

1.3.3 The Wilberforce Report

In 1965, a committee appointed by the Lord Chancellor and under the chairmanship of Lord Wilberforce delivered a report⁸ which referred to the difficulties caused by the decision in the *Austerberry* case and recommended legislation to provide that positive covenants which related to the use of land and were intended to benefit specified other land should run with the land.

The recommendations of the Wilberforce Report were never taken further, although a Law Commission working paper in 1971⁹ described the present law on positive rights as being illogical, uncertain, incomplete and inflexible. A further Law Commission Report¹⁰ laid before Parliament in 1984 made recommendations for the reform of the law relating to positive and restrictive obligations and submitted a draft Bill for that purpose. Nothing was, however, done.

1.3.4 Leasehold as remedy

The rule preventing the transmission of the burden of positive covenants has only a very restricted application as between the landlord to a lease and the successors in title of the original tenant. In the case of leases granted prior to 1996, covenants by tenants which 'touch and concern' the land are enforceable by the landlord against the successors in title of the tenant. In the case of leases granted after 1995, the Landlord and Tenant (Covenants) Act 1995 provides that all covenants between landlord and tenant are enforceable by and against their successors in title, save those which are expressed to be personal.

It might therefore seem as if a leasehold structure would afford a remedy where it is desirable for the burden of positive covenants to bind successors in title of the covenantor. Leases of residential premises have long been favoured in this country for that reason. There are estimated to be approximately one million houses and one million flats held in long leasehold ownership in England and Wales. However, while short-term leases of commercial premises do indeed provide a useful mechanism for the transmission of covenants, longer leases, particularly of residential premises, introduce problems of their own.

1.3.5 The problems with leases

The chief problems associated with long leases of residential premises are as follows:

(a) A long lease is a wasting asset: the investment in the tenant's home steadily loses value as the lease approaches the end of its term.

⁸ The Report of the Committee on Positive Covenants Affecting Land (1965) Cmnd 2719.

⁹ No 36: Transfer of Land: Appurtenant Rights, published on 5 July 1971.

¹⁰ Transfer of Land: The Law of Positive and Restrictive Covenants (Law Com no 127).

(b) The interest of the tenant under a long lease often conflicts with that of his landlord: many leaseholders experience serious difficulties with their landlords, ranging from neglect of their obligations under the lease to outright exploitation.

(c) The defaulting tenant under a lease will usually be subject to the draconian penalty of forfeiture which, if deployed successfully, will destroy the value of his interest disproportionately to the default in question.

(d) There is generally no implied right for covenants to be enforced directly between tenants (save where it is possible to demonstrate the existence of a letting scheme, as in the case of *Williams v Kiley* [2003] 1 EGLR 46, which involved leases in a shopping parade).

(e) Leasehold documentation is not uniform.

(f) Tenants are obliged to pay a ground rent which may be considerable.

Frequent legislative attempts over a number of decades (of which Part 2 of the Act is but the most recent example) to alleviate or cure some of these problems have met with mixed success. Overall, notwithstanding those attempts, the dissatisfaction with leasehold tenure as a form of home ownership appears to have increased rather than decreased over the years.

1.3.6 Commonhold as remedy

In introducing the Second Reading of the Commonhold and Leasehold Reform Bill in the House of Commons, the Parliamentary Secretary for the Lord Chancellor's Department said:

The problems of long leasehold provide the impetus for the Bill. They are the wrong that the provisions of this Bill are intended to put right.¹¹

It is true to say that participation in a commonhold scheme will remove every single one of the problems identified in paragraph 1.3.5 above. However, it is perhaps more accurate to say in the light of the analysis above that the problems associated with the transmission of the burden of positive covenants have provided the impetus for the Act. Commonhold is a means of owning registered freehold land which gives owners of individual units in a development the security of freehold ownership but allows them to control and manage their own communal areas and applies positive obligations to every successive owner. It is thus an alternative, rather than an answer, to leasehold ownership.

1.3.7 Commonhold and Leasehold: a tabular comparison

It is instructive to compare commonhold with leasehold in its most favourable form (very long lease, with the freehold held by a company established under Part 2 of the Act) in the way illustrated in Table 1.1 below.

¹¹ *Official Report, House of Commons*, 8 January 2002; col 422.