

proceeding, and may therefore be viewed as consistent, strictly speaking, with the Government's original aim. Practically speaking, however, the new rule will either compel payment by the outgoing unit-holder, or restrict the transfer to those who are content to pay the outgoing unit-holder's debts. It remains to be seen whether this consequence will allow a challenge to the rule on the basis that it is *ultra vires* section 15(2) of the Act (see further the discussion in paragraph 6.3.15 below).

This new rule materially improves the commonhold's position: no longer will it face the prospect of a unit-holder owing substantial sums to the commonhold association simply assigning to another and then disappearing, leaving the commonhold association with a new unit-holder with no liability for the debt. This was a grave shortcoming of the original proposals, and its replacement is to be welcomed.

The limitations of the new rule are to be noted: the rule applies only to debts outstanding in respect of the commonhold assessment and the reserve fund levies (although these are likely to be the main areas of dispute), and does not apply to any other sums that might be owed by the outgoing unit-holder to the commonhold association. The rule does not therefore make commonhold debts in general 'run with the land'—a topic considered further in paragraph 6.3.15 below.

6.3.14 Unavailability of restriction on new charges as a sanction

Consistently with its reluctance to countenance any restriction upon transfer of a commonhold unit, the Government also resisted the following Opposition proposal:

One of the provisions which might properly be contained in the CCS [commonhold community statement] is one prohibiting any new charge being created over the unit unless any debts due to the association shall first have been discharged (or will be discharged simultaneously with the execution of the charge). Absence of such a sanction might make it difficult to 'sell' a commonhold scheme.¹⁸

6.3.15 Whether liability runs with the land¹⁹

During the passage of the Commonhold Bill through Parliament, the Government insisted that a freehold unit in commonhold land should be treated like any other freehold property as far as liabilities incurred by the unit-holder were concerned. It was therefore to be expected that there would be no provision in the Act for such liabilities to attach to the land upon transfer of the unit, and become the liability of the new unit-holder.

¹⁸ *Official Report, House of Lords*, 16 October 2001; col 499.

¹⁹ See also paragraph 3.2.5 and 4.13.5 of the text

Section 16(1) of the Act deals with this topic by providing that:

A right or duty conferred or imposed—

- (a) by a commonhold community statement, or
- (b) in accordance with section 20

shall affect a new unit-holder in the same way as it affected the former unit-holder.

On one reading, this subsection is doing no more than explaining that the incoming unit-holder shall become subject to the commonhold community statement regime: in other words, it provides for the *basis* of the new unit-holder's liability, without saying anything about whether that liability is *retrospective*. Support for that interpretation is added by the consideration that the duty referred to is a prospective one ('*shall* affect . . .'), which can only logically be one that will have come into being during the currency of the new unit-holder's ownership. Moreover, the choice of language in section 16(1) ('shall affect a new unit-holder *in the same way* as it affected the former unit-holder'—emphasis supplied) is indicative of an attempt to impose a similar *type* of liability, rather than the same liability. If that is the correct interpretation of section 16(1), then it would follow that the incoming unit-holder could not be rendered liable, for example, for arrears owed by the outgoing unit-holder.

The authors accept, however, that the words are capable of being construed as imposing liability for existing breaches of the rules, including the responsibility for historic arrears of assessment. It must also be recognised that commercial common sense supports that interpretation: if a unit-holder can transfer his unit without impediment (see section 15(2)), and if the transferee is not liable for the transferor's arrears, then the position of the commonhold association will be bleak, particularly if the transferor cannot easily be traced, or is impecunious. Some comfort may be gained from the fact that the prospective transferee may be deterred by the knowledge that any shortfall will have to be met by a supplementary levy to which he will be required to contribute, but this comfort falls some way short of the protection that would ensue if the transferee were rendered liable for his predecessor's breaches.

It may be that this conundrum will be one of the first issues under the Act to be litigated, although the fact that rule 1 of the commonhold community statement expressly imposes retrospective liability for commonhold assessments and reserve fund levies (see paragraph 6.3.13 above) will be likely to confine the ambit of any debate to other commonhold debts. Until then, the authors suggest that the preferable interpretation of section 16(1) is that liability does not run with the land, and that any liability of incoming unit-holders for debts incurred by their predecessors will be confined to commonhold assessments and reserve fund levies, and even that may be vulnerable to an attack based upon *vires*. It would therefore be prudent for the commonhold association to continue to seek to recover any debt due immediately before the transfer of a commonhold unit in the first instance from the outgoing unit-holder rather than the new unit-holder.