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Reforming the law

Commonhold Legislative History

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Introduction

- 1.1 This document is intended to supplement our Consultation Paper *Reinvigorating Commonhold: the alternative to leasehold ownership*. It is not intended to be used as a freestanding document. Most consultees will probably not need or wish to refer to it, but some will have been taking an interest in the idea of commonhold for many years. In considering our current proposals, they may find it useful to have a resource setting out how the provisions which came into law as Part I of the Commonhold and Leasehold Reform Act 2002 evolved from the proposals originally contained in the Aldridge Report of 1987.¹
- 1.2 This paper therefore traces how the proposals for commonhold legislation evolved over time. But rather than setting out each of the sets of proposals in turn, it deals with proposals thematically. So each of the headings of this background document picks up the area covered by a chapter or chapters of our Consultation Paper. It then sets out how the particular problems which we are now addressing were dealt with in the Aldridge Report, and the draft Bills and Consultation Papers which followed it. In some cases we are now proposing the adoption of ideas which were proposed in previous consultations. In other cases we have taken the view that proposals which were contained in previous Consultation Papers were rejected for good reason.
- 1.3 We begin this document with a brief outline of the reports which preceded the 2002 Act, and which provide the points of reference for the remainder of this document.

An outline of the legislative history of commonhold

- 1.4 Commonhold has a long legislative history in England and Wales. As far back as 1965, the Wilberforce Committee recommended the adoption of a new structure to regulate rights and obligations in blocks of flats and other multi-owned developments.²
- 1.5 In England and Wales, flats have almost universally been sold on a leasehold, as opposed to freehold, basis. That is because, for historic reasons, certain obligations to pay money or perform an action in relation to a property (such as to repair a wall or a roof) cannot legally be passed to future owners of freehold property.³ These obligations are especially important for the effective management of blocks of flats. For instance, it is necessary that all flat owners can be required to pay towards the costs of maintaining the block.
- 1.6 Whilst it is possible for flats to be granted on a freehold basis outside of the commonhold structure (known as “flying freeholds”), freehold ownership of flats creates a number of problems in practice. In particular, as flats are structurally interdependent, the failure of

¹ Commonhold: Freehold flats and the freehold ownership of other interdependent buildings (1987) Cm 179 (“Aldridge Report”).

² Report of the Committee on Positive Covenants Affecting Land (1964-65) Cmnd 2719, chaired by Lord Wilberforce. The Committee suggested adopting a scheme similar to that which had been introduced in New South Wales, known as “strata title”.

³ The Law Commission has proposed the creation of a new interest in land (“the land obligation”) which can be positive or negative and will bind future owners of the land. However, the needs of freehold flats and other multi-occupancy developments will not be met satisfactorily by this new land obligation: Making Land Work (2011) Law Com No 327 paras 1.10, 5.17, 5.18, 5.90 and 5.91.

certain owners to repair their flat could cause significant damage to other owners' properties. However, once a freehold flat has been sold for the first time, the subsequent owners will generally not be under an obligation to repair their property. Flats have therefore been "sold" on a leasehold basis which allows repairing (as well as other) obligations to be transferred to future owners.

- 1.7 At the time the Wilberforce Committee published its report in the 1960s, many other common law jurisdictions already had structures in place which allowed flats to be owned on a freehold basis: for instance, "strata title" in Australia and "condominium" in the United States of America. In these countries, however, flats were never commonly owned as leasehold. Forms of ownership other than leasehold had existed, but it appears that these were not acceptable to mortgage lenders. One of the main driving forces behind the introduction of strata title and condominium overseas was therefore to provide a form of ownership that was attractive to lenders.
- 1.8 By contrast, in England and Wales, the main advantage of introducing commonhold was to provide an alternative form of ownership to leasehold. Whilst leasehold has been generally accepted by mortgage lenders, homeowners have often been dissatisfied with this form of ownership. Mortgage lenders have also suggested that a commonhold-type of ownership would be preferable.⁴
- 1.9 In 1985, the Nugee Report highlighted growing dissatisfaction with leasehold as a form of ownership.⁵ In particular, concerns were raised about poor management and excessive service charges in blocks of flats.
- 1.10 The following year, in 1986, Government asked the Law Commission to set up a working group of officials, headed by Law Commissioner Trevor Aldridge, to recommend a new scheme which would regulate relations between separate, interdependent properties.⁶ The report of the working group has become known as the Aldridge Report.⁷
- 1.11 The Aldridge Report was published in 1987 and proposed the introduction of "commonhold". The working group chose this name as it seemed to convey "both the notion of land ownership" and the "element of community of interests and co-operation in management" intrinsic to the scheme.⁸ The report recommended that commonhold should act as alternative to the leasehold structure as a way of allowing positive obligations, such as obligations to carry out repairs, to be transferred to future owners.

⁴ Building Societies' Association, *Leaseholds – time for a change?* (1984).

⁵ Report of the Committee of Enquiry on the Management of Privately Owned Blocks of Flats (1985), chaired by Edward Nugee QC.

⁶ Although Trevor Aldridge was a Law Commissioner, the Report was prepared independently of the Commission following consultation with a selected group of interested bodies.

⁷ See n 1.

⁸ Aldridge Report, preface, para 3.

1.12 It is clear that the task of turning the recommendations in the Aldridge Report into legislation was not an easy one. A succession of consultations and draft Bills followed.

- (1) The 1990 Bill: the first draft Bill was published in 1990 along with a Government consultation document.⁹ It was earmarked as the “next step in plans to establish new legal arrangements for the freehold ownership of flats and other interdependent buildings with shared facilities”. The aim of commonhold was, as in the Aldridge Report, to allow units in a block of flats to be held on a freehold basis whilst ensuring that positive covenants could be transferred to future owners. The majority of the recommendations made in the Aldridge Report were accepted in the 1990 Consultation Paper as settled policy. Other aspects of commonhold, however, caused more difficulty, such as the existence of leasehold interests within commonhold, and the question of whether or not commonhold should become compulsory.

The responses received to the 1990 Consultation Paper raised a number of complicated issues surrounding the operation of commonhold in the 1990 Bill which could not be quickly addressed. In particular, conversion to commonhold from leasehold without the consent of the freeholder raised the question of the appropriate level of compensation. As an interim solution, Government proposed to introduce the right of collective enfranchisement for flat leaseholders as a first step towards commonhold.¹⁰

- (2) The 1996 Bill: the second draft Bill on commonhold was published in 1996, along with a further consultation paper.¹¹ In many places, the 1996 Bill replicated the provisions of the 1990 Bill. However, no legislation was introduced following the 1996 Bill. Responses to the consultation highlighted concerns about:
 - (a) the restriction of leases to a term of 25 years within commonhold;
 - (b) the commonhold association’s power to sell a unit to recover arrears, without a court order;
 - (c) the lack of an alternative dispute resolution process; and
 - (d) too great a reliance on secondary legislation for the details of the system.¹²

⁹ Commonhold: A consultation paper (1990) Cm 1345. This paper contained both a consultation paper (“1990 Consultation Paper”) and a draft Bill (“1990 Bill”).

¹⁰ Department of the Environment, *Enfranchisement of Long Leasehold Flats: The Government’s Revised Proposals* (July 1991).

¹¹ Lord Chancellor’s Department, *Commonhold: Consultation on Draft Bill* (July 1996). This publication contained a consultation paper (“1996 Consultation Paper”) and a draft Bill (“1996 Bill”).

¹² *Hansard* (HL), 18 November 1996, vol 575, col 123W.

- (3) The 2000 Bill: a revised Consultation Paper and draft Bill were published in 2000.¹³ This Bill revisited the problems raised in the previous consultation papers, and proposed a simplified form of commonhold. For instance, rather than create a bespoke company structure for the commonhold association, as the 1990 and 1996 Bills did, the 2000 Bill sought to rely on existing company law. A general election was called whilst the 2000 Bill was at the report stage and the Bill fell. It was, however, reintroduced without significant amendment following the 2001 general election. The Act¹⁴ finally received royal assent in May 2002 and the commonhold provisions came into force on 27 September 2004.

1.13 Whilst the basic model of commonhold has remained the same since the Aldridge Report, the technical operation of commonhold has undergone a number of reworkings. Below, we examine how each topic discussed in our Consultation Paper was addressed by the Aldridge Report, 1990 Bill and 1996 Bill. Where relevant, we also discuss any significant issues arising from the 2000 Consultation Paper, or key debates that occurred as the 2000/1 Bill made its way through Parliament.

¹³ Commonhold and Leasehold Reform: Draft Bill and Consultation Paper (August 2000) Cm 4843 (“2000 Consultation Paper” and “2000 Bill”). See also *Department for Constitutional Affairs, Commonhold and Leasehold Reform Draft Bill and Consultation Paper: Responses to the Commonhold Consultation Exercise* (January 2001).

¹⁴ Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”).

Consultation Paper Chapters 2, 3 and 4: Converting existing buildings to commonhold

The consent requirement

Aldridge Report

- 1.14 *Freeholder consent* – The Aldridge Report did not express a view on whether conversion to commonhold from leasehold should be possible against the wishes of the freeholder.¹⁵ However, the Report recommended that if Government were to decide to make conversion possible without the freeholder's consent, the freeholder should be paid market value for his or her interest.¹⁶
- 1.15 *Leaseholder consent* – The Aldridge Report required the consent of all leaseholders in the building (irrespective of lease length) to convert to commonhold, including the consent of any sub-tenants. As leases were permitted within commonhold in the Aldridge Report,¹⁷ such sub-tenancies could continue to exist following conversion to commonhold. The consent of sub-tenants was thought necessary because:
- (1) slight modifications might be required to ensure that the sub-tenant's obligations were consistent with the requirements of the commonhold;
 - (2) for commonhold to succeed it would be essential that those who occupy the units gave positive support; and
 - (3) when the commonhold came to an end, contractual tenancies would also have terminated.
- 1.16 To mitigate the difficulty of obtaining the consent of all leaseholders in the building, the Report suggested the court could be given a power to dispense with the consent of up to 20% of the leaseholders and tenants.¹⁸
- 1.17 *Mortgage lenders' consent* – It was proposed, in the Aldridge Report, that any leaseholders' mortgage lenders would be required to consent to the conversion. This proposal was made because such mortgages would need to be redeemed and transferred to the commonhold units on conversion.¹⁹

¹⁵ Aldridge Report, para 4.7.

¹⁶ Aldridge Report, para 4.8(a).

¹⁷ See para 1.20 below.

¹⁸ Aldridge Report, para 4.13.

¹⁹ Aldridge Report, para 4.11(d).

1990 Bill and Consultation Paper

- 1.18 *Freeholder consent* – Government concluded that there was only one viable option for establishing commonhold against the wishes of the freeholder: by the leaseholders acting collectively and purchasing the whole building from the freeholder.²⁰ At this point in time, it was not envisaged that leaseholders should be able collectively to buy the freehold and not establish a commonhold structure.²¹
- 1.19 In order collectively to obtain the freehold, there would have to be provision for compensating the freeholder.²² The 1990 Consultation Paper stated that the obvious starting point would be the open market value of the freehold but that it might be possible to apply “qualifications” to ensure “a balance is maintained”.²³
- 1.20 The idea that existing blocks of flats should be compulsorily transferred to commonhold was rejected as “excessive” and “impractical”, as it would have placed a significant burden on the courts.²⁴
- 1.21 *Leaseholder consent* – Whilst the 1990 Consultation Paper acknowledged that the “tidiest approach” would have been to require all leaseholders to have participated in a conversion to commonhold, this approach would have allowed a single non-participant to block the conversion and would have been open to abuse by the landlord.²⁵ If unanimity were not required, it would still have been “quite unreasonable” to allow such a major change without the support of a substantial majority.²⁶ The 1990 Consultation Paper therefore proposed that if 80% of leaseholders in the building wanted to convert to commonhold, they should have been able to apply to court to determine the issue. This would have prevented a minority of leaseholders from unreasonably objecting to the conversion. The court would have had such powers as were thought fit, including the power to award compensation to the minority of leaseholders.²⁷
- 1.22 The question then arose as to what interests the non-participating leaseholders should receive following conversion. The answer would have depended on whether leases would be allowed in commonhold following conversion.
- (1) If Government decided that leasehold could continue to exist within the commonhold structure, then the court would have had the power to make reasonable adjustments to the lease to enable it to fit within the commonhold

²⁰ 1990 Consultation Paper, para 4.2.

²¹ 1990 Consultation Paper, para 4.3.

²² 1990 Consultation Paper, para 4.7.

²³ 1990 Consultation Paper, para 4.18.

²⁴ 1990 Consultation Paper, para 4.6. For instance, the court would likely be called upon to resolve compensation disputes and to settle the terms of the new commonholds.

²⁵ 1990 Consultation Paper, para 4.26.

²⁶ 1990 Consultation Paper, para 4.27.

²⁷ 1990 Consultation Paper, para 4.8.

structure. The report suggested “this would doubtless have to be coupled with some provision for compensating the non-participating long leaseholder”.²⁸

- (2) If Government decided that leasehold should be prevented from existing within commonhold, an application could have been made to court to compel the conversion of the remaining leasehold interests into commonhold units. Again, the Report proposed that this forced change to the leaseholders’ interest would have to be accompanied by compensation.²⁹ Further, the leaseholders wishing to convert would have had to pay for the other leaseholders’ shares of compensation to the freeholder. Otherwise, “a provision which forced property on a person and made him pay for it against his will would be quite unacceptable”.³⁰ This would, however, have made the cost of converting to commonhold very high for participating leaseholders and a number of theoretical ways of financing the conversion are considered in our Consultation Paper.³¹

1.23 *Mortgage lender consent* – Government envisaged the possibility of forcing a minority of lenders to accept a commonhold unit, if the majority would accept the security. An analogy was drawn with the position of leaseholders on conversion to commonhold. The conclusion was reached that, if there should be a power of the court override the wishes of a minority of leaseholders and require them to take a commonhold unit, “it would seem clear that the power of the court to override the objections of the minority should extend to overriding the objections of [mortgage lenders]”.³²

1996 Bill and Consultation Paper

1.24 *Freeholder consent* – Under the 1996 draft Bill, the consent of the freeholder would have been required. It was anticipated that leaseholders might convert to commonhold after having purchased the freehold through collective enfranchisement.³³

1.25 *Leaseholder consent* – The 1996 draft Bill referred to the unanimous consent of leaseholders. However, it was intended that regulations would have been introduced

²⁸ 1990 Consultation Paper, para 4.30. For instance, to reflect any discrepancies which would otherwise arise between the physical descriptions of the commonhold unit and the property subject to the lease, or between the rights of the unit owner under the commonhold regulations and of the tenant under the lease.

²⁹ 1990 Consultation Paper, para 4.31.

³⁰ 1990 Consultation Paper, para 4.33.

³¹ For instance, at the end of the lease, the participating leaseholders could have the right to acquire the freehold of that unit at no cost, or the cost of acquiring non-participating units could be borrowed and charged to the unit. Then, at the time the lease term would have expired, the leaseholder would have to decide whether to discharge the loan and remain in the unit or sell the freehold unit to discharge the loan.

³² 1990 Consultation Paper, para 4.38.

³³ The 1996 Consultation Paper says at para 3.4: “it will also be possible for owners in existing developments to convert to commonhold for example, where leaseholders collectively have obtained the freehold in their development under the Leasehold Reform, Housing and Urban Development Act 1993”. The 1996 Consultation Paper also confirms at para 2.11 that commonhold was at one point associated with enfranchisement, however “the two concepts are quite distinct ... In bringing forward proposals for commonhold it is not intended to extend the rights of tenants compulsorily to acquire the freehold of their buildings”.

which would have allowed the court to dispense with the consent of up to 20% of residential leaseholders holding interests of less than 21 years.

- 1.26 *Mortgage lender consent* – The 1996 draft Bill left the question of whether mortgage lenders should be required to consent, and whether their consent could be dispensed with by the court, to be determined in subsequent regulations.³⁴

The procedure for converting

Aldridge Report, 1990 and 1996 Bills and Consultation Papers

- 1.27 The Aldridge Report did not set out a separate procedure for converting to commonhold. It simply mentioned that the grounded rule would also have applied to a converted building, so as to have avoided the problems of what it termed “pepper-potting”.³⁵ The 1990 and 1996 Bills similarly did not have a separate procedure for converting an existing building to commonhold. The same process would have applied as for setting up a new commonhold.³⁶

³⁴ 1996 Bill, cls 10 and 11.

³⁵ Aldridge Report, para 4.8(b). The expression alludes to the scattering of leasehold properties within a commonhold building.

³⁶ More detail on the procedure for setting up a new commonhold can be found in the Aldridge Report at paras 3.1 to 3.47.

Consultation Paper Chapter 5: Mixed-use and multi-block developments

1.28 In our Consultation Paper, we set out three possible options for how commonhold could be made to work for more complex developments. Two of these, “flying commonholds”³⁷ and “layered commonholds”,³⁸ were discussed at various points throughout the legislative history of commonhold. We consider each in turn below.

Flying commonholds

Aldridge Report

1.29 The Aldridge Report was based on a general principle that restrictions on the creation of commonhold should be kept to a minimum.³⁹ This principle would have pointed to allowing flying commonholds. The report discussed the advantages flying commonholds could bring, in that they would allow a building to be divided into more than one commonhold. For instance:

a building with individual office suites on the lower floors and flats above could be two commonholds, one for the office units and the other for the flats. Dividing uses may well reduce disputes between unit owners about services and facilities, because the owners of different types of property will have different requirements and expectations.⁴⁰

1.30 However, the report then outlined a number of practical difficulties with flying commonholds, which led to the conclusion that flying commonholds should not be permitted. These difficulties included:

- (1) the need to ensure that what is included in a commonhold is a logical and viable property, in order to make it easy and economical to manage;
- (2) the problem of positive covenants would re-emerge, and would only be resolved if the land obligations scheme was enacted;
- (3) “pepper-potting” commercial units in and amongst residential units in a building would present dangers associated with problems of management (this was drawn from the conclusions of the Nugee Report);

³⁷ A “flying freehold” is a freehold which in part or in whole does not touch the ground, and consequently is situated above another freehold. Although it is not currently permitted, if a commonhold were to be created from a flying freehold, the resulting commonhold would be a “flying commonhold”.

³⁸ A “layered commonhold” is a commonhold development which has multiple layers of separate sub-associations linked together as part of an overarching umbrella association. The current commonhold model does not allow such developments to be created.

³⁹ Aldridge Report, para 3.1.

⁴⁰ Aldridge Report, para 3.13.

- (4) on termination, it would be more complex to determine the interests of all the owners if there were more than one commonhold in a building, which might lead to disputes; and
- (5) the ability to rebuild / redevelop a commonhold after termination might be inhibited if complicated and extensive rights were needed over another part of the same building.⁴¹

1990 and 1996 Bills and Consultation Papers

1.31 The 1990 Consultation Paper reached the same conclusion, discussing the need for structural independence of commonhold buildings. The Consultation Paper explained that this independence was necessary so that commonholds could be effectively managed as a whole, and be easily redeveloped in the event of the commonhold being terminated.⁴² This was reflected in clause 19(1)(b) of the 1990 Bill. The provision was carried forward into the 1996 Bill.⁴³

2000/1 Bill and Consultation Paper

1.32 The 2000 Consultation Paper did not discuss the question of flying commonholds, but the issue was debated extensively in the House of Lords, and briefly in the House of Commons. A number of amendments were proposed which would have permitted the creation of flying commonholds.

1.33 There were two main arguments given for allowing flying commonholds.

- (1) Lord Goodhart raised the issues of managing a mixed commonhold.

There could, of course, be a mixed commonhold to include both the shops and the flats but that is likely to be difficult to run and to lead to continuous tensions between the shop units and residential units. It seems to me, therefore, that it is a better solution to have a commonhold for the flats and a separate freehold ownership for the shops.⁴⁴

- (2) Lord Kingsland discussed the potential impact on developers of allowing flying commonholds.

[It] might encourage developers of mixed-use buildings to consider using commonhold. It is reported that many are reluctant to consider developing the whole building as commonhold because they are concerned that it might be perceived as limiting the investment value of the commercial element. To permit flying commonholds would enable the residential elements to be sold on a

⁴¹ Aldridge Report, para 3.14.

⁴² 1990 Consultation Paper para 3.4.

⁴³ 1996 Bill, cl 3(2)(b).

⁴⁴ *Hansard* (HL), 20 February 2001, vol 622, col CWH 18.

commonhold basis while the commercial elements are retained on a freehold-leasehold basis.⁴⁵

- 1.34 However, the arguments against flying commonholds always led to the proposed amendments being withdrawn. The main argument was that flying commonholds would still encounter the problem of positive covenants. Even if this could be addressed through specific legislation for commonhold (as some amendments tried to do), it was felt that piecemeal reform to positive covenants was unsafe and unsatisfactory, and that it was necessary to wait for the Law Commission's report on land obligations.⁴⁶ Lord McIntosh of Haringey also argued that:

lawyers and mortgage companies do not like [flying freeholds]. I would not wish to introduce an analogy with flying freeholds too readily.⁴⁷

Layered commonholds

Aldridge Report and the 1990 and 1996 Bills and Consultation Papers

- 1.35 Subdivision of commonholds seems to have been given very little consideration in the early legislative history. The Aldridge Report does not include any discussion of the matter, and seems based on the assumption that there would only be a single, undivided commonhold association for each commonhold. The 1990 Consultation Paper again did not discuss the issue, and the accompanying Bill included a provision preventing the registration of land as commonhold if any part of the land was already registered as commonhold.⁴⁸ This provision was also present in the 1996 Bill,⁴⁹ but was again not discussed in the Consultation Paper.

2000/1 Bill and Consultation Paper

- 1.36 The 2000 Consultation Paper gave more consideration to layered commonholds. The paper suggested that in most mixed-use cases, it would be sufficient to create a single commonhold and regulate relationships between the different parts through careful drafting of the commonhold community statement ("CCS"). However, the paper went on to recognise that there might be cases where a developer wished to create neighbouring associations. Two options were put to consultees: that relationships between neighbouring associations could be regulated through the general law of easements and covenants; or a parent association could be created. The paper suggested that the first option was preferable, as the law on easements and covenants was well understood, and commonhold should use existing legal frameworks wherever possible.⁵⁰ The consultation responses were mixed, some preferring a parent association, and others preferring the use of easements and covenants.

⁴⁵ *Hansard* (HL), 20 February 2001, vol 622, col CWH 19.

⁴⁶ *Hansard* (HL), 19 November 2001, vol 628, cols 943 to 945 (Lord Kingsland and Baroness Scotland of Asthal).

⁴⁷ *Hansard* (HL), 16 October 2001, vol 627, col 503.

⁴⁸ 1990 Bill, cl 12(5).

⁴⁹ 1996 Bill, cl 9(3).

⁵⁰ 2000 Consultation Paper, para 3.33.

1.37 When the Bill was debated in Parliament, the idea of subdivided commonholds received very little attention. Baroness Gardner of Parkes suggested that subdivision would be a good idea, as:

the residents would not be managing the commercial element, and the commercial element would not be managing the residential element. Indeed, it would be very unfair to the residents to burden them with the management of the commercial element where there were very high costs of fire insurance, particularly if there is a restaurant or premises of that type. It could be quite beyond the means of the residents particularly if the moment came when the shop or restaurant was producing an unfavourable rent.⁵¹

1.38 In reply, Lord McIntosh of Haringey argued that:

our intention is that the developments should all be subject to one commonhold development for the present time, but it is possible for the two types of occupier to have differential interests and for different managers to manage different parts.⁵²

1.39 Layered commonholds were not included in the 2002 Act, as enacted.

⁵¹ *Hansard* (HL), 20 February 2001, vol 622, CWH 17.

⁵² *Hansard* (HL), 20 February 2001, vol 622, CWH 20.

Consultation Paper Chapter 6: New commonhold developments and development rights

Aldridge Report

1.40 The Aldridge Report left very little scope for developers to reserve ongoing development rights after the sale of the first unit. This position was achieved through two restrictions in particular: the inability to amend the extent of the commonhold after the sale of the first unit; and the requirement for buildings to be structurally complete before the first sale (“the built rule”). However, some provision was made for the phasing of developments, although these provisions would still have been subject to a number of restrictions.

Restrictions on changes to commonhold land

1.41 Firstly, it appears that the developer would not have been able to reserve a right to amend the size of the commonhold, by adding or removing land after the sale of the first unit. Paragraph 13.4 of the Aldridge Report stated:

the basic rule is that once the first unit is transferred by the promoter to a purchaser ... the form of the commonhold is crystallised. Both the promoter and the purchasers are bound by the commonhold declaration and the plans to which it refers, all of which are registered.

1.42 The members of the commonhold association could, however, vote to add or remove land by unanimous agreement. If unanimous agreement could not be reached but 80% of members supported this decision, they could have applied to the court to approve the decision.⁵³

1.43 As soon as one unit had been sold, therefore, that initial purchaser would have been able to veto a decision of the developer to vary the scope of the commonhold. As the developer would retain control of the remaining units (which would be likely to equate to over 80% of the voting rights) the developer would have needed to apply to court to sanction the variation.

1.44 The policy reason behind this decision was to ensure that the “balance of the commonhold” was not adversely affected. For instance, if more units were added this could over burden the common parts, whereas if units were removed, this could result in the expenses of the commonhold being too high for the remaining residents.⁵⁴

The built rule

1.45 Another restriction on development rights proposed in the Aldridge Report was the “built rule”. This rule required that, in general, the commonhold development should be structurally complete before any unit could be transferred to a unit owner.⁵⁵

⁵³ Aldridge Report, para 13.5.

⁵⁴ Aldridge Report, para 13.6.

⁵⁵ Although “final finishes and decorations” could be uncompleted at the time of sale: Aldridge Report, para 3.21.

- 1.46 The purpose of the built rule was to protect consumers from having to complete their purchases before the development was complete. In particular:
- (1) the existence of certain facilities might have been a decisive factor in a purchaser deciding to buy a unit in that particular commonhold. There should therefore be assurances that these facilities would eventually have been provided;
 - (2) the number of units and size of the development could have had an effect on the viability of certain services being provided. For instance, if fewer units were eventually built, the cost of providing services might have been higher; and
 - (3) if the physical boundaries within the commonhold had already been built (for instance, boundary walls between units and common parts) before any units had been sold, the plan was likely accurately to reflect the actual extent of the boundaries within the commonhold.⁵⁶
- 1.47 A restriction would have been entered onto the HM Land Registry title to prevent a unit being sold before satisfactory evidence (such as a certificate from a surveyor) had been provided that the built rule had been satisfied.⁵⁷

Phasing provisions

- 1.48 The built rule was softened by provisions which allowed a developer to complete works in up to four phases. Phasing would have been permitted to enable developers to fund the construction of additional phases from the sale of units in the previous phase. Additionally, requiring the whole development to be complete before any sale could have resulted in the first buildings beginning to deteriorate and would have been a waste of resources.⁵⁸
- 1.49 Under the phasing provisions, a unit could not have been sold until that particular phase was structurally complete. The first phase was required to contain at least 25% of the intended units within the development. Common facilities associated with that phase would have been required to have been completed at that time or in the following phase. Where the building of common facilities was postponed to the following phase, that subsequent phase would have been required to include 25% of the intended units in the development. The purpose of this rule was to ensure that the developer had a financial incentive to build the next phase.⁵⁹
- 1.50 Where the developer opted to build in phases, additional information would have needed to be included within the declaration registered at HM Land Registry. The developer would have been required to set out the number of proposed phases, the units and facilities in each phase and the dates of commencement and completion of

⁵⁶ Aldridge Report, para 3.17.

⁵⁷ Aldridge Report, para 3.21.

⁵⁸ Aldridge Report, para 3.18.

⁵⁹ This policy reason is explained more clearly in the introductory section of the 1990 Consultation Paper. If a subsequent phase only includes common facilities, the developer may be inclined to delay building this phase which may be costly and not generate further profit: 1990 Consultation Paper, para 3.25.

each phase.⁶⁰ The phasing requirements enabled a purchaser to find out which facilities would have eventually been available and when. It also enabled purchasers to find out how long they might have been expected to face inconvenience caused by continuing development.⁶¹

- 1.51 When deciding to build in phases, the developer was also required to explain in the declaration whether any rights were being reserved until the completion of the development.⁶² The Aldridge Report provided no further detail about these potential reserved rights. As each building or phase would have needed to be structurally complete before a unit could be sold, arguably there would not have been any great need for the developer to reserve substantial development rights over that particular phase. Developers might, however, have wished to reserve certain access or marketing rights. Purchasers would be aware at the outset of how long it would have taken to complete the remaining phases and how long they would have been likely to be subjected to inconvenience from these works.
- 1.52 The Aldridge Report proposed that where the developer did not complete the subsequent phases in accordance with the commonhold declaration, the unit owners should have been able to seek an injunction or sue for damages.⁶³

1990 Bill and Consultation Paper

- 1.53 The 1990 Bill accepted the majority of the Aldridge Report's recommendations regarding the restrictions on varying the extent of the land, the built rule and the phasing provisions.
- 1.54 The 1990 Consultation Paper confirmed that the developer would have been able to make variations to the commonhold land or to the commonhold declaration only before the sale of the first unit. These variations would have included adding or removing land, adjusting boundaries within the commonhold, or altering the allocation of voting rights and service charge contributions. After the sale of the first unit, such changes could only have been made by unanimous agreement or with 80% support and the sanction of the court.⁶⁴
- 1.55 The 1990 Consultation Paper also discussed the built rule, and clarified the policy reason behind the rule.

This requirement was designed to protect purchasers from being trapped into substantially incomplete developments which the promoter then, perhaps because of his insolvency, abandoned before his completion. It also reduced the scope for boundary disputes of the kind which commonly arise following construction in cases where plots are sold (and the sales are registered) prior to development.

⁶⁰ Aldridge Report, para 3.43.

⁶¹ Aldridge Report, para 3.23.

⁶² Aldridge Report, para 3.43.

⁶³ Aldridge Report, para 3.31.

⁶⁴ 1990 Consultation Paper, para 3.27.

- 1.56 In the 1990 Bill, the built rule takes the form of a two stage “structural requirement” test. Each building or phase would need to have reached “the required stage of construction” and have the required degree of “structural independence”. It was left to regulations to determine what was meant by “the required stage of construction”.⁶⁵
- 1.57 The Bill would also have implied into every contract for sale of a unit (other than a unit in the final phase) a term that the developer would have completed all subsequent phases by the date specified in the declaration. This provision was presumably introduced to give effect to the recommendation in the Aldridge Report that a unit owner should be able to enforce the completion of the works by way of mandatory injunction or damages. However, this implied term could have been excluded by agreement.

1996 Bill and Consultation Paper

- 1.58 The 1996 Bill carried forward the two-stage built rule in the same form it was set out in the 1990 Bill. However, the detail of the phasing provisions was not carried forward, and instead the detail was left for regulations to determine at a later date.

2003 Draft Regulations proposed under the Commonhold and Leasehold Reform Act 2002

- 1.59 The restrictions set out by the Aldridge Report and 1990 Bill have not been carried forward into the current legislation. Instead, developers are given a wide scope to reserve ongoing development rights. However, it appears that when consideration was being given to the drafting of the Commonhold Regulations 2004, greater restrictions were initially put forward in relation to development rights. These provisions were eventually removed, perhaps in order to provide greater flexibility to developers.⁶⁶ In particular, the following restrictions were suggested in the 2003 draft regulations, which were removed in the final form of the Regulations:

- (1) a requirement for development rights to expire within five years of the first sale (except with regards to works which have been commenced within the five-year period and marketing rights);⁶⁷
- (2) a requirement to specify the date on which the common parts would be completed;⁶⁸
- (3) a requirement to specify any major works to be carried out, for example, construction of a new building, road or sewer or structural changes to an existing building, road or sewer. However, the developer would have been able to undertake unspecified major works in an emergency;⁶⁹

⁶⁵ 1990 Bill, cl 19(2).

⁶⁶ C G van der Merwe and P F Smith, “Commonhold development rights – a comparative assessment” [2005] 69 *Conveyancer and Property Lawyer* 53.

⁶⁷ Draft Commonhold Regulations (2003), reg 19(14).

⁶⁸ Draft Commonhold Regulations (2003), reg 19(8).

⁶⁹ Draft Commonhold Regulations (2003), reg 19(7).

- (4) a requirement not to interfere with any unit owner's quiet and peaceful enjoyment of the unit (rather than a limit on unreasonable interference to the detriment of the unit owner). The developer would also have been required to minimise disruption to other occupants of the commonhold;⁷⁰
- (5) a restriction on removing land transferred to a unit owner (rather than the current position under which land may be removed with the prior written consent of the unit owner).⁷¹
- (6) a requirement that, unless different provisions applied in the CCS, the standard of materials, finishes and landscaping and the height and density of the buildings should not be inferior or substantially different from completed buildings.⁷²
- (7) a requirement not to remove parts of the common parts from the commonhold.⁷³

⁷⁰ Draft Commonhold Regulations (2003), regs 19(3) and (13).

⁷¹ Draft Commonhold Regulations (2003), reg 19(4).

⁷² Draft Commonhold Regulations (2003), reg 19(10).

⁷³ Draft Commonhold Regulations (2003), reg 19(3).

Consultation Paper Chapter 7: The structure of the commonhold association and insolvency

1.60 A key feature of commonhold is the commonhold association. The concept of having a management body made up of the unit owners to own the common parts and manage the commonhold has existed since the Aldridge Report. However, the form of this management body has changed throughout the various stages of the development of commonhold. In particular, this has led to changes in what would happen should a commonhold association become insolvent, and to what degree the members are liable for the debts of the commonhold association. We consider the history of the commonhold association and the liability and insolvency provisions in turn, below.

Aldridge Report

1.61 The Aldridge Report took the view that the management body should be a body corporate: in other words, it should in law be a person which is separate from its members, and should be able to sue and be sued in its own name. It recommended that this should be a bespoke entity, which would be registered at HM Land Registry. The constitution of the commonhold association would be entirely standard, and set by regulations.⁷⁴ The Report contained suggested specimen “Commonhold Association Constitution Rules”.⁷⁵ The commonhold association would have to have a Chairman and Secretary, and could choose to have additional officers.⁷⁶ If a commonhold had more than six units, it would have to be managed by an elected committee; if it had six or fewer, it could have decided whether it would elect a committee, or whether all decisions would have been made in general meetings.⁷⁷ The suggested specimen Rules envisaged that the committee would have comprised at least four and not more than 12 members.⁷⁸

1.62 The Aldridge Report rejected the idea that the commonhold association should be a limited company, registered at Companies House. If the commonhold association were registered with limited liability under the Companies Acts, creditors would be entitled to put the commonhold association into liquidation. The report concluded this would not be appropriate, because it was essential to the proper functioning of a commonhold that there should always be an association in existence.

1.63 Consequently, if creditors were to be deprived of their ultimate remedy of putting the commonhold association into liquidation, then the responsibility for covering the debts of the commonhold association should lie with the unit owners. It might be expected that the result of this would be unlimited liability on the part of all unit owners. Unlimited liability would mean that, should a commonhold association become insolvent, the unit owners would both individually and collectively be responsible for the entire value of the

⁷⁴ Aldridge Report, para 8.19.

⁷⁵ Aldridge Report, Appendix C.

⁷⁶ Aldridge Report, para 8.16.

⁷⁷ Aldridge Report, para 8.15.

⁷⁸ Aldridge Report, Appendix C, rule 30.

commonhold association's debts. If one unit owner was unable to pay his or her full share of the debts, the other unit owners would have to make up the shortfall. This would appear to be the approach taken in most common law jurisdictions.⁷⁹ The Aldridge Report, however, took the view that this was inappropriate. Whilst unlimited liability may be appropriate for a business partnership, where you choose who your partner is, unit owners have no choice over who their neighbours are. In practice, creditors would enforce judgments against the better-off unit owners, who would then have to go to the trouble of getting contributions from their less well-off neighbours. If that should prove difficult, or impossible – if their neighbours were bankrupt, or clearly not worth suing – they would have to subsidise them.

- 1.64 The Aldridge Report therefore proposed a compromise which was termed “restricted liability”. Under this approach, if a creditor was enforcing a debt against a commonhold association, then so much of the debt as remained unpaid⁸⁰ could have been enforced against the individual unit owners, in the same proportions as their share of the commonhold contribution. Under these proposals, unlike with unlimited liability, a unit owner would never have been held responsible for the share of a debt which was not paid by a neighbour. The report noted that this process would have been more difficult for creditors than enforcement against a limited company registered at Companies House, but it was felt to be a reasonable compromise.
- 1.65 It would therefore have been possible for unit owners to have found that the equity in their units was at risk if a creditor had decided to enforce a unit owner's share of the commonhold association's debt by obtaining a charging order against an individual unit, or by taking bankruptcy proceedings against individual unit owners. It could be argued that this risk would be comparable with the risks faced by the owner of a freehold house. However, the case could also be made that it would be fundamentally different, in that a unit owner might have incurred liabilities as a result of the actions or defaults of others, in a way which could never occur to the owner of a freehold house.
- 1.66 These proposals meant that the commonhold association could never have become insolvent, as the unit owners would each have been responsible for their proportionate share of the commonhold association's debts. Consequently, as the commonhold association could never have ceased to exist through its insolvency, there was no need to consider or make provision for what should happen in that scenario to the individual units. The only circumstances in which the commonhold could cease to exist would be if the owners voted to end the commonhold; for redevelopment, or perhaps for wholesale refurbishment.⁸¹

⁷⁹ For instance, in New South Wales. The Aldridge Report drew heavily on the early versions of the strata title scheme which had been introduced there.

⁸⁰ It was not explicitly stated how long a debt would have to remain unpaid before this could be done, and whether a creditor should first have attempted to enforce the judgment against the commonhold association itself eg by obtaining what is now termed a “third party debt order” against the commonhold association's bank account, including any reserve fund.

⁸¹ The provisions relating to the voluntary termination of a commonhold are discussed at paras 1.155 to 1.170, below.

1990 and 1996 Bills and Consultation Papers

- 1.67 The 1990 and 1996 Bills retained the concept of the commonhold association as a bespoke corporate body. It would have been constituted along similar lines to those proposed in the Aldridge Report. The draft Bills therefore maintained the principle of restricted liability, but it took a slightly different, more elaborate form. It has not been possible to ascertain why more elaborate provisions were considered to be necessary, although the impracticality of a creditor having to enforce a single debt by taking separate enforcement proceedings against multiple unit owners may have played a part.
- 1.68 In the 1990 and 1996 Bills, the creditor would not have been permitted to enforce a debt directly against the individual unit owners, nor take proceedings directly to wind-up the commonhold association. Instead the creditor would have had to apply to the court for the appointment of a “commonhold administrator”. The administrator would have taken over the running of the commonhold, and would have had to decide how the commonhold association should be managed.⁸² He or she would formulate proposals which would have been placed before the creditors and would have required the approval of the court. In many cases this would have meant that the administrator would have demanded service charge contributions from the unit owners to cover the commonhold association’s debts. But if the administrator took the view that the commonhold association was “irretrievably insolvent” he or she could have petitioned the court for the winding-up of the commonhold association.⁸³ It should be noted that:
- (1) unlike with a limited company registered at Companies House, only the commonhold administrator could have petitioned for the winding-up of the commonhold association. This provision was intended to ensure that the commonhold association would only have been wound-up if it were irretrievably insolvent;
 - (2) the test for winding-up would have been more stringent (“irretrievably insolvent”) than for a limited company because the winding-up of the commonhold association would have resulted in unit owners losing their homes;⁸⁴ and
 - (3) because the commonhold association was a bespoke corporate body – and because it was based on restricted liability, not limited liability – it could not rely on the provisions for company insolvency contained in the Insolvency Act 1986. Instead, extensive specific provisions were required, which were set out in the 1990 and 1996 Bills.

⁸² 1990 Bill, cls 52 and 53.

⁸³ 1990 Bill, cl 69.

⁸⁴ 1990 Bill, explanatory note to cl 69.

- 1.69 Broadly speaking, the intention of the provisions was to replicate the order of priorities implicit in the Aldridge Report.
- (1) Creditors would first have had recourse to the commonhold contributions which had already been collected, and any contributions collected by an administrator.
 - (2) If that was insufficient, then the commonhold as a whole would have had to be sold.
 - (3) Any legal charges (for instance, any mortgages) secured on a unit would have been deducted first from the value of the unit.
 - (4) The owner's proportion of the debts owed by the commonhold association would then have been deducted from the value of his or her unit. An owner would not have been liable for a neighbour's share of the debts, even if the remaining value of the neighbour's unit was insufficient to cover his or her share of the debts.
 - (5) Any remaining value of the unit would then have been returned to the unit owner.
- 1.70 As a result of these matters being spelled out in greater detail, the proposals attracted more criticism than previously. It was noted that as provisions for insolvency now had to be made, this greatly increased the length of the Bill.⁸⁵ It also drew attention to the possibility that unit owners might lose their homes as a result of financial mismanagement of the commonhold association.
- 1.71 There were minor differences in content and more substantial differences in structure between the 1990 and 1996 draft Bills, but their overall approach to insolvency was broadly the same.⁸⁶

⁸⁵ Dudley Fishburn MP noted in the House of Commons that the 1990 Bill was "as thick as a telephone directory": *Hansard* (HC), 8 March 1991, vol 187, col 580. On the other hand, Letitia Crabb suggested that the 1996 provisions "are long, but that is because they are a sensitive, meticulous and fair response to the Aldridge brief": L Crabb "The Commonhold Association – As you like it" [1998] *Conveyancer and Property Lawyer* 283.

⁸⁶ In the 1996 draft Bill the provisions on insolvency were largely removed to a series of schedules.

Consultation Paper Chapter 8: The commonhold community statement

Aldridge Report

1.72 The CCS has been a feature of commonhold, in one form or another, since the Aldridge Report. In the Aldridge Report, the CCS was called the “commonhold declaration”, and was described as:

the formal document, usually incorporating a plan, used to establish the commonhold and registered at HM Land Registry. It defines the extent of the individual units and the rights and responsibilities of the owners.⁸⁷

1.73 The Aldridge Report envisaged that the rights and obligations of unit owners between themselves would be created by standard provisions set out in regulations.⁸⁸ These provisions could then be altered for individual commonholds in the commonhold declaration. Rather than setting out all the standard provisions, the commonhold declaration would state only those provisions that had been varied or added to those set out in the regulations. The Aldridge Report explained that this approach was taken because it was important for it to be immediately obvious “if the regulations for a particular commonhold differ from the standard ones”.⁸⁹ For the same reason, the report suggested that “all variations to the standard regulations must be registered at [HM] Land Registry”.⁹⁰

1.74 As well as altering the standard provisions at the outset, it was also possible under the Aldridge model to amend the provisions at a later date, either by a unanimous vote, or with the consent of 80% of the unit owners and a court order.⁹¹

1.75 However, the ability to alter the standard provisions was restricted in two ways. First, the Report stated that it should not be possible to create directly or indirectly discriminatory regulations. It was felt necessary to include this restriction explicitly as the writers were “not certain that the general legislation against such discrimination would cover all regulations it would be possible to make governing a commonhold”.⁹² The Report also concluded that it should not be possible to create regulations which restricted the right of an owner to dispose of his or her unit, whether that was by sale, lease, mortgage or any other disposition. This restriction was included because “the

⁸⁷ Aldridge Report, p 5.

⁸⁸ The Aldridge Report suggested the provisions should be in regulations rather than primary legislation so they could be more easily changed by Government at a later date.

⁸⁹ Aldridge Report, para 7.6.

⁹⁰ Aldridge Report, para 7.6.

⁹¹ Aldridge Report, para 7.5. The Aldridge Report gave no reasons for these specific majorities, but the 1990 Consultation Paper discussed this in slightly more detail. See para 1.79 below.

⁹² Aldridge Report, para 7.20(a).

control of dispositions is a common characteristic of the leasehold system, and [is] incompatible with freehold ownership”.⁹³

- 1.76 The Aldridge Report recommended that the duties and powers of the commonhold association, including its repairing and maintenance obligations, should also be set out by regulations. However, the Report concluded that it should not be necessary to vary these provisions in any individual case, so no provision was made for these obligations to be altered in the commonhold declaration.⁹⁴

1990 and 1996 Bills and Consultation Papers

- 1.77 The 1990 Bill followed much of the approach set out by the Aldridge Report. The commonhold declaration was the document which defined the commonhold and each of the commonhold units. Standard provisions detailing the rights and obligations of the unit owners, such as “the enjoyment of common services and facilities”, would be set out in regulations. Deviation from the standard provisions was permissible, in the commonhold declaration, in order to “meet the special requirements of a particular development”.

- 1.78 Again, the ability to vary the standard provisions was subject to a number of restrictions. For instance, variations were not allowed to interfere unacceptably with the repairing and indemnity obligations of the commonhold, or to restrict a unit owner’s ability to dispose of his or her unit. The prohibition against discriminatory provisions was also carried forward from the Aldridge Report. It is not clear whether it was envisaged that all of the provisions of the regulations would appear in each individual commonhold declaration, or whether it was only the modified provisions that would appear. Given that the general approach of the 1990 Bill was to follow much of that set out in Aldridge, it would seem likely that the 1990 Bill intended just the modified provisions to be set out in the commonhold declaration.

- 1.79 Provisions could also be varied at a later stage by the unit owners, subject to “qualified unanimity”. This meant that at least 80% of all votes had to be cast in favour. The Consultation Paper explained that a majority of more than 50% was required to “ensure major decisions of great significance ... are only taken with the appropriate degree of support”.⁹⁵ Where an 80% majority could not be reached, those seeking to achieve an 80% majority could apply to court to have opposing votes discounted. The court could discount up to 20% of the total number of votes if it considered it would be fair and reasonable to do so. The court could impose conditions when discounting the votes, such as requiring compensation to be paid to those in the minority.

- 1.80 The 1996 Bill adopted the same approach as the 1990 Bill.

⁹³ Aldridge Report, para 7.20(b).

⁹⁴ Aldridge Report, para 8.19.

⁹⁵ 1990 Consultation Paper, para 3.12.

Consultation Paper Chapter 9: Management and maintenance issues

1.81 In Chapter 9: Management and Maintenance Issues of our Consultation Paper we address various issues relating to the internal organisation of the commonhold. Although there is no other overarching factor which links them, this chapter will address the history of how they were addressed in earlier versions of commonhold.

Appointment of the committee

Aldridge Report

1.82 As the Aldridge Report proposed that the commonhold association should be a bespoke body corporate, it did not have directors. Instead, it would have been managed by a committee. A commonhold of more than six units would have been required to have a committee. A commonhold of six, or fewer, units could have chosen whether to have a committee or not.⁹⁶ The Committee would have comprised between four and 12 members.⁹⁷

1.83 The specimen “Commonhold Association Constitution Rules” stated that the committee would be elected by the members in a general meeting,⁹⁸ although the committee might have co-opted further members to fill any vacancies, until they could be filled at the next general meeting. The same rule also stated that a committee member might be removed by a general meeting.⁹⁹ The Rules stated that “the committee is responsible for managing the commonhold...subject to any resolution of a general meeting.”¹⁰⁰ Although not elaborated or explained, this would suggest that the members would have been able to control the decisions taken by the committee by a resolution which received a bare majority of votes.¹⁰¹ The quorum proposed for meetings of the committee was two.¹⁰²

1990 Bill and Consultation Paper

1.84 The 1990 Draft Bill and Consultation Paper retained the concept of a bespoke body corporate which would not be registered under the Companies Acts. It retained the same provisions recommended by the Aldridge Committee (see paragraph 1.82 above),¹⁰³ although matters such as the size of the committee, method of election and

⁹⁶ Aldridge Report, para 8.15.

⁹⁷ Aldridge Report, Appendix C, Rule 30.

⁹⁸ Aldridge Report, Appendix C, Rule 31.

⁹⁹ Removal would not, therefore, have been subject to the safeguard of “special notice” which was provided for by the Companies Acts (see now the Companies Act 2006, ss 168, 169 and 312).

¹⁰⁰ Aldridge Report, Appendix C, Rule 35.

¹⁰¹ It should be noted that a direction to the same effect would now require a special resolution, ie a duly proposed resolution passed by 75% of the available votes of those attending a general meeting, or 75% of the total available votes if passed by the written resolution procedure.

¹⁰² Aldridge Report, Appendix C, Rule 37.

¹⁰³ 1990 Draft Bill, sch 1, paras 1 to 3.

the quorum for committee meetings, would have been dealt with by the standard rules for commonhold associations. These would have been prescribed by statutory instrument.¹⁰⁴

- 1.85 Only unit owners would have been entitled to be members of the committee.¹⁰⁵ It would not, therefore, have been possible to appoint professional directors, that is, directors who were paid for their services. It would, however, have been possible to pay committee members for work done outside the scope of the ordinary duties of a committee member.¹⁰⁶ The committee (or the members, if there was no committee) would have been entitled to appoint managing agents if it wished, though this would not have been compulsory.¹⁰⁷

The duties owed by the committee

- 1.86 The Aldridge Report recommended that a reasonable standard of care and skill should be required of committee members, as they are looking after “not only their own property, but other peoples”. The Report went on to suggest that committee members should be required:

to exercise the degree of skill and care which may reasonably be expected of the owner of a freehold house, who has received no special instruction or training, when conducting his own affairs in relation to that house.¹⁰⁸

- 1.87 The 1990 Draft Bill seems to make no provisions in relation to the duties owed by the committee.

Use of proxy voting

Aldridge Report

- 1.88 The body of the Aldridge Report does not make any detailed provision for proxy voting. A member’s right to appoint a proxy is, however, mentioned in the specimen “Commonhold Association Constitution Rules”.¹⁰⁹ The possibility that the giving of proxies might give rise to abuse is not considered.

1990 Bill and Consultation Paper

- 1.89 The 1990 Draft Bill and Consultation Paper did not make specific provision for proxy voting. Its existence was recognised by the fact that commonhold constitution rules might make provision for it.¹¹⁰

¹⁰⁴ 1990 Draft Bill, sch 1, paras 4 and 7, and explanatory notes.

¹⁰⁵ Aldridge Report, para 8.17.

¹⁰⁶ Aldridge Report, Appendix C, Rule 43.

¹⁰⁷ Aldridge Report, para 8.51.

¹⁰⁸ Aldridge Report, para 8.48.

¹⁰⁹ Aldridge Report, Appendix C, Rule 10.

¹¹⁰ 1990 Draft Bill, sch 1, para 7(f) and (i),

Requirements for insurance

Aldridge Report

- 1.90 The Aldridge Report proposed that buildings insurance would be the responsibility of the commonhold association,¹¹¹ and that minimum insurance requirements would be contained in regulations prescribed by statutory instrument.¹¹² Duplicate cover would have been prohibited by legislation, to prevent the possibility of the principal cover being reduced.¹¹³ It would not have been appropriate for interests of individual unit owners and their mortgage lenders to be noted on the policy, as claims would be paid to the commonhold association. It would then be responsible for repairing or rebuilding if possible. If the members opted to terminate the commonhold, the proceeds of the claim would be distributed on that basis.
- 1.91 The Aldridge Report noted that the Committee had been advised by the Association of British Insurers that it would be “difficult, if not impossible” to obtain insurance cover to cover amateur managers at a reasonable cost, but it provided that they would be entitled to a limited indemnity from the commonhold association.¹¹⁴

1990 Bill and Consultation Paper

- 1.92 The 1990 Draft Bill and Consultation Paper required the commonhold association to insure both the common parts and the units. It attempted to overcome the problem that insurance would not be available for all potential risks in all areas by providing that the commonhold association should take out insurance which is “available without negotiation of special terms”.¹¹⁵ An association would also have been required to insure against third party risks.¹¹⁶ It was recognised that this might be vital to ensure that the commonhold remained viable if faced with, say, a substantial claim from a visitor. Insurance would have to be taken out with an “approved insurer”.¹¹⁷ Regulations would make supplemental provision for minimum insurance requirements, dealing with matters such as the descriptions of property loss to be covered, consequential loss insurance, the amount of cover, the risks to be covered, and excesses, exceptions and limitations.¹¹⁸

Standard of maintenance

Aldridge Report

- 1.93 The commonhold association would have been under a duty to repair, decorate and maintain the common parts.¹¹⁹ The Aldridge Report did not elaborate on the standard

¹¹¹ Aldridge Report, para 8.35.

¹¹² Aldridge Report, para 11.8.

¹¹³ Aldridge Report, para 11.9.

¹¹⁴ Aldridge Report, para 8.50.

¹¹⁵ 1990 Draft Bill, cl 45.

¹¹⁶ 1990 Draft Bill, cl 46.

¹¹⁷ 1990 Draft Bill, cl 47.

¹¹⁸ 1990 Draft Bill, cl 48.

¹¹⁹ Aldridge Report, para 8.32.

to which this would be carried out. “Repair” was taken as including “replacement, reasonable refurbishment and necessary improvement work”.¹²⁰ It was not in favour of replicating the requirements as to the frequency with which work should be carried out, and materials to be used, which are and were common in the decorating obligations in leases.¹²¹

1990 Bill and Consultation Paper

1.94 The 1990 Draft Bill and Consultation Paper followed the Aldridge Report. It provided that the commonhold association would be under a duty to keep the common parts in repair, and that this would include, “carrying out, where appropriate, any necessary improvement”.¹²² Improvements which went beyond this would be possible, but only where there was complete unanimity.¹²³ A decision on this would have been categorised as a “class 1 resolution”. Therefore, in accordance with the general scheme of the 1990 Draft Bill, the votes relating to a unit could be cast by a mortgage lender instead of by the owner. It appears to have been assumed that it would have been sufficient to require that the common parts be kept “in repair” and “in appropriate decorative condition”.¹²⁴ It was not suggested that it might ever be necessary or appropriate for these to be defined more closely, or by reference to the specific circumstances of the commonhold and its buildings.

Rights of entry

Aldridge Report

1.95 It was noted in the context of repairing obligations that the commonhold association would have the power to enter “any part of the property” for inspection purposes and to carry out the work.¹²⁵ This appears to cover a right of entry to individual units, and was not discussed in any further detail, for example, specifying the notice that would be required, and provisions in emergencies. The right of entry would also apply to other unit owners.¹²⁶

1990 Bill and Consultation Paper

1.96 Under the 1990 Draft Bill and Consultation Paper, rights of entry for repair and for other purposes would have been dealt with by detailed commonhold regulations.¹²⁷ Although the detail would have been in the regulations themselves, they might potentially have been extensive. The enabling clause, for example, provided that a right of entry might be given to the commonhold association or a unit owner if there were reasonable grounds for believing that the condition of a unit might result in injury or loss to any

¹²⁰ Aldridge Report, para 8.26.

¹²¹ Aldridge Report, para 8.31.

¹²² 1990 Draft Bill, sch 2, para 1(1)(a).

¹²³ 1990 Draft Bill, sch 2, para 9.

¹²⁴ 1990 Draft Bill, Sch 2, para 1(1)(b).

¹²⁵ Aldridge Report, para 8.26.

¹²⁶ Aldridge Report, para 7.14.

¹²⁷ 1990 Draft Bill, cl 6(6). See also 1990 Draft Bill, sch 2, para 1(2).

person, or loss or damage to another unit or to the common parts.¹²⁸ The rights of entry would have extended to inspection, and also to carrying out necessary works.

Consent to alterations

Aldridge Report

1.97 A unit owner would have been “entitled to make internal alterations and additions which neither affect the structure nor the common parts”, but would need the consent of the commonhold association to any alterations or additions which would affect the common parts.¹²⁹ The point was not addressed as to whether a unit owner would have had any remedy if the commonhold association did not act reasonably. Nor did it address the point that alterations within one unit might affect another (for example, removal of fitted carpeting, and installation of wooden floors).

1990 Bill and Consultation Paper

1.98 Under the 1990 Draft Bill and Consultation Paper, the detail of any obligations which imposed restrictions on altering or carrying out works within individual units would have been contained within commonhold regulations.¹³⁰ The provision which enabled such regulations to be made was worded rather more widely than the corresponding paragraph of the Aldridge Report. The Report seemed to have assumed that consent would be needed only for work which affected the common parts. The 1990 Draft Bill recognised that works carried out within a unit might still affect “the use or enjoyment of any other land within the commonhold”, and might therefore require the consent of the commonhold association. The Draft Bill did not address the issue of whether a unit owner would have any remedy if an association did not act reasonably, but this could have been included within the regulations.

Commonhold and long-term contracts

Aldridge Report

1.99 The Aldridge Report recognised that a developer of a commonhold might attempt, whilst it still controlled the commonhold association, to tie it in to long-term “sweetheart” contracts.¹³¹ It therefore proposed that, for a period of six months from the date of the first annual general meeting when the commonhold association was in the control of the members, the commonhold association should have been entitled to cancel any existing contract.

1990 Bill and Consultation Paper

1.100 The 1990 Draft Bill addressed the issue of contracts which purported to be made on behalf of commonhold associations which did not exist at the time. It followed what would be the position under company law, and provided that the person who purported to act on behalf of the commonhold association would be liable on the contract.¹³² It did

¹²⁸ 1990 Draft Bill, cl 6(6)(g).

¹²⁹ Aldridge Report, para 7.15.

¹³⁰ 1990 Draft Bill, cl 6(7).

¹³¹ Aldridge Report, paras 8.56 and 12.16.

¹³² 1990 Draft Bill, cl 27.

not make any provision in respect of what were referred to in the Aldridge Report (see paragraph 0 above) as “sweetheart contracts”. Commonhold associations would therefore have been bound by any contracts made on behalf of the commonhold association when it was controlled by the developer rather than by the unit owners. It is stated that this was a decision by Government, as it was felt that there was insufficient evidence to show that developers and contractors were abusing their position. The matter was, however, to be reviewed if significant abuse came to light.¹³³

1996 Bill and Consultation Paper

1.101 On all the matters dealt with in paragraphs 1.82 to 1.100 above} the 1996 Draft Bill and Consultation Paper broadly followed the 1990 Draft Bill, and so the 1996 Draft Bill will not be considered in detail.

¹³³ 1990 Draft Bill and Consultation Paper, paras 3.46 to 3.47.

Consultation Paper Chapter 10 & 11: Financing the commonhold and responding to emergencies

Aldridge Report

Contribution to shared costs – the service charge contributions

1.102 The Aldridge Report recognised that there would need to be an effective system to decide how much each unit owner should contribute towards the common expenses, and to collect those contributions.¹³⁴ These were referred to as the service charge contributions. The commonhold association would have to calculate and collect the contributions from the unit owners,¹³⁵ and no provision was made for formal consultation on the level of service charges. No indication was given that these would have to be approved by the membership. As the management of the commonhold would normally have been in the hands of the committee,¹³⁶ this implies that only the committee would be involved in setting the service charge contributions.

Emergency contributions

1.103 The Aldridge Report did not make any provision for service charge contributions to be raised on an emergency basis. It should be noted that there was no requirement that the members of the commonhold should be consulted on the level of contributions, and they would not have had to approve the contributions. So if it were necessary to raise a supplementary charge, there would have been no need for an expedited procedure to be available.

1.104 The Report recognised that there would be occasions when the commonhold association might temporarily suffer from a lack of funds. It would be able to borrow, but would not be able to offer any security. The only security available to it would be the common parts, and, if a mortgage lender exercised its power to sell these, the commonhold would lose essential facilities. In many cases the common parts would be simply unmortgageable. It was suggested that the commonhold association could “borrow against...the right to collect future service charges”, but no details were given as to how this would operate in practice.¹³⁷ As the commonhold association would have been a bespoke body corporate, and not a limited company, it would not, apparently, have had the power to raise funds on the security of a “floating charge”.¹³⁸

Contributions to reserve funds

1.105 The Aldridge Report recognised that it was important that, in addition to collecting a service charge for current expenditure, the commonhold association should also collect a reserve fund. Reserves would cover expenditure which would arise regularly, but not every year (such as redecorating); and also expenditure which would arise only

¹³⁴ Aldridge Report, para 9.1.

¹³⁵ Aldridge Report, para 8.24.

¹³⁶ See para 1.61 above.

¹³⁷ Aldridge Report, para 9.3.

¹³⁸ See Consultation Paper, paras 11.17 to 11.21.

occasionally, but would then be substantial. The cost of reroofing, or the replacement of a lift, were given as examples of the latter.¹³⁹

1.106 When a commonhold was set up, a surveyor would be required to certify what contributions to the reserve fund would be considered adequate. The commonhold association would thereafter be under a duty to maintain a reserve fund which it reasonably considered to be adequate. The Report rejected the idea that a fixed percentage should be transferred to the reserve every year, on the basis that, depending on the circumstances of the commonhold, this could result in an amount which was too high or too low.¹⁴⁰

1.107 The Report seems to have envisaged that there would be a single reserve fund, and that what it could be used for would be set by regulation.¹⁴¹ The commonhold declaration (what is now the CCS) could have added further purposes, and others could have been added by a resolution which was passed unanimously, or which had achieved an 80% majority and received approval from the court.¹⁴² If funds for a specified purpose were available in the reserve fund, then the commonhold association would have been bound to use the funds for those purposes, and could not have retained the reserve so that it could have been used for some other purpose.¹⁴³

1.108 It was suggested that the commonhold association would hold reserve funds on trust for the unit owners.¹⁴⁴ The full implications of this were not explained, but it was suggested that, if the commonhold were terminated, the unit owners would own the fund in the same proportion that was applicable to all the property.¹⁴⁵

Shares of the contributions to be paid by each unit

1.109 The Aldridge Report proposed that the percentage of overall costs to be paid by each unit would be allocated by the “commonhold declaration”,¹⁴⁶ what is now called the CCS. It recognised that it could be argued that sometimes costs should be borne in different proportions, on the basis that some unit owners would not benefit at all from some facilities. One example given was that, in a mixed-use development, residential unit owners might not make any use of a commercial delivery area. It nevertheless recommended that, in the interests of simplicity, all costs should be borne in the same proportions. It assumed that a broadly fair result could have been achieved by taking

¹³⁹ Aldridge Report, para 9.8.

¹⁴⁰ Aldridge Report, para 9.13.

¹⁴¹ No further indication was given of what any regulations would say, apart from the examples given at **para** 1.105 above.

¹⁴² Aldridge Report, para 9.11.

¹⁴³ Aldridge Report, para 9.12.

¹⁴⁴ Aldridge Report, para 9.8.

¹⁴⁵ Aldridge Report, para 9.16. The “ownership share” – the percentage of the value of the whole commonhold that a unit owner would receive if it was terminated – would have been set in the commonhold declaration at the outset: para 5.9(d).

¹⁴⁶ Aldridge Report, para 9.4.

these matters into account when the percentage contributions were fixed at the start of the commonhold.¹⁴⁷

Varying the shares of the contributions to be paid by each unit

1.110 The Aldridge Report assumed that, once set, the contributions allocated to each unit would have remained the same, unless varied by a resolution. The resolution would need to either be passed unanimously by those present at a general meeting of the commonhold, or by 80% and then receive the approval of the court.¹⁴⁸ Provisions were also made to cover the position if part of the commonhold was destroyed, and could not be rebuilt,¹⁴⁹ or was subject to a compulsory purchase order.¹⁵⁰

Liability on transfer of a unit

1.111 The Aldridge Report did not suggest that any provision should be made for the commonhold association to issue a certificate before the sale of a unit which specified what service charge contributions were outstanding. It assumed that a new owner would automatically be liable for any contributions which a previous owner had not paid.¹⁵¹ It would therefore be up to the new owner to find this out from the owner who was selling. If the new owner were misled, then he or she would have been liable to the commonhold association, but might have been able to sue the previous owner for misrepresentation or fraud.

1.112 The Report also considered the issue of how the existence of a reserve fund should affect any apportionment that was agreed on sale. It acknowledged that some might argue that the reserves should be viewed as a payment for a facility already enjoyed; others might view them as an advance payment for future works. It was suggested that this would best be left as a matter for negotiation and agreement between the seller and the buyer.¹⁵²

1990 Bill and Consultation Paper

Contribution to shared costs – the service charge contributions

1.113 The 1990 Draft Bill adopted the basic scheme set out in the Aldridge Report and described at paragraph 1.102 above, and added some further points of detail. The Draft Bill made it clear that service charges should be set by reference to the “accounting period” of the commonhold.¹⁵³ No provision was made for the committee of the commonhold association¹⁵⁴ either to consult with the members of the commonhold association before setting the service charge, or to require the members to approve the charge which it had set. There was, however, an express requirement that the service

¹⁴⁷ Aldridge Report, para 9.5.

¹⁴⁸ Aldridge Report, para 13.3.

¹⁴⁹ Aldridge Report, para 13.11.

¹⁵⁰ Aldridge Report, paras 13.12 to 13.16.

¹⁵¹ Aldridge Report, para 5.19.

¹⁵² Aldridge Report, para 9.15.

¹⁵³ 1990 Draft Bill, cl 36(1).

¹⁵⁴ Assuming there was one: a commonhold with six or fewer units might have been operating without one.

charge should be “sufficient (but not significantly more than sufficient) for the authorised purposes”.¹⁵⁵ It seems reasonable to assume that this might have offered unit owners some limited scope to challenge a service charge which was patently inadequate, or clearly excessive. The only express power given to unit owners to challenge part of the service charge applied if a unit owner had successfully sued the commonhold association: the court could have required that the charge be adjusted so that the unit owner did not have to contribute to the costs incurred by the commonhold association in meeting the unit owner’s own claim.¹⁵⁶

Emergency contributions

1.114 The 1990 Draft Bill made express provision for the commonhold association at any time to levy an “additional service charge” if it appeared that the receipts from the service charge already levied would be inadequate to meet necessary expenditure.¹⁵⁷

1.115 The commonhold association would have been given an express power to borrow money on such terms as it saw fit.¹⁵⁸ Any such loans could not have been secured, because the commonhold association could not have mortgaged all or any part of the common parts.¹⁵⁹ The Draft Bill did not explain how the commonhold association might have been able to “borrow against...the right to collect future service charges”,¹⁶⁰ or make any provision for this. For the reasons discussed at paragraph 1.104 above} in discussing the Aldridge Report, the possibility of the commonhold association granting a floating charge did not arise.

Contributions to reserve funds

1.116 The 1990 Draft Bill provided that commonhold regulations could have required associations to set up and maintain a reserve fund or funds.¹⁶¹ The commonhold association would then have had to include in the service charge sufficient amounts to be able to make the appropriate transfers to the fund or funds.¹⁶² The transfers would have needed to be sufficient to maintain the fund or funds at a level adequate to their purposes.¹⁶³ Payments which fell within the scope of a reserve fund object would have to be made, so far as possible, from that fund,¹⁶⁴ and it would not have been permitted to make payments for any other purpose.¹⁶⁵ The precise way in which the reserve fund or funds would have operated would therefore have depended upon the wording of the

¹⁵⁵ 1990 Draft Bill, cl 36(2).

¹⁵⁶ 1990 Draft Bill, cl 37, and explanatory note.

¹⁵⁷ 1990 Draft Bill, cl 36(7).

¹⁵⁸ 1990 Draft Bill, cl 29(1)(d).

¹⁵⁹ 1990 Draft Bill, cl 5(2).

¹⁶⁰ Paragraph 1.104 above.

¹⁶¹ 1990 Draft Bill, cl 6(2)(b).

¹⁶² 1990 Draft Bill, cl 36(3)(b).

¹⁶³ 1990 Draft Bill, cl 38(1).

¹⁶⁴ 1990 Draft Bill, cl 38(2).

¹⁶⁵ 1990 Draft Bill, cl 38(3).

commonhold regulations, and whether any scope was given to individual commonholds to set up reserve funds for specific purposes of their own.¹⁶⁶

1.117 The commonhold might be wound-up, either on voluntary termination by the members, or by the court. In either case, debts incurred in respect of matters for which there was a reserve fund, would, so far as possible, be met from the appropriate reserve fund. The reserve funds would therefore have enjoyed a special status, but it is difficult to see that this would have amounted to their being held “on trust” for the unit owners.¹⁶⁷

Shares of the contributions to be paid by each unit

1.118 The 1990 Draft Bill would have implemented the recommendations contained in the Aldridge Report and required every commonhold declaration to set out the numerator¹⁶⁸ of the fraction of the service charge payable by each unit which was required to contribute.¹⁶⁹ This fraction would have applied to all the expenses within the service charge, and so it would not have been possible for different fractions to apply to different elements of the service charge.¹⁷⁰ The number attributable to each unit would have to be a whole number.¹⁷¹ It would not, however, have indicated the proportion of the service charge which the unit would have borne. In order to ascertain the proportion – in other words, to calculate the fraction – one would have to know the total of the numbers attributed to all the units. The share of the service charge was set out in this way, so that it was left open, and would allow for phased developments.¹⁷²

Varying the shares of the contributions to be paid by each unit

1.119 The 1990 Draft Bill and Consultation Paper would have implemented the recommendations of the Aldridge Report on varying the contributions payable by each unit. Any alteration to the number set in the commonhold declaration would have required either a unanimous resolution of the unit owners, or a resolution passed by 80%, plus the approval of the court.¹⁷³ The necessary resolution would have been a “class 1 resolution”, so votes could be exercised by mortgage lenders instead of the unit owners. It would not have been possible to alter any requirements of the commonhold regulations which related to existing reserve funds.¹⁷⁴

¹⁶⁶ See para 1.107 above.

¹⁶⁷ See para 1.108 above.

¹⁶⁸ This is the upper number in a fraction. For example, in $\frac{1}{4}$, the numerator is 1.

¹⁶⁹ 1990 Draft Bill, cl 4(5) and cl 13(4)(a)(ii). It would have been possible for, say, a garage or parking space to be a “unit” but not to have to contribute to the service charge.

¹⁷⁰ This was discussed at para 1.109 above.

¹⁷¹ 1990 Draft Bill, cl 13(5). The number would typically be “1”, but might be a different number, if it was desired that larger units should pay a larger proportion of the service charge.

¹⁷² 1990 Draft Bill, cl 15, explanatory note.

¹⁷³ 1990 Draft Bill, cl 50(4).

¹⁷⁴ 1990 Draft Bill, cl 50(2), and explanatory note.

Liability on transfer of a unit

1.120 The 1990 Draft Bill and Consultation Paper assumed that an incoming unit owner would be liable for the arrears of any unpaid service charge contributions relating to that unit.¹⁷⁵ The Draft Bill therefore made provision for the commonhold association to provide on request certain information free of charge to specified persons.¹⁷⁶ More detailed provisions could have been made by regulations, and it was suggested that a prudent prospective purchaser would therefore have required details of all arrears before becoming committed to the purchase.¹⁷⁷ It seems to have been assumed that the contract could then provide for how the arrears would be paid, and how, if necessary, they would be apportioned.

1996 Bill and Consultation Paper

1.121 On all the matters dealt with in paragraphs 1.113 to 1.120 above} the 1996 Draft Bill and Consultation Paper broadly followed the 1990 Draft Bill, and so the 1996 Draft Bill will not be considered in detail.

¹⁷⁵ Usually, but not necessarily, a purchaser.

¹⁷⁶ 1990 Draft Bill, sch 2, para 13.

¹⁷⁷ 1990 Draft Bill and Consultation Paper, para 3.33.

Consultation Paper Chapters 12: The ban on residential leases within commonhold – possible exceptions

Aldridge Report

1.122 The Aldridge Report did not propose a prohibition on long leases and instead discussed how these might be accommodated within the commonhold system.¹⁷⁸

1.123 For instance, the Report recommended that, should a unit owner fail to pay his or her service charge, a leaseholder with a lease over 21 years could be required to pay the service charge on the unit owner's behalf, even if it exceeded the value of rent due to the unit owner. The Aldridge Report went on to suggest that it was likely that where leases over 21 years were created of a commonhold unit, the unit owner would then probably pass on full responsibility for paying the service charge to the long leaseholder. The leaseholder would then be likely to demand a proxy in return, allowing the long leaseholder to exercise the unit owner's vote in the commonhold association.

1990 and 1996 Bills and Consultation Papers

1.124 By the time of the Consultation Paper in 1990, concerns were being raised regarding the appropriateness of allowing aspects of long leases into a form of ownership which was designed to replace such leases. Specific concerns included:

- (1) the diminishing term and wasting asset aspects of a long lease;
- (2) potential lack of interest of non-occupier landlords in the management of the property;
- (3) increased complexity of the legislation, for instance due to the need to include service charge provisions enforceable against landlords; and
- (4) a concern that it would be "inconsistent with a fundamental concept of commonhold, namely that the commonhold should be democratically run by and for the benefit of the unit owners, as the people with the substantial interest in the commonhold."¹⁷⁹

1.125 Consequently, in the 1996 Consultation Paper it was proposed that the term of any lease within commonhold would be limited to 25 years.¹⁸⁰

2000/1 Bill and Consultation Paper

1.126 By the time the 2000 draft Bill was published, it had been decided that the term of leases in commonhold would be restricted to five years, and that the grant of a lease for a

¹⁷⁸ Aldridge Report, paras 10.15 to 10.16.

¹⁷⁹ 1990 Consultation Paper, paras 4.54 to 4.59.

¹⁸⁰ 1996 Consultation Paper, para 2.3.

premium would be prohibited.¹⁸¹ The particular concerns that led to this policy were the importance of occupiers taking part in the running of the commonhold association and the setting of budgets, and that there should be “no long-term occupants... whose interest differs from that of a unit [owner]”.¹⁸²

- 1.127 There were, however, continued calls for the proposed restrictions on granting residential leases to be dropped altogether on the basis that it restricted the freedom of a unit owner. It was argued that this restriction meant commonhold ownership was no longer akin to freehold and did not mirror the position in countries such as Australia.¹⁸³
- 1.128 An alternative solution, imposing a longer 21-year limit on residential leases in commonhold, was also proposed. It was suggested that permitting this length of lease would create more flexibility, avoid over-regulation and provide a closer approximation to freehold.¹⁸⁴ It might also have addressed some of the issues associated with home purchase plans and shared ownership leases within commonhold.¹⁸⁵
- 1.129 Ultimately, however, a maximum term of seven years was agreed. Baroness Scotland described the reasoning for this: “it is the time limit at which responsibility for repair and insurance to the property passes from the landlord to the tenant”.¹⁸⁶
- 1.130 The seven-year limit also aligns with a reform made in the Land Registration Act 2002. This provides that the grant of a lease for more than seven years “triggers” the requirement that it be registered.

¹⁸¹ 2000 Consultation Paper, p 86; Department for Constitutional Affairs, *Commonhold and Leasehold Reform Draft Bill and Consultation Paper: Responses to the Commonhold Consultation Exercise* (January 2001), para 2.4.

¹⁸² 2000 Consultation Paper, p 86.

¹⁸³ W Wilson, "The Commonhold and Leasehold Reform Bill", *House of Commons Library: Research Paper* 01/115 (14 December 2001), p 37.

¹⁸⁴ G Fetherstonhaugh QC, M Sefton and E Peters, *Commonhold* (2004), p 195.

¹⁸⁵ D Clarke, L Crabb and N Roberts, *Clarke on Commonhold* (loose-leaf ed 2006), para 15[34].

¹⁸⁶ W Wilson, "The Commonhold and Leasehold Reform Bill", *House of Commons Library: Research Paper* 01/115 (14 December 2001), p 38. This was a reference to provisions such as ss 11 to 14 of the Landlord and Tenant Act 1985 which imposes repairing obligations on landlords of tenancies for less than seven years. These obligations cannot be contracted out of: Landlord and Tenant Act 1985, ss 11 to 14.

Consultation Paper Chapter 13: Dispute Resolution

Aldridge Report

- 1.131 The Aldridge Report in 1987 set the ground work for the dispute resolution procedure which reached the statute books in the Commonhold Regulations, 17 years later. The recommendations made in the Report have been reflected in the subsequent legislation in key areas, for instance, setting out that the commonhold association would have the right to enforce the regulations against both unit owners and the tenants of its unit owners.¹⁸⁷
- 1.132 In addition, the Report noted that there may be disputes between unit owners which the commonhold association may not be suitable or willing to engage in. For instance, one of the directors may also be one of the unit owners, or the commonhold association may be apathetic on an issue which is nonetheless important to the particular unit owners.¹⁸⁸ The Report therefore set out that a unit owner or tenant would be able to take action directly against another unit owner or tenant. The Report also set out that the appropriate remedies would be either damages or an injunction.
- 1.133 The Aldridge report considered that the clear rules set out in the commonhold system, and the availability of professional managing agents to assist in the running of a commonhold, would help to reduce disputes.¹⁸⁹ Nonetheless, the Report suggested a cheap, quick and readily accessible procedure to settle disputes when they did arise.¹⁹⁰ Further, this procedure would be open to all unit owners, regardless of whether the commonhold was his or her home or business. The report noted, however, the risk of trivial and even revenge complaints being made if the procedure was too cheap and informal.¹⁹¹
- 1.134 The Aldridge Report ruled out giving the Leasehold Valuation Tribunal¹⁹² jurisdiction over commonhold disputes as, at the time, this tribunal was set up mainly to address valuation disputes rather than the broader range of disputes which might occur in a commonhold. Cases would therefore proceed straight to the county court, or High Court, as appropriate.¹⁹³
- 1.135 The Aldridge Report considered the possibility of a commonhold commissioner, as used in some parts of Australia, which would deal with disputes. This idea was rejected by the Aldridge Report, which cited funding and a lack of initial work as the reason for rejecting this suggestion. It noted that funding need not follow the Australian model, with public subsidy, and could instead be funded through fees charged for any application to the Commissioner or a levy charged to all commonhold associations. However, it was

¹⁸⁷ Aldridge Report 7.25.

¹⁸⁸ Aldridge Report 7.25.

¹⁸⁹ Aldridge Report, para 16.3(b).

¹⁹⁰ Aldridge Report, paras 16.1 to 16.2.

¹⁹¹ Aldridge Report, para 16.12.

¹⁹² In England the work of the former Leasehold Valuation Tribunal now forms part of the work of the First-tier Tribunal (Property Chamber).

¹⁹³ Aldridge Report, paras 16.4 to 16.5.

noted that this would make commonhold a more expensive form of ownership than leasehold.

1.136 The Aldridge Report considered only arbitration (rather than mediation or other forms of alternative dispute resolution). It noted the potentially quicker resolution and saving of public resources, but equally that this could be more expensive for the parties. Further, there would be no setting of precedents if disputes were kept out of the court. The Report ultimately concluded that arbitration should not be a compulsory feature of commonhold.

1990 Bill and Consultation Paper

1.137 The proposals surrounding the 1990 draft Bill followed the Aldridge Report in many key respects. This included the rejection of the use of a tribunal or the creation of a commissioner as alternatives to court proceedings for commonhold disputes. Instead, jurisdiction would simply have been conferred on the High Court and the county court.¹⁹⁴

1.138 The 1990 draft Bill also imposed, in clauses eight and 34, a duty on the commonhold association to enforce any relevant obligations of unit owners and provided a right for “any member”¹⁹⁵ of the commonhold association to directly enforce any duties or obligations of the commonhold association.

1996 Bill and Consultation Paper

1.139 The provisions in the 1996 draft Bill for dispute resolution, closely resembled those which had appeared in the 1990 draft Bill. Clause 20 provided that the commonhold association had the right to enforce any obligations imposed on unit owners. Calls for a commonhold commissioner and criticism of a proposed role for the commonhold association in resolving disputes continued following the 1996 Bill.¹⁹⁶

1.140 The 1996 Bill again provided for the High Court and county court to have jurisdiction to hear commonhold disputes, rather than a commonhold commissioner or a tribunal.¹⁹⁷

2000/1 Bill and Consultation Paper

1.141 The explanatory notes to the 2000 Bill introduced the option of the commonhold association not taking action, if to do so would not be in the interests of the commonhold.¹⁹⁸ It also set out that there would initially be internal procedures for dealing with disputes, but that access to the courts would not be prevented.¹⁹⁹

¹⁹⁴ 1990 draft Bill, clause 115.

¹⁹⁵ 1990 draft Bill, clause 34(5).

¹⁹⁶ See for instance Louis Charlebois, “Commonhold: Lest we forget” [1997] Conveyancer and Property Lawyer 169, p 174.

¹⁹⁷ 1996 draft Bill, clause 50.

¹⁹⁸ 2000 Bill, explanatory notes to clause 28.

¹⁹⁹ 2000 Consultation Paper, p 82.

- 1.142 Despite the Aldridge Report's rejection of the idea of a commonhold commissioner, the idea was reintroduced in the subsequent Parliamentary debates.²⁰⁰ It was ultimately rejected on the basis of the expense, lack of initial work, and that the other proposals were sufficient.²⁰¹
- 1.143 The 2002 consultation, which preceded the Commonhold Regulations, set out that an alternative dispute resolution procedure would be established, in order to reduce recourse to the courts. It set out the framework for the procedure which was ultimately adopted in the Commonhold Regulations, providing for attempts at initially resolving the dispute informally before progressing through the procedure. It also set out the structure for the prescribed forms which were ultimately adopted.

²⁰⁰ *Hansard* (HL), 16 October 2001, vol 627, col 532 to 537.

²⁰¹ The provision for a commonhold ombudsman was perhaps seen as a cheaper solution than a commonhold commissioner.

Consultation Paper Chapter 14: Enforcement

1.144 Proposals for commonhold have always needed to give powers of enforcement to the commonhold association should a unit owner fail to pay his or her contribution to the shared costs.

Aldridge Report

1.145 Under the Aldridge Report, interest would automatically be payable on any sums which had been overdue for more than one month. The stated rationale for this approach was to give an incentive to pay promptly, and to act as compensation to the other owners. The rate of interest would have been prescribed by regulation.²⁰²

1.146 Where a unit owner fails to pay his or her service charge, the commonhold association would also have the power to direct that a tenant of the owner²⁰³ deduct the amount of outstanding service charge from the rent due to the unit owner. This sum would instead have been paid to the commonhold association.²⁰⁴

1.147 The commonhold association would also have been given a “lien”²⁰⁵ for all arrears of service charge. This would have operated as a first charge (similar to a mortgage) on the unit, giving the commonhold association the power, as a last resort, to sell the unit to pay off the arrears. The charge would be noted on the registered title of the unit.²⁰⁶ The Aldridge Report suggested that this is, in fact, in the interests of mortgage lenders as:

non-payment of service charges undermines the [mortgage lender’s] security ... it is possible that they will have several loans secured on different units within the same development. Any disadvantage in having their interest postponed to a lien on one unit is offset by the additional protection which they have in relation to other units, through an efficient system of obtaining payment of service charges. It also gives more protection than that enjoyed by the [mortgage lender on] a lease whose interest is terminated where a landlord forfeits the lease on breach of covenant by the [leaseholder].²⁰⁷

1990 Bill and Consultation Paper

1.148 The 1990 draft Bill similarly provided that if service charges were unpaid for more than one month, interest would become payable.²⁰⁸ Additionally, the commonhold

²⁰² The Aldridge Report recommended that the interest should be linked to the rate of interest payable on judgment debts (court orders requiring a person to repay a debt): Aldridge Report, para 9.22.

²⁰³ This could be a tenant under a short lease or a licence.

²⁰⁴ Aldridge Report, para 9.24.

²⁰⁵ A “lien” is a right to retain property until a debt has been satisfied.

²⁰⁶ Aldridge Report, para 9.27.

²⁰⁷ Aldridge Report, para 9.28.

²⁰⁸ 1990 Bill, cl 39(6).

association would be under a duty to take such steps as are reasonably practicable to recover any arrears.²⁰⁹

1.149 At the time of the 1990 Consultation Paper and draft Bill, it had not yet been decided whether long leases would be permitted within commonhold. The Bill also provided that it would be possible for the commonhold association to serve a demand for payment of the commonhold costs directly on the leaseholder of a long lease.²¹⁰ The leaseholder's liability to pay rent under the long lease would then be discharged to the extent of the money paid to the commonhold association.²¹¹ Where the amount paid to the commonhold association exceeded the amount payable under the lease, the leaseholder would have a right to claim the difference back from the landlord.²¹² For example, the landlord would be liable to reimburse the leaseholder if the leaseholder had been required to pay service charges which the landlord could not have claimed from the tenant as a result of statutory protections under the Landlord and Tenant Act 1985. Long leaseholders would not, however, have the right to challenge the commonhold association directly under 1985 Act:

as the provisions for democratic control of the affairs of the commonhold association are considered adequate protection for long leaseholders (who, in taking the lease, are free, if they wish, to require a proxy to exercise the unit owner's votes).²¹³

1.150 Where any of the units are let on short tenancies, the commonhold association would be able to serve a "diversion notice" on the tenant which would require the tenant to pay all sums due under the tenancy to the commonhold association.²¹⁴ Any liability under the tenancy would then be discharged to the extent of the amount recovered. Owners of short tenancies would have been able to challenge the amount of service charge payable under the Landlord and Tenant Act 1985. This is because, the commonhold association would have been entitled to demand only sums which would have been payable by the tenant to his or her landlord.²¹⁵

1.151 The 1990 draft Bill also would have put into effect recommendations of the Aldridge Report by automatically placing a charge over the unit owner's property to secure the payment of any service charge arrears.²¹⁶ The draft Bill stated that this charge should take priority over all mortgages secured on the unit. The explanatory notes to clause 43 stated that the commonhold association would have had the same rights as an ordinary mortgage lender, except that the commonhold association would not have been able to take possession of the unit, as the commonhold association was prohibited under the 1990 draft Bill from owning land other than the common parts. The aim of this provision,

²⁰⁹ 1990 Bill, cl 39(9).

²¹⁰ 1990 Bill, cl 39(2(c))

²¹¹ 1990 Bill, cl 39(10).

²¹² 1990 Bill, cl 42.

²¹³ 1990 Bill, explanatory note to cl 41.

²¹⁴ 1990 Bill, cl 40.

²¹⁵ 1990 Bill, explanatory note to cl 41.

²¹⁶ 1990 Bill, cl 43.

according to the explanatory notes, was “to give the commonhold association security for its service charge arrears comparable to that which would commonly be available to the landlord under a long lease.”

1996 Bill and Consultation Paper

- 1.152 Again, the 1996 draft Bill similarly provided that if service charges were unpaid for more than one month, interest would become payable at the rate set by the Lord Chancellor.²¹⁷
- 1.153 By the time of the 1996 draft Bill, it was agreed that only leases under 25 years in length should be permitted within commonhold. The 1996 draft Bill did not, therefore, include provisions requiring a long leaseholder to pay commonhold contributions directly to the commonhold association, instead, only the diversion procedure for short tenancies was provided for.
- 1.154 The draft Bill again set out provisions for the creation of a charge over each commonhold unit and the commonhold association’s power of sale for the recovery of unpaid contributions.²¹⁸ The commonhold association would have been able to sell the unit by public auction or by private contract. Before exercising the power of sale, the commonhold association would first have needed to give one month’s notice to the owner and any mortgage lender. The commonhold association would have been able to transfer the freehold of the unit in the name of the unit owner. The commonhold association would also have had the right to take possession of a unit, subject to any restrictions that would by law apply in relation to the right of a mortgage lender to take possession.

²¹⁷ 1996 Bill, cls 22(4) and (5).

²¹⁸ 1990 Bill, sch 6, para 5.

Consultation Paper Chapter 15: Voluntary termination of commonholds

Aldridge Report

- 1.155 The Aldridge Report recognised that commonhold law needed to incorporate some provision for the eventual termination of the commonhold. The reasons for this are not discussed in detail in the Report, but brief reference was made to the fact that buildings deteriorate over time, or might be substantially or totally destroyed by fire or some other cause.
- 1.156 The Report proposed that a commonhold could be terminated by the unanimous consent of those with a financial interest in the commonhold. All unit owners, and their lenders (including second and subsequent mortgage lenders) would have been entitled to vote on a resolution to terminate.²¹⁹ If 100% were in favour, then the termination could have proceeded immediately and the meeting would have appointed a liquidator to oversee the termination. If more than 80% of the votes cast were in favour, then those in favour could have applied to the court for an order which would authorise termination.²²⁰
- 1.157 It appears that the Aldridge Report envisaged that the court would have discretion over whether to make such an order. Tenants would have had an automatic right to compensation, though compensation might also have been awarded to those who were particularly prejudiced.²²¹ No examples were given of what might count as particular prejudice.
- 1.158 The Report described in some detail the mechanics of winding-up the commonhold.²²² A liquidator would first have had to be appointed. The titles to all the individual units would have been cancelled, and the commonhold association would have become the owner of the whole commonhold development.²²³ The commonhold association would have held this on trust for all the unit owners.²²⁴ The share of the whole development to

²¹⁹ Aldridge Report, para 11.23. Nothing was said to suggest that owners and lenders would vote as separate “classes”. As the idea of “splitting” the votes between owners and lenders had previously been specifically rejected, it would seem that if a unit had been subject to, say, three mortgages, four sets of votes might be cast in respect of the same unit. It would have been theoretically possible for a winding-up resolution to have been passed with the requisite 80% majority, and yet for a majority of votes actually cast by owners to have opposed the proposals.

²²⁰ Aldridge Report, para 11.23 refers to “an order authorising the termination”.

²²¹ Aldridge Report, paras 14.5 and 10.34.

²²² Aldridge Report, para 14.4 to 14.7.

²²³ Aldridge Report, para 14.9.

²²⁴ Aldridge Report, para 14.10. Instead of owning the freehold of a unit, a unit owner would now own an equitable interest in the freehold of the whole development, and all mortgages (or charges) would now become equitable charges. However, the commonhold association by now would be in the hands of the liquidator, and it is difficult to see how, in a liquidation of a limited company, a liquidator could be holding assets on trust for those entitled, at least until the final accounts were issued. The assumption may have been that the financial assets of the commonhold association would have been sufficient to cover the expenses of the liquidation.

which a unit owner would become entitled on termination would have been set out in the Commonhold Declaration (what is now the CCS) when the commonhold was first set up.²²⁵

- 1.159 As the commonhold association would have been a bespoke body corporate, registered with HM Land Registry rather than with Companies House, the dissolution of the commonhold would have been recorded at HM Land Registry rather than at Companies House.
- 1.160 What is less clear from the Report are the logistics of how a dissolution would have operated, and how it would, in practical terms, have affected the unit owners. At some point it would have been necessary for all unit owners to vacate the building, which might have required possession orders against owners who had objected to the termination (or who had agreed, but were simply delaying moving out). There is also the practical problem that it is likely that owners would have been required to vacate their units before the sale of the entire commonhold was completed and they could have received their share of what was due to them.²²⁶
- 1.161 It is also unclear how this proposed scheme would have affected secured lenders (such as mortgage lenders) with an interest in the proceeds of sale. Once a termination was underway they would in practice have been unable to enforce their security by taking possession of a unit and exercising their power of sale. The termination accounts would have involved the necessary complication of an individual sub-account for each unit. The Report does not address in detail what would have happened if the debts secured on any unit exceeded its individual value. Because each unit owner's share was pre-determined in the Commonhold Declaration, difficulties could have arisen if it was alleged that the comparative value of units had changed, for instance because some had been substantially improved or because of some external factor. As an example, an adjacent development could have led to certain units having lost an attractive sea view.

1990 Bill and Consultation Paper

- 1.162 The 1990 draft Bill made a number of alterations to the proposals in the Aldridge Report. In particular, such changes were made in the context of the decision that if a commonhold association became irretrievably insolvent it would be possible for it to be wound-up.²²⁷ The provisions on voluntary termination therefore formed part of a broader winding-up process.

²²⁵ Aldridge Report, para 14.10. See also para 1.72 above.

²²⁶ There might sometimes be alternatives. If the commonhold were being sold to take advantage of a lucrative offer for redevelopment by a property company, the company might be willing to offer alternative accommodation on an exchange or part-exchange basis. The unit owner's equitable interest in the freehold of the entire commonhold development might in theory offer security for the unit owner to enter into a bridging finance arrangement, but it would be a very unfamiliar form of security for banks to accept.

²²⁷ 1990 Bill, cl 69. The Secretary of State would also have a reserve power to seek the winding-up of a commonhold association: see cl 66(1).

1.163 The 1990 draft Bill required a unanimous vote – counting the votes of lenders in preference to those of owner – to trigger a winding-up.²²⁸ However, the 1990 draft Bill then went on to include the provision that if there was not unanimity, any party who had supported the resolution might then have applied to the court for an order approving the termination.²²⁹ This would have been the case even if only a minority had voted in favour of termination. The provisions would have given the court power to approve the application, to approve it subject to conditions, to suspend its operation, or to dismiss it.²³⁰ Specific provisions would have allowed the court to require compensation to be paid to a member who had voted against termination.²³¹

1.164 The explanatory notes stated that this policy had been taken because:

Government has concluded, however, that the right to apply to the court to pass a winding-up resolution ought to be available as a weapon of last resort to a minority of unit owners to protect them against the possibility of oppression by the majority.²³²

1.165 The liquidator would have assumed sole responsibility for the management of the commonhold, taking over the functions of the members and officers of the commonhold association.²³³ The commonhold association would have become the owner of the freehold of the entire commonhold development, including the units.²³⁴ Each former unit owner would instead have become entitled to a pre-determined share of the assets available on winding-up.²³⁵ The 1990 Bill did not address the issue, discussed at paragraph 1.161} above, that the comparative values of the units might have changed since the shares were set out in the Commonhold Declaration.

1.166 The interests of any mortgage lenders would have been extinguished,²³⁶ but would have been replaced by an alternative security in the unit's commonhold share.²³⁷ Mortgage lenders might, therefore, have been uneasy at the fact that their security interest was extinguished on the termination of the commonhold. It is, however, questionable whether any such fears would have been justified, as the termination would have been in the hands of a qualified liquidator, He or she would have been bound to account to each secured lender strictly in accordance with the detailed provisions.

²²⁸ These proposals might have had some surprising results. A majority based on the votes of mortgage lenders could have put a winding-up proposal before the court, even though the winding-up might have been opposed by a majority of unit owners.

²²⁹ 1990 Bill, explanatory note to cl 62.

²³⁰ 1990 Bill, cl 63(4) and (5).

²³¹ 1990 Bill, cl 63(6) and sch 1, para 5(5)(a).

²³² 1990 Bill, explanatory note to cl 62.

²³³ 1990 Bill, cl 70(1).

²³⁴ 1990 Bill, cl 6(a).

²³⁵ 1990 Bill, cl 6(b).

²³⁶ 1990 Bill, cl 71(1).

²³⁷ 1990 Bill, cl 83(2)(a).

- 1.167 A former unit owner would have been allowed to continue in occupation under a deemed licence, which would initially have lasted for only one month.²³⁸ The length of the licence could have been extended by the liquidator. The rights and obligations within the commonhold would have continued, so far as they could be applied to a licence.²³⁹ A former unit owner would not have been entitled to any share of the proceeds of sale of the commonhold until the unit had been vacated.²⁴⁰
- 1.168 The winding-up of a commonhold would have brought to an end any tenancy.²⁴¹ Compensation might have been payable in appropriate cases.²⁴²
- 1.169 The Bill required the liquidator to have separate accounts for each unit in an attempt to achieve fairness in dealing with the various claims that had to be met. For example, the proportionate share to be credited to each unit owner would have been determined in accordance with the share predetermined in the commonhold declaration.²⁴³ From this, there would then have been deducted any debts secured on the former unit, such as a mortgage,²⁴⁴ and any compensation payable to a tenant of the unit.²⁴⁵ The balance would then have become available to meet the debts of the commonhold, and any remaining balance would then be due to the unit owner.²⁴⁶

1996 Bill and Consultation Paper

- 1.170 In most respects the draft Bill published with the 1996 Consultation Paper followed the 1990 draft Bill. The main difference was the structure of the 1996 Bill which was much simpler than the 1990 draft Bill. This meant that much of the detail, including provisions dealing with voluntary termination, was moved to a number of schedules at the end of the 1996 draft Bill.

²³⁸ 1990 Bill, cl 73.

²³⁹ 1990 Bill, cl 73(4).

²⁴⁰ 1990 Bill, cl 73(5).

²⁴¹ 1990 Bill, cl 74. Any tenancy enjoying statutory protection would continue under the terms of the relevant legislation, though the fact that the tenancy was on commonhold land which was being redeveloped would have amounted to a ground for recovery of possession.

²⁴² 1990 Bill, cls 77 to 79.

²⁴³ 1990 Bill, cls 82(3) and 13(4)(a)(ii).

²⁴⁴ As between debts secured on each unit, the normal priorities as between mortgages would have applied: 1990 Bill, cl 84.

²⁴⁵ 1990 Bill, cl 83(2).

²⁴⁶ 1990 Bill, cl 83(3).