims are given above, n 85.

\textsuperscript{212} Above n 64.

\textsuperscript{213} Para 1 of Comment on s 3-117, dealing with the effect on unit owners of judgments against the association.
the property of the association. On the other hand, if the association is organized as an unincorporated association, under the law of most States each unit owner would have joint and several liability on the judgment. This Act strikes a balance between the two extremes.214

It would seem, therefore, that prior to the UCIOA 1994, earlier model acts215 provided either for unlimited liability (as in Australia) or entirely limited liability, depending on whether the association was organised as an unincorporated association or as a corporation. The UCIOA 1994 has been adopted in only seven states,216 so most states will still be relying upon the earlier model Acts, or locally drafted Acts. Explaining the proposed new model Act, the Comment continues:

2. In condominiums and planned communities, the Act makes the judgment lien a direct lien against each individual unit, but allows the individual unit owner to discharge the lien by payment of his pro-rata share of the judgment based on that unit’s relative common expense liability. The judgment would also create a lien against any property owned by the association.217

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214 Ibid.
215 The original model Acts in this field were the Uniform Condominium Act (1980), the Uniform Planned Community Act (1980), and the Model Real Estate Cooperative Act (1981). The original Uniform Common Interest Ownership Act (‘UCIOA 1982’) was adopted in 1982 and combined, in a single comprehensive law, the previous three uniform laws in this area. By 1994, UCIOA 1982 had become the law in at least five States, while the Uniform Condominium Act, or substantially similar laws, existed in 21 States. The Uniform Planned Community Act was the law in one State (from the Prefatory Note to the UCIOA 1994). The NCCUSL website (<http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uca.asp> (accessed 27 June 2007)) would suggest that the Uniform Condominium Act itself is currently the law in only 12 states. States with large numbers of condominium units, such as California and New York, have not adopted any Uniform Act, so would appear to use their own locally-drafted statutes.
217 This would seem to be the procedure referred to in Clarke on Commonhold at 22[4]. It would appear that the intention of those who drafted the Uniform Condominium Act (1980) and the UCIOA 1982 was that this should be the policy of Acts derived from it.
The position of condominiums and planned communities under the UCIOA 1994 would therefore seem similar, though not identical, to the restricted liability of the original Aldridge proposals, but this is not the whole story. In the United States, whether one is dealing with a condominium or a planned community will tend to be more important than whether the homeowners' association is incorporated or unincorporated. With a condominium, the ‘common elements’, although managed by the association, will be vested in the unit-owners as tenants in common, so they, and not the association, may be held to be in occupation for the purpose of defending tort claims. Thus, under the law of some states, unit holders have been held to be jointly and severally liable for accidents on the common elements, even if the homeowners' association has corporate status. Section 3-111 of the UCIOA 1994 therefore abrogates this line of decisions. The Comment to it explains:

This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. This changes the law in States where plaintiffs are forced to name individual unit owners as the real parties in interest to any action brought against the association. The subsection also provides that a unit owner is

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218 It should be noted that, in US law, the distinction between a ‘condominium’ and a ‘planned community’ is that, in the former, the ‘common elements’ will be vested in the unit owners as tenants in common, but in the latter they will be vested in the association: see Rosenberry, above n 76 at 5-6, and UCIOA 1994, § 1-103 (the ‘definition section’). Relevant parts of this section:

‘Definitions:

....’(7) ‘Common interest community’ means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration....’

‘(8) ‘Condominium’ means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners.’

‘(23) ‘Planned community’ means a common interest community that is not a condominium or a cooperative. A condominium or cooperative may be part of a planned community.’

219 The UCIOA 1994 goes on to deal with the position with co-operatives, as opposed to condominiums or planned communities, the position with co-operatives being potentially even more complicated, but beyond the scope of this study.

220 The usual term in the United States for the ‘common parts’.

221 Ruoff v Harbor Creek Community Association (above n 85) is an example of this.
not precluded from bringing an action in tort or contract against the association solely because he is a unit owner or a member or officer of the association. 222

It then continues:

This draft makes clear what the drafters of the Uniform Condominium Act and the first version of this Act intended: that the form in which common elements are owned – whether in a condominium, planned community or cooperative – should not impose joint and several personal liability on condominium owners, when no such liability exists for owners in planned communities. Thus, the 1994 amendment to Section 3-111(a) rejects the decision in Ruoff v. Harbor Creek Community Association [...]. 223 Rather, the result under both this section and Section 3-117 – which imposes liability on unit owners for unsatisfied judgments against the association in proportion to their common expense liabilities – is consistent with the decision in Dutcher v. Owens[...]. 224

It would seem, therefore, that under US law the association may be several stages removed from potential insolvency if a claim is made in respect of catastrophic personal injuries sustained on the common elements:

1. If the common elements are vested in the unit owners as tenants in common, and Section 3-111 of the UCIOA 1994 has not been implemented, they may personally be jointly and severally liable. The basis of the decision in Ruoff 225 was that the common elements were vested in the unit-owners as tenants in common even though in that case the Home Owners’ Association was a not-for-profit corporation with full limited liability. If Section 3-111 of the UCIOA 1994 has not been implemented, it would seem to be irrelevant whether or not the condominium association is incorporated.

2. The decision in Ruoff 226 is not, however, the inevitable conclusion. In Dutcher v Owens 227 the tenants of a unit in a condominium sued the unit owner, the condominium association and others to recover for property loss sustained in a

222 UCIOA 1994, s.3-111, Comment, para 1.
223 Case citations omitted: above, n 85.
224 UCIOA 1994, s 3-111, Comment, para 4.
225 Ruoff v Harbor Creek Community Association, above n 85.
226 Ibid.
227 Above n 85.
fire which had begun in an external light fixture in the common area. The Supreme Court of Texas held that

in case of tort claims arising out of the ownership, use and maintenance of ‘common elements’ liability of a condominium co-owner is limited to his pro rata interest in the regime as a whole and the co-owner is not jointly and severally liable.

This decision was reached in spite of the fact that the condominium association in question was an unincorporated association.

3. If the UCIOA has been implemented,\textsuperscript{228} then under Section 3-117, whether the association is incorporated or unincorporated, and whether one is dealing with a condominium\textsuperscript{229} or a planned community,\textsuperscript{230} only the association will be liable, though a unit owner can still be held liable for his share of any unsatisfied judgment against the association, limited to the extent of his proportionate liability for the common expenses. This closely approximates to ‘restricted liability’ under the original Aldridge scheme.

Against this background, it is hardly surprising that Rosenberry can claim not to have heard of a single case of insolvency in the United States or Australia.\textsuperscript{231} In Australian jurisdictions, insolvency of the body corporate would seem impossible, as the principle of unlimited liability applies. She clearly acknowledges\textsuperscript{232} that, in the United States, vesting the common parts in the unit owners as tenants in common will lead under the general law of tort to their joint and several liability,\textsuperscript{233} unless statute intervenes. When she deals in greater detail with the proposed liability of the CHA in contract and tort, she states: ‘By not allowing the unit owners to be named [as

\footnotesize{\textsuperscript{228} This would seem to be the case generally among planned communities, where the common parts are vested in the association rather than in the unit owners as tenants in common (see ch 1, text to nn 29-30).}

\footnotesize{\textsuperscript{229} Ibid.}

\footnotesize{\textsuperscript{230} Ibid.}

\footnotesize{\textsuperscript{231} Above n 76 and text thereto.}

\footnotesize{\textsuperscript{232} Above n 76 at 6: ‘In the US, if the condominium form of ownership is adopted, it is necessary to enact a statute to guarantee that the co-owners are liable only for their pro-rata share of any liability incurred as a result of their owning the common area as tenants-in-common. Otherwise, one owner can be liable for the entire judgement against the association under the tort theory of joint and several liability.’}
defendants in actions in contract or tort, each is responsible only for the portion of the judgement that represents their allocated share. This eliminates joint and several liability. This reflects the position under the UCIOA 1994, but does not apply to the position under earlier US Uniform Acts, the CLRA or under Australian legislation. Under the CLRA, the common parts are vested in the CHA, which has limited liability, so unit-holders cannot be liable, either as in notional occupation of the common parts, or directly as members of the company. In Australia it seems not to have been argued that the unit-owners are in occupation of the common parts which there, as in US condominiums, are vested in them as tenants in common. However, as the body corporate does not have limited liability, and its members are jointly and severally liable anyway, it would seem otiose to argue the point.

It is, however, surprising, that Rosenberry concludes from this lack of cases of insolvency in the United States and Australia - that 'it is unnecessary to create a separate body of law for commonhold community insolvencies.' As soon as one moves away from unlimited liability of unit-holders some further provision would seem necessary and inevitable. If one has restricted liability, then some mechanism for the orderly imposition of this would seem essential, though insolvency per se

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233 So making the insolvency of any Home Owners’ Corporation highly unlikely.
234 Above n 76 at 40.
235 As to the possible indirect liability of the members, above, text to nn 176-190.
236 Above n 76 and text thereto.
237 Either by virtue of their membership of the association, or as tenants in common of the common elements.
238 The recognition of this would seem to account for the change in policy between Aldridge and the 1990 draft Bill (the 1996 draft Bill following the latter) (above, text to n 67). It is possible that the procedure in the US for a ‘judgment lien’ to bind all units works more efficiently than would the procedure for imposing a charging order over all units in England. Under the UCIOA 1994, s 3-117: ‘(a) In a condominium or planned community: (1) Except as provided in paragraph (2), a judgment for money against the association [if recorded] [if docketed] [if [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment]], is not a lien on the common elements, but is a lien in favor of the judgment lien holder against all of the units in the common interest community at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.’ Payment of the unit owner’s proportionate share discharges the lien on the unit. (JCM Orten and JH Zacharia ‘Allocation of damages for tort liability in common interest communities’ Real Property, Probate and Trust Journal, (Winter 1997) at 6
may still be rare. If one has full limited liability, then a comprehensive code for insolvency will be required, though in practice this can be effected by application, with minor amendments, of the general provisions on corporate insolvency.\(^{239}\) There will then, however, be the problem that winding up a CHA will leave the units with the unsatisfactory status of flying freeholds, and some device such as the ‘successor association’\(^{240}\) will be required. If this is granted automatically, it may be unfair to creditors, but the threat of withholding a succession order - as has been argued by Crabb, and in this chapter - may be used in various ways as a device to undermine limited liability.

2.3 Why has the possible insolvency of the CHA received such attention in England and Wales?

This leads on to consideration of the intriguing point as to why those who have drafted and commented upon the English proposals have apparently become so concerned about the possible insolvency of the CHA. If the CHA had remained a body corporate which could not be wound up, and whose members had restricted personal liability, as in Aldridge,\(^{241}\) or unlimited personal liability, as under Australian strata title systems, insolvency could not have been an issue. The move in 1990 towards combining restricted liability with some provisions for winding-up – which, the present writer would argue, was necessary for the orderly enforcement of judgment debts - brought the issue to the fore. Little attention was given to this point when it first appeared in the 1990 Draft Bill and Consultation Paper, but more attention was given to their 1996 counterparts. Crabb’s widely-cited 1998 article\(^{242}\) drew attention to the issue, explicitly comparing restricted liability under commonhold with the limited liability enjoyed by flat-owners under RMC Leasehold.

\(^{239}\) As under the CLRA.

\(^{240}\) CLRA, s 51.

\(^{241}\) As noted (above, text to n 66), the original Aldridge position would have been practicable only if a convenient way could have been found of enforcing the unpaid part of any debt pro rata against all unit-holders.

\(^{242}\) Above n 59.
Whilst RMC Leasehold has other shortcomings, on this point it was clearly more attractive. One is driven to the conclusion that the English RMC Leasehold system has developed an advantage that the predecessors of strata title or condominium systems in other jurisdictions had not, so there had not been the same demand to offer limited liability to strata titles or condominiums. For example, in New Zealand the ‘cross-lease’ system meant that the owners of the cross-leases, as joint owners of the freehold would be jointly and severally liable anyway. But English leasehold flatowners who acquired the freehold reversion to their block could not own an undivided share in the freehold and so had to set up a company to own it. The limited liability company, as the most familiar, was the type that was adopted, and so, without it ever being planned or fully thought through, leaseholders under RMC Leasehold gained limited liability. They then wanted to retain this advantage under commonhold, and were not prepared to accept the restricted liability offered by pre-2000 models of commonhold, which were essentially drafted as a refinement of Australasian strata titles. Company titles, such as those encountered in New South Wales, in other Australian states, and in the United States, could offer owners the

243 Mr Michael Wills (Parliamentary Secretary, LCD) acknowledged, when opposing an Opposition amendment to allow a court to make unit-holders liable for their share of the debts of a commonhold association, that a failure to give the association limited liability would make it less attractive to flatowners, when compared with RMC Leasehold: ‘...the proposal would put the unit-holder at a distinct disadvantage when compared with an enfranchised leaseholder in similar circumstances. The leaseholder would be protected by existing company law from being pursued personally by a creditor of the company owning the freehold but, in similar circumstances, the commonhold unit holder would not have that protection....the new clause hardly provides an incentive for leaseholders to move to commonhold as opposed to a right-to-enfranchise company.’ (HC Deb vol 381 col 642 (11 March 2002)).

244 Above n 4.

245 As New Zealand — in common with all common law jurisdictions, except for England and Wales - permits the legal estate to be owned in undivided shares.

246 Because of the prohibition of legal tenancies in common, and the restriction of the number of legal joint tenants contained in LPA 1925, s 34 (above, text to nn 3-4, and n 7) features believed to be unique to English land law among common law systems (see OCBJ, p 387).

247 Though restricted liability has greater similarities with some US condominium schemes (above, text to nn 214-217) than with the unlimited liability that prevails in NSW (above, text to nn 210-211).

248 See OCBJ 401-2 for an explanation of this scheme.
benefit of limited liability, but subject to the perennial difficulty in obtaining a secured loan when occupation is by licence rather than by proprietary interest.\textsuperscript{249} Leaseholders under the RMC Leasehold system thus achieved limited liability as a side-effect of the restriction on the number of joint tenants in the LPA 1925, and with full limited liability as a comparator, earlier proposals for an English equivalent based on existing strata title and condominium systems were found wanting.

The Aldridge Report identified the difficulty of giving limited liability to the CHA when it was essential for a commonhold to have one. It proposed the solution of giving the CHA restricted,\textsuperscript{250} rather than limited liability, and providing that the CHA might not be wound up. The 1990 and 1996 draft Bills retained limited liability, but allowed for the CHA to be wound up, and provided that, in that case, the entire commonhold would have to be sold. The CLRA tries to give the CHA limited liability, so it has to be possible to wind it up, and attempts to circumvent the problems that result from not having a CHA by providing for a successor association. This is a bold attempt to get around this difficulty, but it is trying to square a circle which remains determinedly round. For the essence of limited liability is that when a company is dissolved, its individual members - at least in theory - go their separate ways.\textsuperscript{251} The persistent problem with commonhold is that the members have a common interest in there being a CHA, and, if the company is dissolved, the identical

\textsuperscript{249} Intriguingly, New Zealand did evolve, parallel with the ‘cross-lease’ system, a system of ‘company leases’ which seems virtually identical to RMC Leasehold. There seems to be, at least among some, a preference for retaining these over Unit Titles: ‘There seems no good reason to disturb flat and office owning companies already in existence. Some people owning flats by this particular method are attracted by the power that the constitution of the company can confer to give other flat-owners absolute control as to who is permitted to buy or lease flats. Flat-holders are in this way able to exclude a new occupant whom they regard as unsuitable. But we think that no more such schemes should be created.’ \textit{Preliminary Paper 35: Shared ownership of land: A discussion paper} (New Zealand Law Commission, Wellington, 1999) at 1, para 3.

\textsuperscript{250} This resembles United States common interest ownership provisions more than Australian strata title legislation, and may be derived from the \textit{intentions} of the Uniform Condominium Act (1980) and the Uniform Common Interest Ownership Act (1982): above, text to n 224.

\textsuperscript{251} It must be conceded that it is not unknown for a limited company to cease trading when insolvent, to be wound up, and fairly soon afterwards for a new company with the same (or similar) members and undertaking the same (or similar) functions to re-appear. The problem seems to be that the nature of the CHA makes the stratagem rather more transparent!
group of individuals will have to come together to form the new company. When both original and successor CHAs must comprise the same members, perform the same functions, and hold at least some of the same assets, the legal theory of ‘dissolving’ a company becomes difficult to uphold. If not regulated, the procedure could become a vehicle for fraud. But as soon as one requires the approval of the court before the successor association can take over the common parts, then, unless there is clear guidance to the contrary, this could be used as a way of exacting further contributions as the price for there being a successor association, thus defeating the principle of limited liability.

One may, with some justification, ask why this should not also apply to a successor RMC. A tentative explanation is that, because no special provisions need be made to facilitate it, it does not offend the theory that it is an entirely new entity. It does not require any special provisions for it to succeed to the freehold and the common parts: it acquires them by purchase. On the basis that not all the leaseholders may have been ‘participating leaseholders’ in the old RMC, and the participants in the new RMC may be different, it no more offends common notions of fairness than does a new trading company: so long as English company law allows limited companies to be set up so freely, there would seem to be little that one could do to prevent the successor RMC from taking over, even if it means that the members of the original RMC shed their liabilities.

3. TERMINATION OTHERWISE THAN ON INSOLVENCY
Most jurisdictions which have adopted condominium or strata title legislation seem initially not to have dealt with the possibility of terminating a scheme. In the United States, provisions were included from the outset, but later enactments included

252 See preceding note.
253 Clarke on Commonhold 22[2]: ‘In New South Wales and Singapore, strata title systems were established without any provision for termination of the strata title community. It was only after some decades of developing strata title in those jurisdictions that the legislation had to be amended to provide for termination.’ The example is given of the Singapore Land Titles (Strata) (Amendment) Act (1999) permitting a collective sale of a strata development.
254 If, as is often the case, the body corporate has unlimited liability, there would be no need to consider winding-up on insolvency, but the scheme may need to be wound up for other reasons.
more workable provisions.\textsuperscript{255} Provisions need to recognise that the life of a building is finite, and that, even before then, it may be desirable to sell it to allow for a more intensive or lucrative development of the site.

3.1 Voluntary winding-up under commonhold

The provisions included in the CLRA are fairly straightforward, and in essence require either unanimity on the part of unit-holders,\textsuperscript{256} or a resolution supported by at least 80\% of the available votes, plus the approval of the court.\textsuperscript{257} It should be noted that this is the only point where the original Aldridge proposal\textsuperscript{258} that ‘qualified unanimity’\textsuperscript{259} be required to make substantial changes within the commonhold has been retained, and so the requirement is for 80\% of the available votes, not for the 75\% of those present and voting required for a special resolution. The procedure is set out in detail in \textit{Clarke on Commonhold}\textsuperscript{260} and it will not be repeated here. The important point is that, provided there is unanimity, or near unanimity, an orderly procedure exists to terminate the commonhold and to distribute the proceeds of its sale. There are some possible unresolved difficulties. No specific provision has been made for the discharge of mortgages on units. When any termination application is granted, and the CHA becomes entitled to be registered as the proprietor of the freehold estate in each unit,\textsuperscript{261} any registered charges remain binding, so it is likely that all mortgages will be discharged on the sale by the liquidator of the property comprising the former commonhold.\textsuperscript{262} There may be scope for argument as to the

\begin{footnotesize}
\begin{enumerate}
  \item \textit{Clarke on Commonhold} 22[2], nn 2-3.
  \item CLRA, s 44.
  \item CLRA, s 45.
  \item \textit{Aldridge} 7.5, 13.20.
  \item I.e. unanimity, or an 80\% majority plus the approval of the court: 1990 draft Bill, cls 32(8), 50(4) & sch 1, para 5; 1996 draft Bill, cls 15(8), 17(3). As this level of agreement is not required elsewhere in the CLRA, it does not use the term. It would have been required to make \textit{any} amendment to the ‘Commonhold Declaration’: see ch 5, text to nn 251-261.
  \item CLRA, s 49(3). It should be noted that at this stage the unit titles do not and cannot ‘collapse back’ (a term used in \textit{Clarke on Commonhold} 22[8]) into the title of the common parts: the units remain separate titles, each subject to any mortgages. The titles could not be consolidated into one unless and until all mortgages and charges were redeemed.
  \item See \textit{Clarke on Commonhold} 22[15], esp n 3. There could be a difficulty here if the sale proceeds are likely to discharge the charges on the units in aggregate, but one or more units is subject to ‘negative
\end{enumerate}
\end{footnotesize}
precise division of the assets of the commonhold. It was previously proposed\(^{263}\) that, just as the Commonhold Declaration would allocate votes and liability for service charge contributions, it should also allocate a share of the capital value, which would be applied if the commonhold were wound up. It is submitted that the CLRA is correct not to follow this procedure, but to leave it for negotiation, if necessary with expert valuation evidence. It is also submitted that it would not be correct for the proportion of the commonhold assessment and reserve fund levy\(^{264}\) to determine capital shares on termination. A simple example will illustrate this. In the case of a block of flats of identical size, some of which overlook the sea, and others do not, they clearly should all be liable for the same proportion of the commonhold contributions, but they may have very different capital values, depending on their aspect. The earlier commonhold proposals could have accommodated this by having

equity.' \(\text{Clarke}\) suggests that it is unlikely that unit-holders would consent to a termination unless it was clear that their mortgages could be repaid, but is this necessarily the case? An attractive offer might be received from a developer for the site of the commonhold which a unit-holder might wish to accept even if, because of negative equity, it would leave him owing a mortgage debt. Alternatively, if there were a termination with an 80% majority under CLRA, s 45, the unit-holder with negative equity might be one of the dissentients. Could he be forced to sell, and to remain liable for the unsecured mortgage debt? Could a mortgagee thus find that part of its debt became unsecured? Even those members of the Council of Mortgage Lenders who are prepared to accept commonhold units as security are clearly unhappy with the statutory provisions as the June 2007 edition of the \textit{CML Handbook} (<http://www.cml.org.uk/handbook/frontpage.aspx> accessed 11 September 2007) contains a specific requirement (5.5.6.4) that those acting for them should ‘ensure that the CCS provides that in the event of a voluntary termination of the commonhold, the termination statement provides that the unit-holders will ensure that any mortgage secured on their unit is repaid on termination.’ But this does not really protect the lender, as the unit-holders may always amend the CCS; even if the lender’s mortgage terms allow it to exercise the unit-holder’s votes, it may be outvoted. In practice it is likely that many voluntary terminations will result from an attractive offer to purchase the site of a commonhold for redevelopment, so other unit-holders may be willing, perhaps under a condition imposed by the court, to forego a small proportion of their profit and pay off the balance of others’ mortgages in order to secure a substantial overall gain.

\(^{263}\) \textit{Aldridge} 9.7; 1990 draft Bill, cl 13(4)(a)(iii); 1996 draft Bill, cl 5(3)(a)(iii).

\(^{264}\) The fact that these proportions may be different - see para 59 in \textit{Commonhold - Guidance on the drafting of a Commonhold Community Statement including Specimen Local Rules} (DCA, December 2004) - would make it unsuitable as the basis for distribution of capital.
the capital value fraction differ from the service charge fraction, but it would seem unwise to make the capital values unalterable. To develop the example further: what if, because of adjacent redevelopments, some flats lose or gain an attractive view? Further, the interiors of some flats may have been maintained and indeed fitted out to a much higher standard than others. For these reasons it is suggested that the stance of the CLRA on this is correct.

The CCS may make provisions requiring the termination statement to make arrangements of a specified kind, or to be determined in a specified manner. It is submitted that the view taken in Clarke on Commonhold is correct and that it will generally - for the reasons stated above - be unwise to attempt to deal in the CCS with a matter which is not likely to occur for some time. A provision which prescribes the method of determining a valuation may be more appropriate, as it is less likely that provisions as to the manner of determining issues will become obsolete or inappropriate. For example, it may be useful to have a provision requiring that a single valuation of all the flats to establish the proportions for division of the proceeds be carried out by a chartered surveyor appointed by the CHA or the liquidator. In any event, the court has power to disapply these provisions if appropriate.

3.1.1 Voluntary termination without unanimity

The CLRA is not especially clear on what is to happen if the CHA should approve termination with at least 80% agreement, but the dissentients continue to object. The liquidator is then required to apply to the court for an order determining both the terms and conditions upon which a termination application may be made, and the terms of the termination statement to accompany it. The dissentients will presumably respond to that application, putting forward their objections, but it is not

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265 Alldridge 8.4; 1990 draft Bill, cl 13(4)(a)(ii); 1996 draft Bill, cl 5(3)(a)(ii). Under Alldridge identical proportions would have applied to the allocation of votes, service charges, and capital shares unless the contrary was provided for: 8.4.

266 Chattels which became fixtures would technically become part of the realty: TSB Bank plc v Botham (1996) 73 P & CR D1 (CA) deals with whether certain typical modern examples of fitted furniture have become fixtures.

267 CLRA, s 47(2); see Clarke on Commonhold 7[48].

268 CLRA, s 47(4), and Clarke on Commonhold 7[48] n 2 and 22[10] - 22[14]. Others may argue that it is better to make provision as a default position, and to apply to depart from them if necessary.

269 CLRA, s 45(2).
clear whether the court can refuse altogether to allow a termination application, perhaps on the basis that it would inevitably be oppressive to the dissentients, and that no conditions could be imposed which would redress any unfairness. If the minority’s sole objection was that they would prefer to retain their homes rather than sell for a large profit, it seems unlikely that it would be sustained.\(^{270}\) The court may also be called upon to deal with questions arising when certain unit-holders have ‘negative equity’ in their units.\(^{271}\)

The legal position of owners during the course of a voluntary termination is not wholly clear.\(^{272}\) The CHA will become the registered proprietor of all the units as well as the common parts.\(^{273}\) The titles all remain separate\(^{274}\) and the Land Registrar must cancel all the commonhold entries on every title that is affected,\(^{275}\) so at that point the land ceases to be ‘commonhold land’. Doubts have been expressed as to whether mortgagees remain adequately protected, but each title remains subject to any charges that have been registered against it,\(^{276}\) and it is assumed that, in accordance with the usual principles of insolvency law, the liquidator\(^{277}\) or the court\(^{278}\) would not accept any termination statement which did not provide for all charges to be satisfied out of the proceeds of sale of the commonhold land. There could, however, be difficulties if certain units were subject to negative equity.\(^{279}\)

Crabb\(^{280}\) takes the view that, on the cancellation of the commonhold entries, the CHA thereafter holds each unit on trust for the former unit-holder.\(^{281}\)

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\(^{270}\) Kenny (see ch 2, n 53 at 8) feels that this provision is tilted too far in favour of the majority, who could use it to oppress the minority.

\(^{271}\) Above, n 262.

\(^{272}\) The mechanics of voluntary termination are discussed in some detail in Clarke on Commonhold 22[8]-[18].

\(^{273}\) CLRA, s 49(3). The liquidator, not the directors, will act on behalf of the CHA.

\(^{274}\) This would seem to answer Riddall’s argument (see ch 2, nn 70, 73) that an estate in a unit is a determinable fee.

\(^{275}\) Commonhold (Land Registration) Rules 2004, r 21(2)(b).

\(^{276}\) This is the view of Crabb in Clarke on Commonhold 22[15] n 3.

\(^{277}\) On a termination under CLRA, s 44.

\(^{278}\) On a termination under CLRA, s 45.

\(^{279}\) Above n 262.

\(^{280}\) Clarke on Commonhold 22[17].
hand, the Commonhold (Land Registration) Rules 2004[^282] do not suggest that, on registering the CHA as the proprietor of each unit, a restriction should be entered so as to indicate a bare trust. If the CHA holds each unit on trust for the former owner, then presumably each beneficial interest remains subject to any former charge. How would this take effect if any unit was subject to negative equity? Crabb points out that if the CHA does hold each unit on trust for its former owner it may present problems if a termination begins as a voluntary termination but the commonhold turns out to be insolvent[^283]. The better view must be that on termination each former unit-holder has financial claims against the CHA rather than any beneficial interest in a unit.

### 3.2 Voluntary termination of an RMC Leasehold development

Comparing, however, the position on voluntary termination of a commonhold with that under RMC Leasehold, it must be conceded that RMC Leasehold fails to deal with the problem of sale for redevelopment at all well. The literature on long leasehold flats does not address this issue. The RMC could sell the freehold to an outside investor, but that would not affect the leases, and indeed the leaseholders would retain their right individually to extend them[^284]. What may have been the original presumption when 99 or 125 year leases were granted[^285] - that the building might be coming to the end of its useful life at the end of the term, or, at the least, that its life expectancy could be reviewed then – appears thwarted. With 999 year leases, it is scarcely credible that anyone can have expected the building to be standing at the end of the term, so presumably the use of such a term indicates that the leaseholder

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[^281]: She argues, ibid, n 9, that this is the Government's view in *Termination of a Commonhold, a Consultation Document* (above n 189) at 2.5, but the actual words used are rather equivocal to support this conclusion: 'On termination of the commonhold, the unit-holders will hold a beneficial interest in the land. The extent of that interest will be determined by the termination statement, the basis of which will have been approved either by a 100% resolution of the members, or an 80% resolution, together with the approval of the court.' In any event, it seems unwise to place too much weight on this statement, which is surely inaccurate in stating that the unit-holders would 'hold a beneficial interest in the land' (see the body of the text).

[^282]: R 21.

[^283]: *Clarke on Commonhold* 22[18].

[^284]: LRHUDA, pt I, ch II.

[^285]: It is far from clear that it was ever presumed that, under a building lease, the building would be coming to the end of its useful life at the end of the term.
should have an interest in the building so long as it stands, and that the leaseholder at
the time of the eventual sale of the site will participate in it to secure his fair share of
the site value.  

In spite of lease renewals, the expiry of leases by effluxion of time can still
in theory be used as an opportunity for redevelopment, because of the provision allowing a landlord, with the sanction of the court, to refuse to allow a leaseholder to
renew his lease if the lease is due to terminate within five years, and the landlord
satisfies the court that he intends to demolish or reconstruct the building in which the
flat is contained once he has regained possession. This could seldom apply in
practice, as the vast majority of leases will have become completely unmortgageable
and thus unsaleable long before only five years remain unexpired of the term. The
provision that the new term to be granted is ‘90 years on the residue of the existing
term’ should mean that is possible, if all the terms were granted originally with the
same expiry date, to ensure that the expiry dates of the extended leases will continue
to coincide, but, again, it seems unlikely that an extended lease would continue
without further renewal until as few as five years remained unexpired. A landlord -
including in theory an RMC - is more likely to be able to obtain possession under the
provision allowing possession to be gained for demolition or reconstruction by
reference to the expiry date of the original lease. If this opportunity is missed,
however, the opportunity would not arise again until the final five years of the
renewed term, which would remain a ‘window of opportunity’ even if - as is likely -

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286 If a high-rise building were simply to fall down, and the owner of the freehold reversion were to sell
the site for low rise development - unlikely, but not impossible - would the owners (or lessees) of the
airspace on the upper floors have any redress? On the basis of the discussion in K Gray ‘Property in
Thin Air’ [1991] CLJ 252 at 259, probably not.

287 Under LRHUDA, pt I, ch II.

288 LRHUDA, s 47.

289 There may be an exception in the case of short terms or ‘fag-end’ leases in premier locations e.g.
some Central London blocks, where wealthy buyers do not need a mortgage and look upon the
purchase of a short lease as a capitalisation of the rent that they might otherwise pay.

290 See LRHUDA, s 56(1)(b).

291 A landlord could obtain possession at this stage under LRHUDA, s 61(2)(b).
the lease were renewed again in the meantime. The opportunities for a landlord to regain possession to redevelop are therefore very limited. If leases have been granted with different expiry dates it may be impossible, even in theory, to take advantage of these provisions.

The scope of the preservation of original expiry dates is also restricted in that it applies only to leases which have been renewed under the statutory procedure. Whereas well-advised institutional ground landlords may ensure that all leases are renewed under the statutory procedure so as to retain their rights, other landlords may prefer - even if an application has been threatened or made - that any extended lease should be granted by agreement. An RMC ground landlord is even less likely to insist upon leases being renewed under the statutory procedure. Indeed, following enfranchisement many RMCs invite their member leaseholders to take up an extended lease, which inevitably means that the future ‘window of opportunity’ based on the expiry of the original term is lost.

Even if an RMC could take advantage of the preservation of original expiry dates, it seems designed with OGLs, rather than RMC/landlords in mind; whilst the large institutional landlord would be able to pay the compensation required on the premature termination of an extended lease, it is difficult to imagine that an RMC could do this, unless some arrangement could be made with the developer to whom the RMC was intending to sell the site whereby an advance payment was made as a sort of bridging loan. This would be dependent upon the developer being satisfied that the RMC could successfully obtain possession from all leaseholders to enable the

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292 LRHUDA, s 61(2)(a): ‘at any time during the period of 12 months ending with the term date of the lease in relation to which the right to acquire a new lease was exercised’. This applies even if the lease is further renewed in the meantime: LRHUDA, s 61(3).
293 See LRHUDA, s 61(3).
294 i.e. as ‘windows of opportunity’ for recovery of possession: LRHUDA, s 61.
295 i.e. under LRHUDA, s 56, following an application under s 47.
296 Either because it is more straightforward, or perhaps so as to avoid the requirement that, on a statutory renewal, the ground rent should be reduced to a peppercorn, and so effectively capitalised: LRHUDA, s 56(1).
297 Under LRHUDA, sch 14.
proposed deal to go through. It does not seem likely that the procedure has much been used, as no cases are reported. 298

If, however, these practical and financial difficulties could be overcome, a smaller majority would be able to put a sale into effect under RMC/leasehold than would be required under commonhold. A group of leaseholders 299 who wanted to regain possession for the purposes of redevelopment 300 would normally need only to control a bare majority of the votes of the RMC in General Meeting to be able to elect a slate of sympathetic directors to the Board to implement the proposals.

One of the matters considered by the Nugee Committee was how to deal with blocks of flats which were reaching the end of their useful life. It was stated that one London borough had estimated that up to 10% of the private blocks in its area fell into that category. 301 It was felt that some blocks might deteriorate to the point that a closing order had to be served, 302 and that a more orderly solution would be for tenants to sell by mutual agreement, but that some tenants would either put up with a poor state of affairs, or would hold out for a better price for selling up. 303 The matter had previously been considered both by the Wilberforce Committee and the Law Commission. 304 The former recommended that a court should have a general power to declare the effective life of a building to be at an end and to make provision for its sale and the division of the proceeds amongst those interested. 305 The latter, when considering its ‘development obligations’ scheme for freehold flats, did not feel able to make any concrete suggestions for ‘the “end of the life of the building” problem’. 306 It recognised that when the problem affected freehold flats, 307 it would

298 There are no citations in either Hill and Redman or Westlaw.
299 Or a single member of the RMC who controlled at least half the votes, usually by owning at least half of the flats. If this member were a large company, paying compensation to the other leaseholders for the loss of their leases might be a practicable proposition.
300 Under LRHUDA, s 61.
301 Nugee Report 7.2.22. It is not stated which London Borough this was, though Westminster, and Kensington and Chelsea, would be the only likely candidates.
302 Ibid 7.2.23.
303 Ibid 7.2.24.
304 Law Com No 127, paras 26.8 - 26.11.
305 Wilberforce Report para 49.
306 Law Com No 127, paras 26.10 - 26.11.
mean that flat-owners could be left owning uninhabitable flats, or even airspace, though the same could apply to leasehold flats.\textsuperscript{308} It also recognised\textsuperscript{309} that flat-owners' views on when redevelopment was necessary would vary, and that 'any solution must necessarily involve turning people out of their homes against their will in return for a monetary payment of variable amount.'\textsuperscript{310} The Law Commission\textsuperscript{311} and also the \textit{Nugee Report}\textsuperscript{312} ultimately accepted that compulsory purchase might be the only solution.

It is not really clear whether the tentative proposals in the \textit{Nugee Report} were intended to address the problems of mansion blocks let at rack rents, or where the residents were long leaseholders, or both. Evidence is scanty as to whether the problem is still relevant. One gains the general impression that, in practice, over the years, blocks of flats in London have tended to be refurbished - often very extensively - and earlier pessimistic prognostications may not have proved true. Alternatively, it may be that the steady rise in property prices has meant that protected tenants and long leaseholders in blocks which are past economic repair have been prepared to sell up voluntarily.

\textbf{3.2.1 An illustrative case study}

As blocks of privately-owned flats became common later outside London, it may be that some of these problems have yet to be generally encountered. It is perhaps significant that a recent Court of Appeal case, \textit{Bluestorm Ltd v Portvale Holdings Ltd}\textsuperscript{313} involved a block of flats (Embassy Court) built in the 1930s in Brighton, one of the first south coast towns where the building of flats was to become common. The factual background rather than the details of the dispute is relevant to the present

\footnotesize
\begin{itemize}
\item\textsuperscript{307} It should be recalled that, as these proposals pre-dated commonhold and did not therefore include any provision for a CHA, the solution of terminating the ownership arrangements by a 'super-majority' vote could not readily be adopted.
\item\textsuperscript{308} The position with leasehold flats has been slightly eased by LRHUDA, ss 47, 61, but, as argued above, the scope of these sections is limited; and neither is likely to be relevant if 999 year leases have been granted.
\item\textsuperscript{309} Law Com No 127, para 26.10.
\item\textsuperscript{310} Ibid, para 26.11.
\item\textsuperscript{311} Ibid.
\item\textsuperscript{312} Para 7.2.25.
\item\textsuperscript{313} [2004] EWCA Civ 289, [2004] 2 EGLR 38.
\end{itemize}
discussion. For the previous 15 years, the building had been ‘subject to neglect, lack of repair and under-investment’\(^{314}\) which one of the parties claimed would cost £2.6 million to put right.\(^{315}\) The sequence of events is also instructive: a property company, Portvale Holdings Ltd, used a subsidiary, Portvale Ltd, to acquire the freehold of the block,\(^{316}\) and Portvale Holdings acquired the leasehold interests in 11 flats. An individual, who was the solicitor to the Portvale Group, and possibly a director in it, progressively acquired a further 15 flats. It is suggested that this pattern is typical of blocks of flats which, if they may not have reached the end of their useful lives, are in desperate need of refurbishment, possibly on a scale beyond that which can generally be funded from an increased service charge. The judgment illustrates that, as one investor - or a group acting together - successively acquires the leases of flats, it can become increasingly difficult for an RMC\(^{317}\) to manage the block. There is a danger that poor physical environment, and an awareness among local people and conveyancers of disputes at the block, mean that flats cannot be sold at anything like the price they would otherwise obtain. A low offer from an investor then becomes attractive, especially if sales have previously fallen through.\(^{318}\)

The RMC Leasehold system seems to cope badly with the situation where a majority, possibly large, of flat-owners would prefer to sell for redevelopment, and a small minority wish to stay put. Commonhold will allow, with the safeguard of the approval of the court, the wishes of a substantial majority to prevail.\(^{319}\) Ironically, leasehold would give the owner-occupier who is part of a recalcitrant minority greater security than would the ‘freehold with special attributes’ under commonhold. It is

\(^{314}\) Ibid [1].

\(^{315}\) Ibid [10]. This figure was not necessarily accepted by the court or the claimant (respondent).

\(^{316}\) The subsidiary was subsequently liquidated when made subject to an order for specific performance of repairing covenants, leaving the block effectively without a landlord.

\(^{317}\) Bluestorm Ltd, the claimant (respondent) here, would not satisfy the definition of an RMC used in this study, as whilst it was set up by certain leaseholders to acquire the freehold, it represented only some 26 flat-owners, whereas the defendant (appellant) and its associates represented 35 (see [8]). (These figures have probably been transposed in error, as it is stated at [3],[4] that the defendant represented 26). The total number of flats in the 12-storey block was not stated, but there would appear to have been 73 flats in all.

\(^{318}\) The writer has come across similar rather intractable scenarios professionally.

\(^{319}\) CLRA, s 45.
submitted that securely entrenching the rights of a minority of flat-owners here is likely not to be desirable, as its corollary may be that other flat-owners (or perhaps more likely their tenants) are having to put up with unacceptable housing conditions. It is likely that statute will eventually have to provide for a ‘super-majority’ of leaseholders to authorise the sale of a block for redevelopment.

3.3 Comparison of RMC Leasehold and commonhold

Arguably neither RMC Leasehold nor commonhold copes well with the building that is in decline, and is coming to the end of its useful life because of lack of repair. The bias in commonhold towards the accumulation of a sinking fund\(^{320}\) may here give it an advantage over RMC Leasehold, but there may still come a point where repairs become simply too expensive. A vicious circle then sets in, whereby the flats deteriorate, and tend to be acquired either by owner-occupiers who cannot afford anything better, or by buy-to-let investors who will let for what the market will bear; the former will be unable to afford, and the latter will be unwilling to pay,\(^{321}\) the substantial service charges necessary to put the block in repair.\(^{322}\) The difficulty of raising money on the security of the reversion (in RMC Leasehold) or on the basis of the ‘income stream’ (in commonhold) is not very relevant, as whether or not repairs are funded by borrowing, the higher service charges\(^{323}\) have still to be paid by residents who are the least likely to be able to afford them.\(^{324}\) The ideal must be for the block to be kept in good repair by a combination of realistic service charges, and use of reserve funds; if this becomes uneconomic, then in commonhold there is the possibility of the unit-owners voting for a termination order; with RMC Leasehold

\(^{320}\) See ch 4, text to n 204.

\(^{321}\) As the service charges would take up too high a proportion of a depressed rent.

\(^{322}\) This may be a reason why the problem does not seem so acute in central London, in spite of the fact that flats there tend to have been originally constructed long before flats elsewhere. The writer has knowledge of a block of mansion flats in Victoria, SW1, which were constructed at the end of the 19th century where the (enfranchised leasehold) residents are quite able and willing to pay annual service charges in excess of £5,000.

\(^{323}\) Or commonhold contributions.

\(^{324}\) Investors may also not be able to afford higher charges: above n 321.
there is the theoretical possibility of the landlord seeking possession. With either, in practice it seems more likely that an investor will progressively acquire the individual units, until one person controls at least 50% of the votes, and so can nominate all the directors. The rights of the other members of the RMC are then of little consequence, and the tenure of the remaining flats has, for most practical purposes, reverted to OGL Leasehold. The investor who owns a majority of the flats and controls the RMC will then either wish to demolish and rebuild, or else extensively refurbish and sell the units again. Whilst it is understandable that leaseholders - both of RMCs and of OGLs - prefer 999 year leases to 99 or 125 year leases, the shorter terms seem to hold out better prospects for the orderly redevelopment of the block.

4. CONCLUSIONS

Comparing the appropriateness of the corporate structure per se, commonhold would seem to have a slight advantage over RMC Leasehold. The structure is tailor-made for its purpose, the standard form of Memorandum and Articles of Association is prescribed, and any variations should be obvious. It is suggested, however, that this is a minor advantage, as it is possible to devise a Memorandum and Articles of Association for an RMC which is equally appropriate. Commonhold would appear to have the disadvantage that the Memorandum and Articles of a CHA may have been amended by Regulation without the directors and unit-holders being aware of it, so giving rise to confusion. The most significant point upon which commonhold will always have a slight advantage is in the disapplication of requirement that an incoming owner must agree to become a member.

On the other hand, there can be no real doubt that RMC Leasehold would appear to deliver limited liability for the leaseholder more fully than does

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325 Under LRHUDA, ss. 47 and 61. Even these sections will not apply if 999 year leases were originally granted. It is assumed that if leaseholders can command a 50% majority they will be able to control the RMC through the election of directors.

326 In practice termination of a commonhold under CLRA, s 44, 45, could more often apply when a viable commonhold receives a highly attractive offer to purchase, with a view to redevelopment.

327 If other flat-owners are apathetic the owner of numerous individual flats may in practice have achieved effective control of an RMC or CHA before controlling 50% of the votes.

328 Above nn 54-56 and text thereto.

329 Above nn 33, 37.
commonhold for the unit-holder. The several respects in which the limited liability of a commonhold may not be as complete as was intended have been identified and discussed. RMC Leasehold has been commonly encountered for three or four decades, and – apart from the doubts over indirect liability recently expressed by Crabb\textsuperscript{330} - there is nothing to suggest that the limited liability that it offers is not complete.

Commonhold Insolvency Regulations should give further guidance on how far the misconduct of the CHA may justify the withholding of the appointment of a successor association, which in turn would reflect how far this may be used as a lever to undermine limited liability. They should also clarify the extent to which indirect liability, both primary and secondary, may be pursued by a liquidator. The result of these may be to deliver more fully limited liability to the CHA, but it is unlikely to surpass the degree of limited liability given by RMC Leasehold, and may still not equal it.

Whether leaseholders in RMC leasehold should have the degree of protection from liability which they appear to enjoy is perhaps open to question. It would seem that other forms of flat ownership in other jurisdictions do not offer it to the same extent, and it is an accident of legal history that delivered it in England and Wales, namely the fact that because of the prohibition of legal tenancies in common by the 1925 property legislation, and the restriction on the number of legal joint tenants, it proved necessary for leaseholders who co-owned their freehold to set up a limited liability company.

When it comes to termination in circumstances other than insolvency, and especially if a block is reaching the end of its life, commonhold would seem to provide for this to be effected in a much more orderly manner. The circumstances in which, under section 61 of the LRHUDA, possession can be recovered for reconstruction are unlikely to be practicable for an RMC to use; and the use of 999 year leases effectively excludes the possibility altogether. Ironically the time-limited ownership offered by leasehold may offer more security than the notional indefinite freehold ownership of commonhold. It is likely that some legislative provision will

\textsuperscript{330} Above nn 192-193 and text thereto.
eventually have to be introduced to provide for the orderly disposal of blocks of leasehold flats which are approaching the end of their useful life.
Chapter 7: Conclusions

Having reviewed the principal areas of difference between commonhold and RMC Leasehold, we are now in a position to attempt some overall balance sheet to summarise the respective advantages of the two forms of tenure.

1. Freehold – more secure ownership?

To begin, it must be recognised that commonhold does deliver freehold ownership of flats: a ‘freehold with special attributes’. For many, this is an advantage in itself. Leasehold has gained a bad name over the years, originally as a tenure for houses, and more recently for flats. Buyers have often not discriminated between OGL Leasehold and RMC Leasehold, and a fresh start with a new form of tenure may be seen as an advantage. Under commonhold, controls on transferring units are prohibited, which clearly differentiates commonhold from leasehold on this important issue.¹ On the other hand, consideration of the special provisions of Land Registry practice to accommodate commonhold illustrates that, in several practical respects, it has more in common with leasehold developments than with ‘ordinary’ freehold.²

However, in the final analysis, the aggregate of the ‘sticks in the bundle’ of ownership in commonhold and in RMC Leasehold must be the same: the difference must lie in how those sticks are distributed between the owners as individuals and the owners as a community, represented by the body corporate.

One might expect that the concomitant of freehold ownership would be that the unit-holder would enjoy greater security than the leaseholder. The comparison here is very patchy: insofar as a commonhold unit can never be subject to forfeiture,³ there is some truth in the proposition; in that it seems more likely that a unit-holder may incur financial liabilities due to the insolvency of the CHA⁴ than would a leaseholder due to the insolvency of an RMC,⁵ and that such liabilities could even result in the loss of the unit, commonhold may in practice prove the less secure.

Further, if a large majority should want to realise the commonhold for redevelopment,

¹ See ch 2, text to nn 128-183.
² See ch 2, text to nn 112-127.
³ See ch 2, text to nn 98-111.
⁴ See ch 6, text to nn 106-109; to nn 115-118; to nn 174-190; and to nn 200-206.
⁵ See ch 6, text to nn 111-114; to nn 119-131; to nn 191-197; to nn; and text follg n 206.
the position of the minority who objected would seem stronger under RMC Leasehold than under commonhold, which arguably gives insufficient protection to the minority. Whether this should be seen overall as an advantage, however, is more debatable, as it can result in blocks of flats deteriorating inexorably into disrepair, when redevelopment, or comprehensive refurbishment, would be the more appropriate option.

2. Simplification and standardisation
Another objective of commonhold was the simplification of documentation. How this actually takes effect in practice remains to be seen. The fact in commonhold that the legal relationship between the individual unit-holders, and between unit-holders and the CHA, will be governed by a single document removes some of the scope for what can go wrong with leasehold tenure, where it is not unknown for the leases of flats to be inconsistent or unworkable. This advantage should automatically be a concomitant of commonhold. Early proponents of commonhold, however, such as the authors of *Leaseholds: Time for a Change*, or the Aldridge Committee itself, wished to go further, and to achieve a high degree of standardisation, so that, so far as possible, identical documentation should govern all commonhold developments. This is much more difficult to achieve. New South Wales and New Zealand have both found that their original ‘one size fits all’ models for strata titles and unit titles respectively have not proved durable. In New South Wales there has been legislative change to a more flexible model, and similar changes are under consideration in New Zealand. This may be in part a realisation that the assumptions behind the original proposals have proved to be somewhat over-optimistic: but the problem has in any event been exacerbated by the trend, which is certainly present in England and Wales, and seems also to be found in other jurisdictions, for developments to become more complex, with apartments of differing sizes, frequently intermixed with houses...

6 See ch 6, text to nn 269-283; cf. text to nn 284-319.
7 See the views of Kenny: ch 6, n 270.
8 I.e. if the refurbishment were to go beyond what the flat-owners could afford via the service charge.
9 See ch 5, text to nn 104-105.
10 See ch 5, n 130, and text thereto.
11 See ch 5, nn 127-128, and text thereto.
12 See ch 5, nn 124, 284.
and commercial elements, becoming increasingly common. The assumption that most flat developments would be of modest scale overall, and that the units would all be of similar size, which seems implicit in Aldridge, is no longer the case. The scheme of the CLRA seems to be about the best compromise that is available, with the basic provisions of the Memorandum and Articles of Association and the CCS prescribed by regulations, flexibility thereafter in the more detailed provisions, and a requirement that deviations from the basic provisions be clearly shown. The fact that the optional provisions cannot override the prescribed basic provisions, and that neither may override the Regulations, which must themselves be *intra vires* the Act, means that it is possible that a CCS cannot always be taken entirely at is face value, but it is to be hoped that such divergences will be rare. This may depend on how far the Land Registry is prepared to monitor commonhold documentation for compliance with the CLRA and Regulations. It also seems possible that CHAs may continue to follow and to distribute Memorandums and Articles which are not up-to-date in that they no longer comply with amended Regulations. The disadvantages of enforced standardisation are readily to be seen in the provision of the CLRA which seems not allow for a ‘divided assessment’. Attempting to use reserve funds to make up for this deficiency may well cause confusion and further problems. This shortcoming is almost certainly one of the main reasons why commonhold is not being adopted for new developments, and it is likely that it will have to be rectified if commonhold is to be more widely adopted. It must, however, be conceded that even a badly-drawn CCS will be likely to fulfil the purpose of a workable legal framework for a development, which cannot always be said of leasehold schemes.

3. RMC Leasehold – the balance tilted in favour of the community?

The previous chapters have identified many exceptions and qualifications that have to be made when discussing and comparing commonhold and RMC Leasehold. It is a

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13 See ch 4, text to nn 61-64, and nn 83-84. The requirement to provide a proportion of “social housing” in larger developments exacerbates this problem.

14 See ch 5, text to nn 113-116.

15 The fact that the directors of the CHA must certify compliance with these (see ch 5, n 117) is not encouraging.

16 See ch 6, nn 54-56, and text thereto,

17 See ch 5, text to nn 56-84.
complex area, and it is not easy to generalise, but certain common threads can be identified.

One thread which does run through the comparison of commonhold and RMC Leasehold is that, comparing the balance between the rights and powers of the individual flat-owner, and those of the community of flat-owners, as represented by the CHA or RMC, in commonhold the balance is tilted more in favour of the individual unit-holder than in RMC Leasehold. A common criticism of OGL Leasehold tenure is that it gives undue rights and powers to the ground landlord – the ‘mismatch’ between the landlord’s financial stake in the property, and the rights that the law gives him – so this is not surprising. But it has been argued in this study that those rights are more defensible when they are exercised by the RMC on behalf of the owners as a group, and the balance in favour of the RMC/landlord then has its positive aspects. Factors such as:

- the possibility of requiring consent to an assignment of a lease, and so to regulate who may become a leaseholder within the block
- the greater certainty that lettings to renting tenants can be prohibited or controlled
- the existence of forfeiture to secure the financial contributions for common services, in priority to other legal interests in the flat
- the existence of forfeiture to secure, in the last resort, compliance with the covenants contained in the lease; and
- the fact that restrictive covenants can be directly enforced against licensees and occupiers

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18 See ch 5, text to nn 65-80.
19 See ch 2, text to nn 32-47.
20 See ch 2, text to nn 157-183.
21 One cannot really put the point any higher than this: see ch 2, text to nn 222-223.
22 See ch 2, text to nn 216-234
23 See ch 4, text to nn 235-257.
24 See ch 3, text to n 250 to end of chapter.
25 It must be conceded, that, in certain respects, enforcement of obligations, particularly positive obligations, is easier in a commonhold: but we are dealing here with overall impression, and the point has been discussed in detail in ch 3.
all contribute to an impression that RMC Leasehold can be used, if the leaseholders have the will so to use it, as the vehicle for a tenure providing for tight regulation: a block where contributions are promptly paid, rules enforced, and perhaps thereby the character of the development preserved. It is unlikely that such a development would appeal to all prospective purchasers, but, it is submitted, the law should continue to make this possible for those who voluntarily join such a scheme.

4. The static/dynamic distinction
The possibility of having a tightly-regulated block is unlikely to be of value unless there is some prospect that such a regime can be preserved. This is likely to be the case, as RMC Leasehold, deriving from a clearly contractual relationship, tends to be a static regime, whereas commonhold is governed by the statute-based CCS, and can thus be more dynamic, the CCS having the quality of a living document, able to respond to changing circumstances and the wishes of the majority.\(^\text{26}\) This is shown most clearly in the provisions for variation of leases when compared with the provisions for amending the CCS. It has been argued that it is still too difficult to vary leases,\(^\text{27}\) and too easy to amend the CCS.\(^\text{28}\) The latter can hardly be viewed as an inherent characteristic of commonhold, as under the Aldridge proposals, and the 1990 and 1996 draft bills, it would have been considerably more difficult to amend the commonhold declaration.\(^\text{29}\) Adopting the company law model for the body corporate meant that it was no longer thought appropriate to continue with the principle of ‘qualified unanimity’ before the CCS could be amended, and the company law models of the ordinary and special resolutions were instead adopted, though with some additional safeguards.\(^\text{30}\) To expect the documents governing a development to remain unchanged for 99 years, still less 999 years, is unrealistic, and to have some facility to amend the CCS is clearly to be welcomed. The majorities envisaged in the original Aldridge proposals would, however, seem to strike the better balance between the desirability of incorporating stability into the instrument governing the

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\(^{26}\) P Kenny (see ch 2, n 53, at 9) characterises commonhold as ‘fluid’: both ‘fluid’ and ‘dynamic’ are open to the criticism that they are loaded terms.

\(^{27}\) See ch 5, text to nn 101-103.

\(^{28}\) See ch 5, text to nn 228-238; text to n 261.

\(^{29}\) See ch 5, text to nn 239-244.

\(^{30}\) See ch 5, text to nn 262-273.
commonhold, and the countervailing advantage of being able to amend it in accordance with changed circumstances; and the more stringent requirements for amendment are not incompatible with the company law model.31

One may also question how far mortgagees are likely to favour lending on the security of a unit, if the character of the block in which it is situated can too easily be changed.

Conversely, the provisions for variation of leases remain both too rigid and too uncertain in their scope, and suggestions have been made as to how some minor amendments could be made to the law on this.32

The tighter regulation characteristic of RMC Leasehold is also reflected in the provisions regulating financial contributions, though these tend to tilt the balance of power in favour of individual leaseholders, and against the RMC. Whereas a CHA can levy commonhold contributions for any purpose, subject to the weak provisions as to consultation included in the CCS, the RMC is strictly bound by the terms of the lease dealing with the service charge, and also by the (stronger) provisions relating to consultation contained in section 20 of the LTA 1985, and those relating to reasonableness contained in section 19. If there is not some flexibility – such as a broad ‘sweeping up’ clause – contained in the service charge provisions of the lease, then arguably the RMC will be hamstrung here. Provisions on consultation and reasonableness which have been designed to protect leaseholders with OGLs may prove unduly onerous when the landlord is an RMC. As Brenan33 points out, a case could be made for relaxing them when the landlord is an RMC, though the difficulty of defining an RMC, and the availability of commonhold as an alternative may make statutory intervention unlikely. On the other hand, the provisions of the CCS tend to the opposite end of the spectrum, in making it difficult for unit-holders to challenge expenditure.34 Any future amendment of commonhold could well reconsider whether the level of commonhold contributions should generally require the approval of the unit-holders in a General Meeting.

31 See text to ch 5, n 273, and to nn 288-290.
32 See ch 5, text follg n 103.
34 This is identified by Larcombe as a drawback of commonhold: see ch 4, n 266.
5. Termination for reasons other than insolvency

Consideration of whether RMC Leasehold can fairly be characterised as static, and commonhold as more dynamic, leads us back to the termination of a development based on either for reasons other than the insolvency of the body corporate. Typically this would arise if some unit-owners wish to sell the block for demolition and redevelopment, but also if it were to be sold for comprehensive refurbishment. Here, in requiring an 80% majority of those who are able to cast a vote, commonhold would seem to strike about the right balance. RMC Leasehold, in making it very difficult to proceed unless there is unanimity, would seem to be storing up problems in the future for leaseholders. Commonhold the better addresses the reality of the situation. It is likely that eventually some provision will have to be introduced to facilitate the sale of a block by a substantial majority of its leaseholders.

6. Liability on insolvency

The scenario where the body corporate becomes insolvent, especially if as a result of a catastrophic uninsured loss, marks a particularly stark contrast between commonhold and RMC Leasehold. From the perspective of the flat-owners, the latter is likely to be seen as having a significant advantage, as it does seem here to deliver fully limited liability. With commonhold, the final answer may depend upon the content of any future Commonhold Insolvency Regulations, and any case law on the extent to which a liquidator may rely upon indirect liability, both primary and secondary.

Until there is clearer guidance on these points, however, it seems safer to assume that it is at least doubtful whether commonhold does deliver full limited liability to unit-holders. This issue has become particularly prominent in the English context because RMC Leasehold very probably does offer fully limited liability; the adoption of the limited liability company as a vehicle to own the common parts would seem to be an indirect result of the decision of the authors of the 1925 property law reforms to abolish legal tenancies in common, and to restrict the number of legal joint tenants to four. The fact that service charge funds enjoy trust status, whereas the

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35 See ch 6, text to nn 269-283.
36 See ch 6, text to nn 284-319.
37 See ch 6, text to nn 111-114.
38 See ch 4, text to nn 213-225.
funds representing the commonhold contributions held by the CHA do not,\(^{39}\) may
also make RMC Leasehold more attractive.

Whether the RMC Leasehold model, in the case of the insolvency of the body
corporate, strikes a fair balance between the interests of the individual flat-owners
and the creditors of the body corporate is another issue, and one which is not strictly
within the scope of this study. There is no self-evidently fair solution to the
conundrum of how far one flat-owner should be put at financial risk because of the
default of his neighbours. It may be argued that commonhold strikes a fairer balance
than does RMC Leasehold between the interests of flat owners and the creditors of
the body corporate, but, viewed from the perspective of the flat-owner, that does not
detract from the advantage of RMC Leasehold. It seems inevitable that until the
uncertainties surrounding the extent to which commonhold does deliver full limited
liability are clarified, they will militate against its acceptance. If any future reform is
perceived to give the CHA any less limited liability than that given to the RMC,
commonhold will be at a continuing disadvantage. It also seems unlikely that
commonhold will gain wider acceptance until it is made clearer that a mortgagee
retains its security on the insolvency of the CHA.\(^{40}\)

7. RMC Leasehold and commonhold – a case for co-existence

It is submitted that sufficient potential advantages of RMC Leasehold over
commonhold have been identified to justify that RMC Leasehold should continue to
be available for developments and that its use should not be restricted by any
compulsory measures to promote the use of commonhold (e.g. by legislation banning
the use of leasehold, or conditions imposed in planning consents requiring that
commonhold be used for developments) or by measures designed artificially to skew
the market (for example, by the favourable treatment of commonhold for Stamp Duty
Land Tax).

Disregarding the separate issues surrounding insolvency, one might
characterise commonhold as more biased in favour of individual autonomy and
flexibility, and RMC Leasehold therefore more suitable for purchasers who are
prepared to accept a more highly regulated and rigid legal structure, particularly in
terms of the enforcement of restrictions, and the obstacles placed in the way of

\(^{39}\) See ch 4, text to nn 226-233.
amending the governing provisions, even if a simple majority of flat-owners are in favour of making changes. As a result of statutory interventions, the provisions regulating service charges do not sit easily within this analysis, as they tend to favour the leaseholder rather than the RMC. They may, however, be seen as consistent with the more rigid structure attributed to RMC Leasehold, in that such charges must be reasonable, and it has to be clearly specified what will be covered by the service charges.

How far prospective flat-owners are willing to submit to a more regulated and rigid regime of ownership may be debatable. It would seem reasonable to presume that this would be more acceptable if assumed voluntarily, and there was a recognised alternative form of ownership where a greater degree of individual autonomy prevailed (i.e. commonhold), with its attendant advantages and disadvantages. There may be a rough parallel here with the United States, where housing co-operatives co-exist alongside condominiums,41 or with New Zealand, where some prefer to retain company lease schemes rather than to convert to unit-titles.42 It must be admitted, however, that there is not a great deal of evidence to suggest that purchasers currently discriminate on an informed basis between OGL Leasehold and RMC Leasehold flats, so the prospects of purchasers intelligently discriminating between commonhold and RMC Leasehold ownership may not be high. Nevertheless estate agents’ advertisements seem increasingly to refer to flats as having a ‘share of freehold’, so this may be a sign that purchasers are becoming more sophisticated and well-informed on this, and there is anecdotal evidence from estate agents that flats in an RMC Leasehold block command higher prices than those in an identical OGL Leasehold block.

Until the issues concerning the liability of unit-holders on the insolvency of commonholds and the position of mortgagees on dissolution are resolved, and the CLRA is amended to provide for divided assessments, it seems likely that developers will continue to employ leasehold (and unfortunately OGL Leasehold, rather than RMC Leasehold) rather than commonhold, but because of the defects of commonhold, not by any informed choice. Only if and when these minor but

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40 See ch 6, n 262.
41 See ch 2, n 175, and text follg n 284.
42 See ch 2, n 176.
necessary amendments are made to commonhold can the strengths and advantages of each be fully recognised.
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