

The enfranchisement revolution

The Commonhold and Leasehold Reform Act (CLaRA) 2002 marks a paradigm change in the evolution of our feudal system of property ownership, says Andrew Lyndon-Skeggs (right).



Like the feudal system from which it derives, the concept of freehold ownership has an air of certainty, security and solidity. The fee simple, or freehold as it is now more loosely termed, implies ownership of land including "everything up to the sky above and down to the centre of the earth below".

Has this all changed with the new legislation on enfranchisement, and the commencement of commonhold from September 27 2004? The answer, inevitably, is Yes... and No.

For a start, the introduction of 'share of freehold', 'Nominee Purchaser Companies' and 'commonhold units' is not just a modern trend complicating a system that was once clear-cut and simple. On the contrary, if one reverts to the origins of our property law, one finds a myriad forms of ownership, with wonderfully evocative titles such as Grand Sergeanty, Knights Service, Socage, Gavelkind and Villein Tenure.

Over the years, the system has gradually been simplified, each major step coinciding with a fundamental shift in the socio-political structure of the country, the latest being no exception.

In my opinion, enfranchisement will fundamentally change the residential property market

With the Norman invasion came the feudal system. The Statute Quia Emptores in 1290, coinciding with a waning of feudal power, introduced a prohibition of new tenures. The Tenures Abolition Act of 1660, shortly after the execution of Charles I, and the end of Absolute Monarchy, dramatically simplified the system of freehold tenure. Then, following the First World War, the Law of Property Act 1922 converted all remaining copyhold tenure to common socage, in other words freeholds.

Now, with the legislation on enfranchisement, running from 1967, and much expanded in 1993 and 2002, we have a paradigm change in the concept of property ownership. Part I of the Commonhold

and Leasehold Reform Act 2002 also introduced a new form of ownership: Commonhold. The social change in this case, particularly in so far as enfranchisement? The demise in the political power of the landed gentry.

Are these changes important? Yes, in my opinion, enfranchisement will have a deep and far reaching impact, fundamentally changing the structure and operation of the residential property market, particularly in larger cities, marking a shift of ownership and control from the landlord, to the individual; commonhold less so.

What do they involve? Enfranchisement is a legal right given to tenants holding long leases, (more than 21 years) to acquire the freehold of their house or, jointly with a minimum of 50% of the other tenants, to acquire their block of flats or, individually, to acquire a 90 year extension to their lease. Commonhold is a new way of owning interdependent freehold properties, whether residential or commercial, as an alternative to long leasehold ownership.

Since the recent widening of the right to enfranchise, there has been a resurgence of interest from tenants. Through

Enfranchisement & Leasehold Solutions Ltd (ELS), we are helping a large and ever increasing number of lessees, in blocks

of all sizes, to acquire their freeholds. It's a complicated process, but one could describe the phenomenon as a 'tidal wave', especially in central London. In our view, it will not be long before residential leases, such as we presently know them, will have been totally superseded by 999 year leases with share of freehold. It is also clear that this is being increasingly demanded by prospective purchasers.

Whether the same will be the case for commonhold is yet to be seen; but unlikely. Commonhold does not confer any fundamental new right; it is simply a form of ownership, akin to a long lease, accompanied by a shareholding in a nominee purchaser management company.

At ELS we are occasionally asked by clients whether they can use their rights of enfranchisement to acquire commonhold, rather than freehold. The answer is "No". The enfranchisement process occurs by formation of a nominee purchaser company, jointly owned by the participant lessees. This company acquires the freehold, which it holds as nominee for the lessees, and grants to each of the participant lessees 999 years leases, at peppercorn ground rents. Non-participants remain as they were before, but with a new landlord. In theory it would be possible to convert this to commonhold, but unlikely, since it would require one hundred percent agreement between all parties, and would confer little or no advantage.

In practical terms, there is little difference between the end result of Collective Enfranchisement and ownership by Commonhold. Each requires the formation of a company. Under Commonhold the unit holders own their flats freehold, whilst being a member of the commonhold association controlling the common parts. Following enfranchisement, tenants hold long (generally 999 year leases) over their flats, whilst the tenant owned management company owns the freehold, and controls the common parts. Both require compliance with Companies House regulations. The running costs will be broadly the same. The method of resolving disputes differs somewhat, but the ultimate recourse is to the Courts.

The principal practical difference is that commonhold makes greater use of standardised documentation for the memorandum and articles of association of the Commonhold Association, and for the Commonhold Community Statement (CCS). However, even this difference will be lessened with the introduction of Right to Enfranchise (RTE) Companies for enfranchisement. Furthermore, we find, at ELS, that after initial enthusiasm at the thought of scrapping the strictures of the existing leases, lessees generally decide to retain, and in some cases extend the original format, conscious of its import for long term management and good neighbourliness. The fact that commonhold does not

confer the right of forfeiture may not be so advantageous when faced with an inveterate debtor refusing to contribute towards the service charge!

So, the take-up of commonhold seems unlikely to flow from existing ownerships. Will it be used for new developments? It could be. Commonhold would be a convenient means of packaging a new development of disparate units, whether residential or commercial and, longer term, if the system becomes widespread, familiarity with the standardised documentation would be advantageous and, perhaps, cost saving.

However, the property industry is essentially conservative and the existing long leasehold system works and, for all its faults, works well. It is also understood and recognised. This is important. A developer is beholden to the market. Purchasers, investors, financiers and occupiers all understand the leasehold system and therefore, in the absence of positive advantage, there would appear to be little merit in venturing into the more uncertain waters of commonhold.

Nevertheless, we do foresee a gradual take up of commonhold, increasing as familiarity builds. Early research suggests that this will be principally in the field of residential, rather than commercial development, though this may reverse. If commonhold does become more widespread amongst residential properties, there will then be two alternative systems running simultaneously: 'virtual freeholds' with 999 year leases, plus management companies; and 'commonhold' with freehold commonhold units, plus indirect ownership of the common parts through a Commonhold Association. The difference? The documentation. Perhaps it will then become desirable to allow substitution of standard documentation for existing leases. We will see!

Meanwhile, we strongly recommend tenants to think in terms of enfranchisement. It offers immediate financial and management benefits, and now is an excellent time to proceed, while the market is quiet, and before the next section of the 2002 Act legislation is brought into force. If you live in a block of flats, and there is no chance of gathering the minimum 50% (even with our assistance!), then opt for the slightly less good alternative of a ninety year lease extension. The cost is much the same. **pp**

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