

COMMONHOLD DISPUTE RESOLUTION

- 1.1 This paper briefly explains commonhold and discusses likely commonhold disputes and the resolution mechanisms and jurisdictions provided by the relevant legislation.
- 1.2 This document does not represent the Law Commission's official view of the matters discussed, nor is it an authoritative statement of the law.
- 1.3 It was completed on 10 August 2004.

What is Commonhold

- 1.4 Commonhold is a new way of owning registered land in England and Wales, created by Part 1 of the Commonhold and Leasehold Reform Act 2002 ("the CLRA 2002") (sections 1-70, and Schedules 1-5).¹ The Commonhold Regulations 2004 ("the Regulations") contain detailed provisions on commonhold.² The explanatory notes published with the CLRA 2002 described commonhold as

a scheme which would combine the security of freehold ownership with the management potential of positive covenants which could be made to apply to each owner of an interdependent property.

"Unit-holders" will own the freehold of their commonhold "units" (the individual flats, houses, shops or business units – commonhold is applicable not only to residential property) and be members of the "commonhold association" ("CA") which will own and manage the common parts of the development. There will be no landlord, and no-one will have rights in the property superior to the "unit-holders".

- 1.5 The CA will be a private company limited by guarantee, registered at Companies House. Its memorandum and articles of association will include standard material prescribed by Schedules 1 and 2 to the Regulations (although they may also include clearly labelled additional provisions specific to that CA).
- 1.6 The units and the CA with its common parts will be registered at HM Land Registry. The developer of the commonhold development or the sponsor of a development converting from leasehold must present to HM Land Registry:
 - (1) the CA's certificate of incorporation, memorandum and articles of association;

¹ Except for sections 42, 52, 64, 65, 66, 67 (and ss 69 and 70 in so far as relating thereto), which came into force on 29 September 2003 (see SI 2003/2377), and sections 21(4) and (5) (extinguishing pre-existing interests which could not be created in parts of a commonhold unit after the land became commonhold), Part 1 of the CLRA 2002 comes into force on 27 September 2004, by virtue of SI 2004/1832.

² The Regulations, made on 14 July 2004, come into force on 27 September 2004. As yet they have no SI number but can be found on the DCA website at <http://www.dca.gov.uk/legist/commreg.pdf>.

- (2) the commonhold community statement (“the CCS”), which will define the physical attributes of the particular commonhold, and set out its rules. It must contain matters prescribed by Schedule 3 to the Regulations, and may contain other “local rules” specific to a particular commonhold;
 - (3) a statutory declaration that any required consents have been given by persons with an interest in the land, such as other freeholders, long (over 21 year) leaseholders and holders of charges over the land; and
 - (4) a certificate confirming that the application, memorandum, articles of association and the CCS comply with the relevant legislation.
- 1.7 HM Land Registry will register the commonhold after processing the required documents, which will be open to inspection at HM Land Registry. The Commonhold (Land Registration) Rules 2004 govern commonhold registration.³
- 1.8 A leasehold can be converted to commonhold if certain criteria are met, in particular that 100 per cent of existing leaseholders, and other owners of what would become commonhold units have consented. On conversion, all leasehold interests will be extinguished, and the memorandum and articles of association and the CCS will replace the lease terms. The CLRA 2002 and Regulations restrict the grant of further leases by unit-holders of residential commonhold units.
- 1.9 The procedures of the CA (meetings, membership, votes, appointment of directors etc) are prescribed in the articles of association. Allocation of votes, majorities needed for decisions, the machinery for the setting and for the payment of the commonhold assessment and levies to the reserve fund, (the equivalent of leaseholders’ service charges), are set out in the CCS in the Regulations.
- 1.10 The CLRA 2002 provides for the winding up of a CA, both voluntarily (for example if a developer makes an irresistible offer to buy the whole commonhold site for redevelopment) and in the event of the CA’s insolvency (where the standard insolvency rules would apply). The CCS may set out rules governing the voluntary winding up process and the distribution of any profit arising.

Commonhold disputes

- 1.11 Section 37 of the CLRA 2002 provides that:
- (1) Regulations may make provision (including provision conferring jurisdiction on a court) about the exercise or enforcement of a right or duty imposed or conferred by or by virtue of-
 - (a) a commonhold community statement;
 - (b) the memorandum or articles of a commonhold association;
 - (c) a provision made by or by virtue of this Part.

³ These Rules have no SI number yet, but should be available on the Land Registry website.

- (2) The regulations may, in particular, make provision-
 - (a) requiring compensation to be paid where a right is exercised in specified cases or circumstances;
 - (b) requiring compensation to be paid where a duty is not complied with;
 - (c) enabling recovery of costs where work is carried out for the purpose of enforcing a right or duty;
 - (d) enabling recovery of costs where work is carried out in consequence of the failure to perform a duty;
 - (e) permitting a unit-holder to enforce a duty imposed on another unit-holder, on a commonhold association or on a tenant;
 - (f) permitting a commonhold association to enforce a duty imposed on a unit-holder or a tenant;
 - (g) permitting a tenant to enforce a duty imposed on another tenant, a unit-holder or a commonhold association;
 - (h) permitting the enforcement of terms or conditions to which a right is subject;
 - (i) requiring the use of a specified form of arbitration, mediation or conciliation procedure before legal proceedings may be brought.
- (3) Provision about compensation made by virtue of this section shall include-
 - (a) provision (which may include provision conferring jurisdiction on a court) for determining the amount of compensation;
 - (b) provision for the payment of interest in the case of late payment.
- (4) Regulations under this section shall be subject to any provision included in a commonhold community statement in accordance with regulations made by virtue of section 32(5)(b).

1.12 Section 32(5)(b) of the CLRA 2002 allows regulations providing for the content of the CCS to provide for any matter for which regulations under section 37 may make provision. The detailed provision on dispute resolution in the Regulations is all included in the CCS, as allowed by this provision.

1.13 “Court” is defined by section 66 of the CLRA 2002 for the purposes of Part 1 of that Act as the High Court or a county court. Section 66(2) makes this subject to provision made under s 1 of the Courts and Legal Services Act 1990 as to the allocation of business between the High Court and county court. In an article “Commonhold in Practice: Advising the Unit Holder” L & T Review 2003, 7(5), 83-85, Andrew Hindle commented that:

Although s 66 defines “the Court” as the High Court or a county court, experience in the Rent Acts and the Housing Act suggests that if a court is involved it is likely to be the latter.

1.14 The limitation period for actions in respect of a right or duty of a kind referred to in section 37(1) of CLRA 2002 is 6 years from the accrual of the cause of action: see section 19A into the Limitation Act 1980, inserted by paragraph 4 of Schedule 5 to the CLRA 2002.

1.15 Regulation 17, made under section 37(1) simply provides that:

Jurisdiction is conferred on the court to deal with the exercise or enforcement of a right conferred, or duty imposed, by or by virtue of—

- (a) a commonhold community statement;
- (b) these Regulations; or
- (c) Part 1 of the Act.

1.16 Section 4.11 of the CCS in Schedule 3 to the Regulations sets out procedures for the resolution of disputes relating to duties imposed by the CCS, CLRA 2002 or provision made under it, where:

- (1) a unit-holder or his tenant wishes to enforce a duty against the CA;
- (2) the CA wishes to enforce a duty against a unit-holder or his tenant;
- (3) a unit-holder or tenant wishes to enforce a duty against another unit-holder or tenant.

Schedule 4 to the Regulations sets out forms (forms 17 to 24) to be used in the application of those procedures. The CLRA 2002, Regulations and CCS do not provide mechanisms for resolving disputes arising under general law between the CA and unit-holders or their tenants, for example under common law nuisance.

1.17 The non-statutory guidance published with the Regulations states that the objective of the procedures is “to encourage the settlement of disputes within the commonhold without recourse to litigation and the courts.” Disputes are to be dealt with initially by use of internal procedures. Should these fail to settle matters, alternative dispute resolution is provided for. However, it is not intended to refuse access to the courts and tribunals as necessary. The specified procedures need not (but can) be used in emergencies or in cases relating to the payment of money: in such cases immediate resort to legal proceedings is possible. The Appendix to this minute describes the procedures in more detail.

1.18 Section 35 of the CLRA 2002 imposes a duty on the directors of the CA to use the powers, rights and procedures in the Regulations to prevent, remedy or curtail failures by unit-holders or their tenants to comply with requirements or duties imposed in the CCS or a provision of Part 1 of the CLRA 2002. They are allowed not to take action if they reasonably think inaction is in the best interests of maintaining harmony in the commonhold, and if it will not cause any unit-holder other than the defaulter significant loss or disadvantage.

Other dispute resolution mechanisms possible under the CLRA 2002

1.19 Section 66(3) of the CLRA 2002 allows the Lord Chancellor to confer on any tribunal any jurisdiction which he can confer on a court. No such provision has been made (for example to confer jurisdiction on the residential property tribunal). Andrew Hindle, in the article referred to above, notes that:

The huge additional loads being imposed on the [Leasehold Valuation] Tribunal under other amendments being introduced by the Act make it ever less likely that disputes will be resolved swiftly – and bear in mind that the Tribunal cannot award costs except in exceptional circumstances.

1.20 Section 42 of the CLRA 2002 allows regulations to provide for a CA to be a member of an ombudsman scheme approved by the Lord Chancellor. Under such a scheme a unit-holder or scheme member CA could refer disputes between them to the ombudsman for him to investigate and determine. While section 66(2)(g) means that the CA could be required to comply with any decision of the ombudsman, there is no such provision requiring a unit-holder to comply with an ombudsman’s decision. No ombudsman scheme has yet been approved, although the CCS includes appropriate wording, were one to be approved in the future.

1.21 Although it is not a dispute resolution mechanism, section 62 of the CLRA 2002 may be of interest, as I understand better education of the public about housing rights and responsibilities, with a view to reducing the number of disputes, may be looked at as part of the housing disputes project. Section 62 allows the Lord Chancellor to give financial assistance to a person providing general advice about the law of commonhold land, so far as relating to residential matters. The Leasehold Advisory Service (LEASE) is funded under this provision.

Other jurisdictions conferred by Part 1 of the CLRA 2002

1.22 The CLRA 2002 confers jurisdiction on the court in a number of commonhold matters (not necessarily characterised as disputes). The table below gives details.

CLRA 2002 section	Enabling power?	Subject matter – power/duty conferred on court	Relevant regulation
3(2)(f)	yes	to dispense with consent otherwise required to apply to register a commonhold	5
6(3) and 6(5)	no	to grant declaration that land was wrongly registered as commonhold, and make any appropriate order	N/A
17(4)	no	where purported grant of lease of residential unit is void for non-compliance with prescribed conditions, to provide for the instrument to have effect as if it created a valid lease, for the return or payment of money, or make other appropriate provision	N/A
23(2)	yes	to dispense with unit-holder’s consent otherwise	none made

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		required to redefine unit size	
24(3)	yes	to dispense with charge holder's consent otherwise required to redefine unit size	none made
30(3)	yes	to dispense with charge holder's consent otherwise required to add land from a unit to the common parts	none made
37	yes	to enforce rights imposed or duties conferred by CCS, CA memorandum and articles of association or provision made by under Part 1 of CLRA 2002	17
40	no	to grant declaration that CA memorandum and articles of association do not comply with Regulations, or that CCS does not comply with requirements imposed by or under Part 1 of CLRA 2002, and make any appropriate order (e.g. rectifying the documents)	N/A
42(4)	no	(High Court only) to make CA comply with regulations requiring it to be part of an approved ombudsman scheme	an ombudsman scheme has not been approved
45(2)	yes (in part)	where 80% of CA members voted for winding-up, on liquidator's application in prescribed period, to determine terms and conditions for making termination application, and terms of termination statement (providing for transfer of commonhold land and distribution of CA assets)	19 prescribes period
47(4)	no	to disapply section 47(3) requirement that termination statement complies with any CCS provision as to termination arrangements	N/A
48(3)	no	where all CA members voted for winding up, and termination application made to HM Land Registry, liquidator can apply to court under s 112 of the Insolvency Act 1986 to determine terms of the termination statement	N/A
51(4)	no	where petition to wind up CA is presented to court under s 124 of the Insolvency Act 1986, to grant "succession order" registering successor CA as proprietor of common parts	N/A
53(3)	no	on making succession order, to require liquidator to make available to successor CA records, copy records or information	N/A

55(2) and 55(4)	no	gives court same powers where it makes order by virtue of s 6(6)(c) or 40(3)(d), as on winding-up, and allows it to impose or modify liquidator's rights and duties and require him to act in particular way	N/A
60(5)(c)	yes	where commonhold land is compulsorily purchased	none made
66(3)	yes	<i>allows any power to confer jurisdiction on a court to confer jurisdiction on a statutory tribunal</i>	<i>none made</i>
Schedule 3, para 8(5)	no	to order entry of joint unit-holder into CA register of members in place of person otherwise entitled	N/A

Possible problems with the rights and enforcement procedures provided by the CLRA 2002

- 1.23 Professor DN Clarke in *Commonhold – The New Law* (1st ed 2002) p 60 points out that the CLRA 2002 does not provide that only a reasonable commonhold assessment or levy may be charged, or provide a specific remedy allowing a unit-holder to challenge the reasonableness of a commonhold assessment or levy. Arguably this is a failure of the legislation to confer on unit-holders a right, rather than a failure to provide an adequate enforcement mechanism for a right. The absence of a reasonableness requirement may lead to more unit-holders refusing to pay the commonhold assessments and levies in protest.
- 1.24 Professor Clarke expresses some surprise that the legislation does not give the CA a statutory lien and first charge on each unit for the payment of commonhold assessments and levies when they fall due, or allow it to apply for such a lien or charge to be imposed in a particular case. This was a deliberate Government policy decision, but means that in the event of non-payment, the CA will have to use ordinary court procedures for the recovery of a debt, and even if the court eventually makes a charging order over the unit, this will not take priority over prior mortgages and registered charges.
- 1.25 No explicit provision has been made under section 37(1)(b) conferring jurisdiction on the court in disputes arising under the CA's memorandum and articles of association. It is not clear if the omission was deliberate. The Regulatory Impact Assessment published with the Regulations simply states that "Where the requirements of commonhold relate to land registration or company registration the usual methods of enforcement and sanctions will apply". It might be argued that as the memorandum and articles of association will necessarily include material set out in Schedules 1 and 2 to the Regulations, any duties imposed or rights conferred by those standard clauses and articles will be duties imposed or rights conferred by virtue of the Regulations, thus the court would have jurisdiction under regulation 17. That does, however, beg the question of why a specific reference to the memorandum and articles of association was included in section 37(1)(b) itself.

APPENDIX: ENFORCEMENT PROCEDURES FOR COMMONHOLD DUTIES PRESCRIBED IN THE CCS

Procedure for enforcement by unit-holder or tenant against the CA

A.1 Paragraphs 4.11.2 to 4.11.9 of the CCS set out the procedure for a unit-holder or tenant to use where the CA has failed to comply with an obligation imposed in the CCS, for example the duty in paragraph 4.5.1 to repair and maintain the common parts of the development.

- (1) The unit-holder or tenant (“the complainant”) seeking to enforce a right or duty against the CA must first consider resolving the matter by negotiating directly with the CA, or using arbitration, mediation, conciliation, or any other form of dispute resolution procedure involving a third party, other than legal proceedings (which I will call “ADR” for short).
- (2) Having considered and rejected, or tried unsuccessfully, the options of negotiation or ADR, the complainant must give notice of his complaint to the CA on form 17.
- (3) The CA has 21 days to consider the complaint and serve a reply notice setting out its proposals on form 18.
- (4) If the CA fails to reply or the reply is unsatisfactory, the complainant must reconsider using negotiation or ADR to solve the dispute.
- (5) Following this reconsideration (and any unsuccessful negotiation or ADR) if the complainant is still not content:
 - (a) he must refer the dispute to any approved ombudsman scheme of which the CA is a member: only after the ombudsman has investigated and determined the dispute, may he issue legal proceedings; or
 - (b) if the CA is not a member of an approved ombudsman scheme, he may issue legal proceedings.

Procedure for enforcement by CA against a unit-holder or tenant

A.2 Paragraphs 4.11.10 to 4.11.16 of the CCS set out the procedure for use where the CA wants to enforce an obligation imposed by the CCS on unit-holder or tenant, for example where the unit-holder is using a commonhold unit for a use not permitted in paragraph 2 of Annex 4 to the CCS. The procedures are similar to those outlined in paragraph 1.1 above.

- (1) The CA seeking to enforce a right or duty against the unit-holder or tenant (“the alleged defaulter”) must first consider-
 - (a) resolving the matter by negotiating directly with the alleged defaulter, or using ADR; or
 - (b) taking no action if it reasonably thinks that inaction is in the best interests of maintaining harmony within the commonhold.

- (2) Having considered and rejected, or tried unsuccessfully, inaction, negotiation or ADR, the CA must give a default notice to the alleged defaulter on form 19.
- (3) The alleged defaulter has 21 days to consider the allegation and serve a reply notice on form 20, accepting or disputing the complaint, or asking for further information about it.
- (4) If the alleged defaulter fails to reply or the reply is unsatisfactory, the CA must reconsider using negotiation or ADR to solve the dispute.
- (5) Following this reconsideration (and any unsuccessful use of negotiation or ADR) if the CA is still not content:
 - (a) it must refer the dispute to any approved ombudsman scheme of which it is a member: only after the ombudsman has investigated and determined the dispute, may it issue legal proceedings; or
 - (b) if the CA is not a member of an approved ombudsman scheme, it may issue legal proceedings.

Procedure for enforcement by unit-holder or tenant against another unit-holder or tenant

A.3 This procedure, prescribed by paragraphs 4.11.17 to 4.11.30 of the CCS is more complex. It may be used by one unit-holder to enforce “local rules” imposed by the CCS e.g. prohibiting the playing of loud music, or other specific “nuisance” type behaviour by other unit-holders or tenants. A unit-holder or tenant is not given an automatic right to take action against another unit-holder or tenant directly, but must first seek a solution through the CA.

- (1) The complainant must first consider resolving the matter by negotiating directly with the alleged defaulter, or using ADR.
- (2) Having considered and rejected, or tried unsuccessfully, negotiation or ADR with the alleged defaulter, if the complainant wishes to pursue the matter, he must give notice to the CA on form 21 requesting that the CA take action to enforce the right or duty.
- (3) The CA has 21 days to consider the request for action, decide, and notify the complainant, on form 22, of its decision either:
 - (a) to take action to enforce the right or duty against the alleged defaulter, which it must then do as soon as reasonably practicable using the procedure contained in paragraphs 4.11.12 to 4.11.16 (described in paragraph A.2 of this Appendix); or
 - (b) to take no action (if it reasonably thinks that inaction is in the best interests of maintaining harmony in the commonhold), in which case it must then decide whether to allow the complainant to enforce the right or duty directly against the alleged defaulter.
- (4) The CA may refuse to allow the complainant to take further action directly if it reasonably thinks that the complaint:

- (a) does not amount to a breach of a right enjoyed by, or duty owed to, the complainant; or
 - (b) is vexatious, frivolous or trivial.
- (5) The complainant may challenge the CA's decision using the procedures set out in paragraphs 4.11.4 to 4.11.9 of the CCS (described in paragraph A.1 of this Appendix). The CA will, however, have only 7 days, not 21, to send a reply to the complaint notice, before the complainant can reconsider negotiation or ADR and then commence legal proceedings against the CA.
- (6) If:
 - (a) the CA fails to respond to the request for action in 21 days, or
 - (b) the CA allows the complainant to enforce the right or duty against the alleged defaulter directly

the complainant must give a complaint notice to the alleged defaulter (form 23).

- (7) The alleged defaulter has 21 days to consider the allegation and serve a reply to the complaint notice on form 24, accepting or disputing the complaint, or asking for further information about it.
- (8) If the alleged defaulter fails to reply or the reply is unsatisfactory, the complainant must reconsider using negotiation or ADR to solve the dispute.
- (9) Following this reconsideration (and any unsuccessful negotiation or ADR) if the complainant is still not content, he may bring legal proceedings against the alleged defaulter in respect of the complaint specified in the notice which he served on the CA.