Northern Ireland
Law Commission
promoting law reform in Northern Ireland

Consultation Paper
Apartments

NILC 15 (2012)

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CONSULTATION PAPER

APARTMENTS

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NORTHERN IRELAND LAW COMMISSION

THE LEGAL TEAM FOR THIS PROJECT ARE:

Senior Project Lawyer: **Sarah Witchell LLB, Solicitor**

Legal Researcher: **Rebecca Ellis LLB, Solicitor**

BACKGROUND

The Northern Ireland Law Commission ('the Commission') was established in 2007 following the recommendations of the Criminal Justice Review Group (2000). Its purpose is to keep the law of Northern Ireland under review and make recommendations for its systematic development and reform.

The Commission was established under the Justice (Northern Ireland) Act 2002. The Act (as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010) requires the Commission to consider any proposals for the reform of the law of Northern Ireland that are referred to it. The Commission must also submit to the Department of Justice programmes for the examination of different branches of law with a view to reform. The Department of Justice must consult with the Attorney General for Northern Ireland before approving any programme submitted by the Commission. If the programme includes the examination of any branch of law or the consolidation or repeal of any legislation which relates in whole or in part to a reserved or excepted matter, the Department of Justice must consult the Secretary of State for Northern Ireland before approving the programme.

MEMBERSHIP

The Commission consists of a Chief Executive, a Chairman, who must hold the office of a judge of the High Court), and four commissioners, one of whom must be a person from outside the legal professions. The Chairman and Commissioners are appointed on a part-time basis.

These positions are currently held by:

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Commissioners:	Professor Sean Doran (Barrister-at-law) Mr Robert Hunniford (Lay Commissioner) Dr Venkat Iyer (Law Academic) Vacant (Solicitor)
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Administration Staff:

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Communications and HR Manager:	Cathy Lundy
Personal Secretary to the Chairman and Chief Executive:	Paula Martin
Administrative Officer:	Joanne Kirk

RESPONDING TO THIS CONSULTATION

This consultation seeks views on the proposed reform of the law relating to apartments in Northern Ireland.

Interested parties are invited to comment on the questions raised in this consultation paper. As well as being available in hard copy, this consultation paper is available on the Commission's website: www.nilawcommission.gov.uk

This document can be made available in an alternative format or language. Please contact us to discuss how we can best provide a copy of this consultation paper that meets your needs.

The closing date for responses to this consultation paper is 25th January 2013.

Responses should be sent to:

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CONSULTATION PROCESS

1. Consultation criteria

This consultation is being conducted in line with the following seven consultation principles contained in the 'Code of Practice on Consultation' which has been adopted across government:

Criterion one: When to consult
Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion two: Duration of consultation exercise
Consultations should normally last for at least twelve weeks with consideration given to longer timescales where feasible and sensible.

Criterion three: Clarity of scope and impact
Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposal.

Criterion four: Accessibility of consultation exercises
Consultation documents should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion five: The burden of consultation
Keeping the burden of consultation to the minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion six: Responsiveness of consultation exercises
Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion seven: Capacity to consult
Officials running the consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Further information on these consultation criteria is available at www.bis.gov.ul/bre.

If you have any queries about the manner in which this consultation has been carried out, please contact the Commission at the following address:

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2. Consultation responses: confidentiality and Freedom of Information

Freedom of Information Act 2000

The Freedom of Information Act 2000 gives the public a right of access to any information held by a public authority: in this case, the Commission. The right of access to information includes information provided in response to a consultation.

The Commission will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and may attribute comments and include a list of all respondents' names in any final report.

If you wish to submit a confidential response, you should clearly mark your submission as 'confidential'. The Commission cannot automatically consider as confidential information supplied to it by you in response to a consultation.

Please note that the Commission will disregard automatic confidentiality statements generated by an IT system.

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PREFACE

This Consultation Paper was initiated under the Commission's First Programme of Law Reform (2009 – 2011) and was continued into the Second Programme of Law Reform (2012 – 2015). The subject of the reform of the law of apartments builds on the Commission's wider work on land law, notably its Report on Land Law Reform.[1] The reform of the law of apartments was selected as a project in accordance with the Commission's selection criteria[2] and after public consultation on the topics to be adopted in the First Programme. In selecting this topic, and continuing it into the Second Programme, the Commission was satisfied that this is an important area of law which affects a wide section of the public and is in need of reform. Several professional groups and organisations with an interest in land and property issues in general supported the Commission's view and expressed concern about the ways in which the current arrangements are operating.[3]

The case for reform arises out of an evolution that has occurred in the last 20 years which witnessed a marked increase in the number of apartment developments constructed particularly in the period 1995 – 2007. The reasons for this included:

- A move towards higher density living in urban areas;
- A demand for greater choice in housing provision;

[1] NILC 8 (2010).

[2] The Commission's selection criteria are: importance to Northern Ireland, suitability, resources and timing. See, further, the Commission's consultations on its First Programme of Law Reform, NILC 1 (2008) and its Second Programme, NILC 6 (2010).

[3] The respondents included Kieran McCarthy MLA of the Alliance Party, the Law Society of Northern Ireland, the Northern Ireland Co-ownership Housing Association Limited and, Charterhouse Property Management Limited.

- A more settled political landscape resulting in increased property development;
- A demand for affordable housing by first time buyers;
- An increase in the buy to let market (particularly from 2003 – 2007);
- The development of more sophisticated forms of apartment living including the emergence of much larger scale developments close to Belfast City centre.

More recently (since 2007) the property market has fallen and the economic climate has become less favourable. This has caused a challenging situation for the owners and occupiers of apartments who are faced with increasing financial pressures as well as problematic issues relating to property management and the provision of services. The reasons for this include:

- Developers being unable to sell apartments in completed developments;
- Lack of available mortgage finance to fund purchases;
- Residents falling into negative equity;
- Apartment owners living in uncompleted developments;
- Insufficient funds to complete the roads and infrastructure;
- Insufficient funds to provide proper maintenance;
- Defective documentation;
- Insolvency of developers;
- Striking off of management companies; Insolvency of managing agents.

Until relatively recently there has been limited experience in Northern Ireland of living in an apartment. The legal framework under which apartment developments operate is complex. In the realm of substantive law, aspects of property law and company law both have an impact on the ownership and management of apartments. Other areas of law which affect residential housing are more a form of control over the

regulation and use of property. These include, planning, building control, environmental and consumer issues.

In a modern housing development there are a range of parties which have an interest in the ownership and management of the property including the developer (or landowner and builder), the apartment owners, the owners of other properties, the management company and the managing agents. Each has its own role and responsibilities but they are also interdependent. For the development to function effectively there has to be an element of co-operation between the parties and there have to be proper channels of communication between them.

In order to address the difficult issues which arise in practice in the operation of residential developments, particularly those consisting of apartments or otherwise having shared amenities, the Commission is conscious that it has to look at the law, the structures and the practice as a whole and not in isolation from each other. Although the focus of this project is on apartments, the considerations which apply to common areas or open spaces in all developments are similar, regardless of the nature of the housing provided. In all cases, the individual ownership of the property has to be able to accommodate collective responsibility for its ongoing governance.

The physical characteristics of blocks of apartments and other forms of multi-owned high density property have some common characteristics and are quite different from those of free-standing properties. Each apartment or unit is part of a larger building and is dependent for support on other units and parts of the structure. Secondly, various parts and areas of the development, both internal (for example, entrance halls, stairs, hallways, lifts, roofs and other structural parts) and external, (for example, access roads and paths, car parking areas, gardens and landscaped areas) are shared in common by the owners.

PROJECT AIMS

The overarching aim of the Project is **to address by the most appropriate means the problems experienced in practice relating to the ownership and management of apartments**. This involves a series of subsidiary, inter-related objectives, which are reflected in this Consultation Paper, which addresses the following:

- Residential building developments in Northern Ireland
- Current law and practice
- The role of developers
- The role of management companies
- The role of managing agents
- Information and documentation
- Management and maintenance problems in practice
- Legal problems
- The background to related law reform in Northern Ireland
- Schemes in neighbouring jurisdictions
- Options for reform
- Questions for consultation

The objectives of the Project are:

- To examine the law under which apartments are owned;
- To examine the structures and framework under which apartments are managed;
- To assess the strengths and weaknesses of the current systems;
- To gather evidence of the problems arising in practice;
- To consult key stakeholders including owners of units, owners' management companies, managing agents, developers, the Law Society of Northern Ireland, MLAs and others;

- To use the analysis of responses received to inform policy development;
- To consider whether legislative reform is appropriate;
- To consider whether the establishment of a form of regulation of licensing for managing agents is a possible solution;
- To consider amending company law to provide for a special form of company specifically to manage residential property;
- To consider mechanism to enable existing company structures to be converted to a more appropriate format;
- To consider appropriate dispute resolution mechanisms to address existing problems;
- To consider the best means of addressing problems on unfinished developments;
- To consider the better provision of information for purchasers of apartments;
- To consider means of improving communication between the parties on a development; and
- To consider proposals which are tailored to the particular context of Northern Ireland and which address the problems arising in this jurisdiction.

PROJECT WORK

The Commission has carried out significant background research including extensive stakeholder consultation with professional and construction related interest groups.

The Commission issued a Questionnaire to all owners' management companies registered at Companies House in Northern Ireland. This stimulated in excess of one hundred responses which, *inter alia*, contain a valuable insight into the views and interests of apartment owners. The Commission made a submission to the Northern Ireland Assembly Committee for Finance and Personnel with its initial views on

the management of apartments and has had several meeting with the Minister for Finance and Personnel.

The Commission wishes to acknowledge those who have assisted in the project to date including those who responded to the Questionnaire, as well as those who have participated in preliminary discussions both formally and informally. The input received has ranged from apartment owners, managing agents, members of the legal profession, MLAs and professional organisations amongst others. The Commission very much appreciates these contributions which have enhanced the contents of this Consultation Paper greatly.

REFOCUS

In July 2012 the Commission restructured this project to focus specifically on issues relating to apartments and associated open spaces. The Commission confirms that it is its intention to consider, as a matter of priority, offering solutions for people currently living in apartments and other developments who are experiencing difficulties with the management of their development. This Consultation Paper represents the work that has been done on the project since July 2012 when it was refocused. Since then the Commission has concentrated primarily on a review of the law under which apartments are owned. It has also examined the structures and framework under which they are managed. This includes the ownership and management of common areas and open spaces.

Due to the constraints of time and resources since the refocus the Commission has endeavoured to provide an overview of the subject and to describe the basic principles of the law within the framework under which residential developments are owned and managed, rather than undertaking a detailed academic analysis. The Commission recognises that this is a subject of law which is of much wider appeal than to lawyers alone. It is conscious that this raises

matters of concern to many members and sectors of the community at large. As well as property professionals, the Commission hopes that this Consultation Paper will be of interest more broadly to anyone who has an interest in this relatively new form of living.

The Consultation Paper is written with a range of readers in mind so that it is as comprehensible to as wide an audience as possible. It raises questions on possible ways forward and is seeking suggestions from consultees in order to canvas views as extensively as possible. It wishes to provide an opportunity for the issues to be considered from different angles. The Commission is of the view that a comprehensive range of solutions has to be considered. It may not be purely a matter of substantive law or of regulation by legislation and there may be more practical ways to achieve effective solutions. It is possible that more than one option will be considered as the best way to address the current deficiencies. The questions raised are matters of principle because the Commission is open minded and is not seeking approval for a particular course of action which it is inclined towards.

This is proving to be a particularly interesting and challenging project, one which has attracted not insubstantial political and media interest. It is vitally important that every member of society realises their right to shape and influence the laws which regulate how we live by making representations to and interacting with the Commission. The Commission strongly encourages all concerned to make their views on this subject known: this can be effected by a variety of media, including in particular e-mail, letters and attendance at relevant events. This is an opportunity not to be missed.

The consultation period will continue from the Publication of this Consultation Paper on **15th November 2012 until 25th January 2013.** On receipt of responses to this Consultation Paper the Commission will draw up its final paper with recommendations for change. These recommendations may or may not extend to legislative change, and there may be

more flexible solutions. It will be important to think about new ideas and the provision of new mechanisms for dealing with disputes that have already arisen. The Commission will also be looking for practical solutions that will enable people to resolve existing problems as well as trying to ensure that the same issues do not arise in the future.

It is envisaged that this project will culminate in a report to the Department of Justice by 1st May 2013.

EXECUTIVE SUMMARY

CHAPTER 1 – INTRODUCTION

This Chapter briefly explains the emergence of apartments into the housing market in Northern Ireland. The growth in apartment building since 2000 is documented, as well as the decline in construction in recent years. It also highlights the size of the apartment sector in relation to other types of housing, as well as the market for apartment ownership.

CHAPTER 2 – WHAT IS AN APARTMENT?

In this Chapter the exact meaning of the term 'apartment' is discussed. There is reference to the single statutory definition contained in the Ground Rents Act (Northern Ireland) 2001. The elements which characterise an apartment are also explained such as the physical characteristics and the nature of interdependence.

CHAPTER 3 – PARTIES IN THE DEVELOPMENT

There are a number of different parties involved in apartment developments from the construction of a development right through to day-to-day maintenance and management of apartments. The role and responsibilities of developers, apartment owners, management companies and management agents are outlined in this Chapter.

CHAPTER 4 – THE ROLE OF A DEVELOPER

This Chapter focuses on the process which a developer will follow when a new development is being constructed. It explains the different obligations which a developer must comply with including planning requirements, roads, water and sewerage, building regulations, home building warranties and energy performance certificate.

CHAPTER 5 – PURCHASE OF AN APARTMENT

The process of buying an apartment from an owners' perspective is detailed in this Chapter. There is a consideration of the various stages and documentation which are required in order to transfer ownership. This process is considered firstly from the perspective of buying a newly constructed apartment and then secondly from the perspective of purchasing an existing apartment.

CHAPTER 6 – TITLE TO APARTMENTS

In this chapter consideration is given to the various elements which constitute title to an apartment. It outlines the nature of leasehold law which applies to apartments in Northern Ireland, and why it has become the norm in this context. There is also an explanation of the role of the lease and why it is of fundamental importance to apartment owners compared to more traditional types of home ownership. The various contents and elements of a lease are also detailed such as the description of the apartment, easements, exceptions and reservations, covenants, ground rents and service charges.

The title of the developer and the management company is also explored. This is relevant due to the existence of common areas in apartment developments which will be held by the developer, unless it is transferred to a management

company. This Chapter also explains the issues regarding enforcement of covenants and the compulsory registration of title requirements.

CHAPTER 7 – THE COMPANY LAW FRAMEWORK

Owners' management companies are subject to the same obligations under company law as trading companies which exist for profit making purposes. This Chapter seeks to explain the obligations which an owners' management company must adhere in regard to their incorporation, constitution, decision making and filing obligations. It also explains the risk of strike off and dissolution which has particularly severe consequences for owners' management companies.

CHAPTER 8 – MANAGEMENT OF APARTMENTS

This Chapter highlights the different issues which arise in relation to managing apartments on a day-to-day basis. As most developments will decide to appoint a managing agent to act on their behalf there is a focus on the relationship between managing agents and apartment owners listing the typical components in an agreement to provide services and a list of typical services provided by an agent.

Reference is also made to service charges and sinking funds which are necessary in order to fund the maintenance of the development, and the effect of non-payment of service charges.

CHAPTER 9 – INFORMATION AND DOCUMENTATION

Due to the unique structure to apartments and the need for cooperation and communication, the information and documentation which an apartment owner receives is of

great importance so that they are fully informed of their rights and responsibilities. It is noted that apartment owners often lack detailed information on the arrangements for the management of the development until quite a late stage i.e. when they have committed themselves to purchasing the apartment.

A list of information which solicitors should obtain is set out, as well as the essential information which should be provided to owners.

CHAPTER 10 – OPEN SPACES

As a result of planning requirements many housing developments will have provision for amenity lands or open spaces. This presents an issue as to how these open spaces will be managed or maintained. This Chapter outlines the various arrangements which can be put in place for such areas which can be managed by an owners' management company, local district council or managed by a charitable trust such as Greenbelt.

CHAPTER 11 – LAW REFORM IN NORTHERN IRELAND

The history of property law reform, specifically on matters affecting apartments, is outlined in this Chapter. The issue was first put on the law reform agenda via the 1971 Survey of Land Law in Northern Ireland, and then again in 1990 through the work of the Land Law Working Group. This paper also seeks to build on the work done by the Law Commission in 2010 in relation to land law. More recently a Private Members Bill was introduced into the Assembly in December 2010 on this topic but was then withdrawn. It is noted that to date none of the recommendations in regard to apartments have been adopted.

CHAPTER 12 – LAW REFORM IN OTHER JURISDICTIONS

This Chapter outlines the position in neighbouring jurisdictions, which have enacted dedicated legislation in this area in recent times. In England and Wales the Commonhold and Leasehold Reform Act 2002 introduced a voluntary form of statutory title known as 'Commonhold'. The 2002 Act creates a strata title system based on freehold ownership, but has not had a high uptake. As a supplement to the commonhold scheme, a right to manage has been introduced to strengthen the rights of residential leaseholders, because management companies are not used as a matter of general practice.

In Scotland, two separate pieces of legislation have been introduced. The Tenements (Scotland) Act 2004 is based on a default statutory management scheme which will apply to all tenements, whereas the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 has introduced a new management scheme which can be adopted by developers at the outset. Scotland has also introduced a regulatory framework for managing agents.

In the Republic of Ireland, where property law has developed along similar lines to our own, it was decided that a new form of statutory title would not offer the best solution. Instead legislation was enacted to address problems relating to the ownership and management of the common areas of multi-unit developments. The Multi-Unit Developments Act 2011 placed certain obligations on all developments, both new and existing, such as a requirement to transfer ownership of common areas, to set up a sinking fund etc. They have also introduced a statutory scheme to regulate managing agents.

CHAPTER 13 – MANAGEMENT PROBLEMS

The problems regarding management of developments are outlined in this Chapter. These include the difference in apartment living compared to other types of housing, the provision, or lack of information for apartment owners and confusion over the roles and responsibilities of the parties involved in a development.

Reference is also made to issues with the management structure, specifically in regard to owners' management companies and the inability of apartment owners to remedy these problems.

There is also a discussion of problems which are encountered in the relationship between owners and managing agents, as well as the financial problems in developments such as lack of transparency, low level of services for high costs, lack of sinking funds, debtors etc. Consideration is also given to the problems in uncompleted developments.

CHAPTER 14 – LEGAL PROBLEMS

In addition to problems in the management of the development, there are also problems in regard to the legal structure. There are issues concerning leasehold title such as enforcement of covenants and transfer of the reversionary interest.

The applicability of the company law framework to owners' management companies gives rise to numerous problems such as burdensome filing obligations and the potential for owners' management companies to be struck off.

CHAPTER 15 – ALTERNATIVE LEGAL STRUCTURES FOR OWNERSHIP OF APARTMENTS

This Chapter outlines the alternative structures in other jurisdictions such as Australia and the United States of America, which have the advantage of several generations of apartment statutes.

The different types of structures such as common interest structures, condominium owners and housing co-operatives are explained. There is also reference to the advantages of a statutory scheme.

CHAPTER 16 – OPTIONS FOR THE LEGAL FRAMEWORK

Having identified the problems currently being faced in this sector, this Chapter seeks to address those problems by considering various options in regard to the legal framework. Comments are invited on what form of statutory title is most appropriate for apartments and whether it would be desirable to impose a new form of title. The suitability of the company law framework for owners' management companies is also discussed, with options for alternatives such as a more simplified model.

Proposals in regard to a statutory management scheme are also discussed, such as placing obligations on all developments to ensure that certain elements of the management structure are always in place. There are also proposals regarding specific management issues such as transfer of title to the common areas.

Finally there is an option to create a specific right of action to address issues such as defective legal documentation, to compel transfer of title, enforce covenants etc. Consultees are also invited to comment on the appropriateness of standardisation of documents.

CHAPTER 17 – OPTIONS TO ADDRESS MANAGEMENT PROBLEMS

This Chapter focuses on addressing the issues outlined in Chapter 13 regarding management problems. Consultees are invited to consider the regulation of management agents, specifically in regard to whether that should be in the form of licensing, a broader form of regulation or even via the creation of a statutory agency.

Consideration is also given to dispute resolution mechanisms where apartment owners cannot agree on the management of the development. Options include more traditional forms of dispute resolution such as a court-based system as well as other means such as mediation or arbitration.

CHAPTER 18 – IMPROVING CONSUMER AWARENESS

In this Chapter there are various options to try and improve the documentation and information which apartment owners receive. This is broken down into information which the developer or managing agent may be able to provide and that which a solicitor can provide.

There is also a proposal regarding establishing more effective ways of communication between all the parties involved in a development such as online forums for each development.

CHAPTER 19 – UNFINISHED DEVELOPMENTS

In current economic circumstances the issue of unfinished developments is particularly relevant. Consultees are invited to comment on whether it would be helpful to undertake a survey of unfinished developments and put in place plans to remedy each development. Some thought is also given to the issue of unadopted roads and bonds.

The merit of provision of funding to Housing Associations to finish developments or buy unsold units is discussed, as well as other innovative solutions. Consultees are also invited to comment on the suitability of amending planning law to compel developers to finish developments as a condition of planning permission.

CHAPTER 20 – QUESTIONS

This Chapter gives a full list of questions raised in the paper for ease of reference.

CHAPTER 1 – INTRODUCTION

BACKGROUND

1.1 In recent years, there has been a huge increase in the number of residential apartments in various types of building development. Many apartment complexes have been constructed on developments which are purely single use for residential purposes. In the context of residential accommodation these may consist of one or more multi-storey buildings or blocks comprising self-contained apartments or flats. It is not uncommon for the building to contain also, usually at ground level, a row of commercial units, such as newsagents or convenience store and other shops. Larger developments may contain several blocks on the same site and even some purely commercial buildings such as a hotel or office block. If they are purely residential they may also contain a mix of apartments, interlinked town houses, semi-detached houses and detached houses. All such developments share a high degree of interdependence.

THE DEVELOPMENT OF APARTMENTS

1.2 Northern Ireland's private residential housing stock has traditionally been dominated by houses and bungalows. In the past there were fewer owner occupied flats or apartments. Until the 1970s, living in a self-contained unit as part of a larger multi-unit development was largely associated with social housing, i.e. towerblocks constructed in the '50s and '60s, or with short-term rental accommodation for students and others. It was only in the 1980s when

the value of residential property began to rise, particularly in urban areas, and apartment living became a more attractive option that purpose-built owner-occupied apartments began to emerge in Northern Ireland. These were initially small-scale, low-rise developments with limited features. As the sector developed, 'flats' began to be marketed at the more affluent and the terminology of an 'apartment' came to be used, probably to distinguish it from flats of a more basic kind.

1.3 In the context of residential property, although such developments are a comparatively new phenomenon, they now make up a substantial proportion of new buildings for residential purposes. No doubt this novelty is the source of some of the difficulties experienced by the owners. Throughout the 1980s and 1990s, the number of apartments increased, with apartments comprising approximately 9% of all new dwellings constructed in this period.[4] It was not until the mid-1990s, however, that the apartment sector really began to take off. The vast majority of apartments (over 70%) have been built since 2000.[5] It is estimated that around 85% of all current apartments have been built since 1995. Between 2005 and 2010, apartments constituted (on average) almost one quarter (24%) of all new-build properties.[6] The most recent figures show that this percentage is falling and for the period 2010/11 20% of all new housing starts were apartments[7].

[4] Northern Ireland Housing Executive, *Northern Ireland House Condition Survey 2006*. This figure may also include social housing.

[5] These figures are based on the list of residential management companies registered with Companies House in 2010 which includes the date when the management company was established.

[6] Northern Ireland Housing Executive, *Northern Ireland Housing Market: Review and Perspectives 2011-2014*.

[7] Northern Ireland Housing Executive, *Northern Ireland Housing Market: Review and Perspectives 2011-2015*.

1.4 The rapid growth in building development came to an abrupt end in 2007 as the global economic crisis gave rise to a sharp downturn in the construction of new dwellings in Northern Ireland. This led to private housing construction levels falling from 14,000 in 2006/7 to 5,500 in 2008/9.[8] Figures for the first six months of 2011/12 show that approximately 2,600 new private homes were started, a 32% reduction compared with the first 6 months of 2010/11[9]. In view of the changed economic climate and the resulting fall in property prices, a number of developers have become insolvent and, as a result, some apartment developments have not been completed or their completion has been delayed. This has caused additional problems for the apartment owners involved.

1.5 In contrast with residential apartments, commercial multi-unit developments, like the traditional office block, have existed for a much longer period and do not appear to give rise to issues, notwithstanding that they share basic features that are inherent in such developments. Nor do the problems arise in the more recent kinds of purely commercial developments, such as shopping centres and industrial estates. This may be due in large part to the fact that business organisations have become used to the nature and structure of such developments, which tend to follow the practice in other jurisdictions. It is also clear, in the case of commercial premises, that well maintained premises in good condition and repair are more likely to attract customers and increase turnover. The process of understanding in the commercial world has also been assisted by the nature of the commercial investors and business organisations which are

[8] Northern Ireland Housing Executive, *Northern Ireland Housing Market: Review and Perspectives 2012-2015*.
[9] Northern Ireland Housing Executive, *Northern Ireland Housing Market: Review and Perspectives 2011-2015*.

already very familiar with operating multi-unit buildings.

THE SIZE OF THE SECTOR

1.6 It is difficult to ascertain precisely the current number of apartments in Northern Ireland. This is partly because the information available for new builds applies to all types of property and the information available for apartments includes Housing Executive flats and other forms of social housing. However, there are statistics available in relation to the number of individual apartments. The 2009 House Condition Survey found that flats / apartments account for 8% of total housing stock, i.e. 60,000 out of 740,000 dwellings, with 2% of the total stock being owner-occupied apartments.[10] Based on these figures, this would mean approximately 15,000 privately owned apartments in Northern Ireland.

1.7 Turning to the statistics for the number of management companies registered with Companies House, the Commission has found that 1,095 companies are registered within the category of 'residential management companies'.[11] It would seem that the vast majority of these are management companies for apartment developments. The developments to which these companies relate are likely to have at least five units. In addition to these, there will be a number of smaller developments and house conversions which do not have a corporate management structure. In terms of the total figure, the Commission estimates that there are around 1,200 apartment developments in Northern Ireland.

[10] Northern Ireland Housing Executive, *Northern Ireland Housing Market: Review and Perspectives 2011-2014*.
[11] These figures were obtained in November 2010.

1.8 Looking at the occupancy in terms of age profile, persons aged 17-24 (16%) and over 75 (11%) were the most likely to occupy apartments. This pattern has been consistent since 2001 and is likely to continue as apartments can provide the most suitable type of accommodation for single households, regardless of age. A characteristic of the sector is the fact that ownership of an apartment can often be relatively short-term as owners buy an apartment with a view to 'up-sizing' to a house a few years later. This is particularly the case with the young professional market. As a consequence, there is often a high turnover of both owners and tenants, which can have an impact on the operation of management arrangements.

1.9 Another feature of the apartment sector of the housing market is that many apartments are tenanted. This in itself can give rise to problems because the ownership and the occupation of the apartment are divided and each has an interest of a different nature. A tenant may have a short term interest in the apartment; the wear and tear can be heavy and there may be a high turnover of occupants. Anti-social behaviour issues may also arise where properties are let out to tenants. Coupled with this, where the owner is not resident and not on the site, there is a distance from the problems on the ground. Potentially the owner may have more interest in receiving the rental income than maintaining the standard of the property or addressing the immediate issues experienced by the tenant.

THE MARKET

1.10 Many apartment developments are in city or town centres forming part of the urban environment. Apartment developments may be a feature of regeneration initiatives which aim to revitalise inner

city areas. For example, Titanic Quarter in Belfast is a large waterfront regeneration development, which includes 2,500 residential units in the first two phases, coupled with leisure facilities, two hotels, retail space, and a major tourism project.

1.11 From the mid-1990s until the mid-2000s when the property market was rising fast there was a boom in buy-to-let properties and apartments were considered to be a good investment. As most apartments in Northern Ireland contain one or two bedrooms, they are suitable accommodation for single persons or couples rather than for families or larger households. Statistics show that 30% of all households comprise of a single person and that this is predicted to increase as the size of average households continues to fall. Apartments are occupied by higher proportions of lone adults (19%) and lone pensioners (16%) than by larger households[12].

1.12 As a consequence of the fall in the property market since 2007 the pace of development has slowed. Some new apartments remain unsold and some have been sold at reduced prices. It is more difficult for prospective buyers to obtain mortgage finance both for buy-to-lets and for owner occupation. Apartments bought at the height of the market have not held their value and some apartment owners are caught in a trap, finding themselves in negative equity and paying a high mortgage. On the other hand, prospective tenants are in a better position. They have a wider choice of properties to rent at affordable rates and may be able to live in more up-market accommodation than they were previously able to afford.

1.13 One outcome resulting from the decline in property values and the wider economic difficulties is that some

[12] Northern Ireland Housing Executive, *Northern Ireland Housing Market: Review and Perspectives 2011-2015*.

apartment owners are experiencing financial difficulties and have fewer funds available to pay for the necessary repairs and maintenance. They are unable to sell their property and move out because of negative equity but they are also finding it expensive to stay. This can cause them to delay or postpone the payments of their bills and service charges. As the cost of provision of the services continues to increase, this in turn puts more pressure on the system and adversely impact the operation of management arrangements.

CHAPTER 2 – WHAT IS AN APARTMENT?

DEFINITION OF AN APARTMENT

2.1 An apartment is an individual unit of self-contained residential accommodation which, together with other such units, the structure of the building and the common areas, makes up a development.

2.2 'Apartment' is not a term that is legally recognised in Northern Ireland but is generally understood to have the same meaning as 'flat', save that 'apartment' may be perceived to comprise a higher standard of accommodation.

2.3 The only statutory definition there is of an apartment or flat can be found in the Ground Rents Act (Northern Ireland) 2001 (c. 5), section 3(7)**.** A flat is defined there as:

"…….. a unit of accommodation in a development containing two or more such units, where –

(a) each such unit is dependent to a substantial degree on one or more than one other such unit for support or shelter; and

(b) the boundary, or part of the boundary, between at least two such units is horizontal; and

(c) the owners or occupiers of such units, or any of them share or may share in the enjoyment of common parts."

PHYSICAL CHARACTERISTICS

2.4 The physical characteristics of an apartment are quite different from those of free standing properties because apartments are units of self-contained accommodation within a multi-unit development. Each apartment is part of a larger building and is dependent for support on other apartments or parts of the structure. A block of apartments comprises both individual units and communal areas. A high degree of interdependence arises by virtue of the particular physical characteristics of the building itself. In essence living in an apartment involves a degree of communal ownership. Various parts of the whole building and development are often shared in common with other owners, such as the structure of the building, access, stairs, passageways, car park, gardens, pipes cables and services.

2.5 In view of this, the arrangements for maintenance and management of apartments, and the legal structure employed are more complicated than those for houses. It is important to ensure that a structure of legal relationships protecting the rights of apartment owners and defining their responsibilities with other apartment owners is properly established. The nature of the legal relationships is complicated and can be difficult for the apartment owners to understand and operate. There is also a view that the complexity has given rise to a lack of clarity and created scope for mismanagement. There is some evidence that if the legal arrangements are unclear, problems can arise with the enforcement of obligations and future resales may be prejudiced because of the difficulty of resolving the issues and rectifying the position.

INTERDEPENDENCE

2.6 All multi-unit developments, whether commercial (e.g., offices or shops), residential (e.g., townhouses or apartments), or of mixed use, share a high degree of physical interdependence. Such interdependence may also exist in other, more traditional developments, such as a terrace of houses or a typical housing estate comprising detached or semi-detached houses. Most developments involve an element of sharing of facilities or services, such as roads, footpaths, pipes and other means of providing services, parking areas, play areas and other amenity spaces. However the degree of interdependence is much less than that which exists in blocks of apartments and the need for management of the developments is less acute. It is not surprising therefore that the problems which may arise in residential housing developments without apartments are less serious.

2.7 The common element of all multi-unit developments is the degree of interdependence they necessarily involve, regardless of the accommodation of which they comprise. This has both physical and legal elements. The physical aspect derives from the fact that the owners or occupiers share the same building. Each apartment is part of a larger building and depends on the other parts for support and shelter. It will also depend on pipes, wires, cables and other conduits running through the building to supply various facilities, such as electricity, gas and water, and services, such as drainage and sewerage.

2.8 The interdependence usually involves an important legal dimension as well. In order to make full use and enjoyment of an apartment, the owner or occupier will need various rights over what are usually referred to as common areas, such as entrance halls, stairs, lifts, corridors and other passageways within the building. It is also common for apartment owners to enjoy, in

common with other unit owners, use of outdoor facilities, like car parks and gardens. Such rights are normally accompanied by obligations, such as the obligation to contribute to the cost of repair and maintenance of common areas. To be fully effective, an apartment development will require the creation of a wide range of mutual rights and obligations as between the different unit owners. Such complexities give rise to another dimension which arises from the element of interdependence. This is the need for day-to-day management of the development.

2.9 Unlike ownership of a house, ownership of an apartment therefore is linked to something akin to membership of a type of club where all members share a similar interest and must play their part to ensure the development is managed properly. In practice, this means paying their portion of the service charges and contributing to decision-making. For this reason, the arrangements for apartment management inevitably contain a scheme of rights and responsibilities, and processes for collective decision-making. Such arrangements are set out in the lease which is drawn up by the solicitor acting for the developer.

CHAPTER 3 – PARTIES IN THE DEVELOPMENT

INTRODUCTION

3.1 When a building development is constructed, there are several parties which will have an interest in it, either from the outset or under the framework that is set up to own and manage it.

DEVELOPERS

3.2 The developer is the most active party during the construction phase and the one which instigates the structure for the development. It is usually a company which owns the site on which the development is to be built. After obtaining the appropriate planning permission for the development, the developer will proceed with the building and sale of the properties which are to be constructed. The terms of the planning permission for any residential housing development containing open spaces or common areas will require some form of management to ensure the sustainability of the development, particularly for the more dense forms of developments and apartment blocks.

3.3 The practice which has developed is for the developer to set up a management company with the intention that it will be responsible for the structure of the building and the common areas. Since the developer does not often wish to be involved in the management of the building as a whole after completion of the development and sale of all the apartments, it is usually specified in the lease of each apartment that

the title and ownership of the structure of the building and common parts of the development will be transferred to the management company by the developer when all the apartments have been sold. This agreement may extend to cover the developers' interest in the entire site. As a result the developer is ultimately able to divest itself of any long term responsibility for the development.

3.4 A new property is generally sold by means of two separate agreements between the developer and the purchaser which together comprise the contract: in the case of an apartment it will be an agreement for lease and a building agreement, the former sets out the details of the title which are to be granted to the purchaser and the latter relates to the arrangements for the actual building of the apartment. If the developer does not own the site, there will be an agreement between the developer and the landowner to construct the development. In these circumstances the purchaser will enter into one agreement for lease with the landowner and another agreement (a building agreement) with the developer to construct the property.

APARTMENT OWNERS

3.5 The owner of the apartment will have two ownership interests. The first is ownership of a legal interest in the apartment itself, which is generally a long leasehold interest. Residential property in Northern Ireland has commonly been sold by way of lease for very long periods such as 999 or 10,000 years[13]. This

[13] The Property (Northern Ireland) Order 1997 No. 1179 (N.I.8) prohibited the creation of any new long leases of dwelling houses in excess of 50 years (Article 30), subject to specified exceptions. It is still possible to create a long lease of a flat/apartment because it is one of the exceptions.

continues to be the means by which apartments are generally sold so an apartment owner will hold a long leasehold interest in the apartment as defined and described in the lease. All the apartments in the development will be sold by way of a lease on similar terms, allowances being made for individual variations, such as appropriate access.

3.6 The second interest held by the owner of the apartment will be an interest in the structure and common areas of the development. Although the structure and common areas are owned by the developer in the beginning, it is normally provided in the lease of each apartment that the developer will transfer to the management company all its remaining estate and interest in the development following the sale of the last apartment in the development.

3.7 Each apartment owner will be the owner of one share in the management company. The management company and the developer hold all the remainder of the property not included in the apartments (i.e. the structure of the building and the common areas) on trust for the owners of the apartments. As the owner of a share in the management company, and under the declaration of trust, the apartment owners have an interest in the entirety of the property.

MANAGEMENT COMPANIES

3.8 The legal structure of most substantial residential developments comprising of four or more apartments incorporates a management company. This type of arrangement is used because it provides a vehicle for the ownership and management of the common parts of the development which do not belong to and are not the responsibility of a single apartment owner. The purpose of the management company is to provide a

mechanism to manage the building as a whole once all the apartments have been sold. The lease for each apartment contains the apartment owner's responsibilities in relation to the common areas including, most significantly, the responsibility to pay a service charge. It is the management company's collection of that service charge which then provides the funds which allow for the maintenance of the common parts and provision of services.

3.9 The management company is usually a company established initially by the developer and controlled by it while the development is being built. It is a private limited company which has the sole purpose of managing the development. Although it does not trade and has fairly limited functions, a management company is treated in law like any other company so the general provisions of company law apply. The developer will normally establish and register the company with a view to transferring its interest in the development, including the common areas and services, to the company on completion of the development. The aim is that the developer's interest in the development will cease when the apartments are all sold, at which point the members of the company will be the apartment owners.

3.10 The first purchasers of the apartments are issued with one share each in the management company and on completion of the development they, as the owners of the management company, become responsible for the day-to-day management. In practice the day-to-day management tasks are often delegated to managing agents, initially appointed by the developer or the management company controlled by it.

3.11 Whilst the apartment owners will each take a share in the company it is unlikely that they will have full voting rights until such time as all units within the development have been sold. Thus it is common

practice for the developer to retain control of the company until the last units in the development are sold. The usual provision made in the lease is that the share in the management company is tied to ownership of the apartment, and that it is transferred with the ownership of the apartment on sale. As well as having an interest in the assets of the management company, ownership of a share also confers the right to participate in the company's operation, including voting rights at meetings.

MANAGING AGENTS

3.12 It is common for a developer or management company, especially in a larger development, to employ at an early stage a firm of managing agents to carry out various administrative tasks and generally to undertake the day-to-day management of the development. The employment of a managing agent can be beneficial where the agents are experienced in the full range of property management issues; they should also be skilled in preparing financial accounts and budgets and have a network of reliable and competent trades people to carry out maintenance work. Since apartment owners tend, on the whole, not to be experienced in property management, the employment of a professional managing agent can be a vital component in the structures for the maintenance and management of a development.

CHAPTER 4 – THE ROLE OF A DEVELOPER

INTRODUCTION

4.1 The developer is responsible for the development of the property and, in conjunction with its professional advisers, devises the features of the development. The developer will plan the nature and type of the building development and all the ancillary matters connected with it.

4.2 The process begins when a developer instructs an architect to draw up plans of the development. The developer may own the development land, but that is not necessarily always the case. If the developer is not the owner, an agreement should be drawn up between the developer and the landowner for the development of the land. Such an agreement should set out the terms on which the developer is to undertake the construction work and how the sale proceeds of each site or unit is to be paid.

PLANNING

4.3 One of the first steps for the developer to take before construction begins is to make an application for planning permission for the development under Article 12 of the Planning (Northern Ireland) Order 1991 No. 1220 (N.I. 11). Current responsibility for planning matters rests with the Department of Environment.

4.4 When developing a site, developers are required to apply for the necessary planning permission and to ensure that adequate infrastructure is in place for the development. This includes proposals for the

construction of roads, drainage and sewers as well as the provision of water and electricity supplies. Consideration also has to be given to telephone services and possibly mains gas. A planning application will require the developer to submit detailed information such as location plans, block plans, floor plans and elevations together with proposals for access to the development, water supply and sewerage services.

4.5 Planning decisions are based on Planning Policy Statements (PPSs), some of which are relevant to residential housing developments. PPS 8 (published February 2004), relates to the provision of open space within a development. In addition Policy OS2 provides that, where the proposal is for a new residential development of 25 or more units, or is on a site of one hectare or more, the developer is required to make provision for public open space as an integral part of the development. In smaller residential schemes, the need for public open space will be considered on an individual basis and where private communal gardens are proposed as an integral part of the development, separate provision of public open space will not be required.

4.6 As a result of this planning policy, developers are generally required to provide amenity areas which include public open spaces and landscaped areas. PPS 8 states that acceptable arrangements should be put in place for the transfer of ownership and responsibility of the amenity lands to the local council, a charitable trust or company or a properly constituted residents' association. In practice, developers will provide for ongoing maintenance of such amenity land by the establishment of a management company for the purpose, or to engage an existing specialist company, such as the Greenbelt Company to ensure that the amenity lands are maintained.

4.7 In addition to the provision of amenity lands there is a requirement in larger developments to make enhanced provision of infrastructure, such as community centres, roads, footpaths and street lighting. Under Article 40 of the Planning (Northern Ireland) Order 1991, a developer may be required to enter into a Planning Agreement with the Department of the Environment before planning permission is granted for the provision of enhanced infrastructure. These amenities may be included in the common areas of the development and maintained for the benefit of everyone on the development.

4.8 When planning permission is issued, conditions may be imposed regulating the use of the land and specifying details of matters that the developer is required to address e.g., the provision of suitable access on to the main road together with the necessary sightlines, appropriate landscaping, materials and finishes. Once planning permission has been granted, work must commence within 5 years or the permission will lapse. When the work commences, the Department endeavours to ensure that the development is carried out in accordance with the terms of the planning permission. However, there is no formal inspection procedure on completion of a development to ensure compliance with the conditions attaching to planning permission.

4.9 It is not a criminal offence to carry out development without the necessary permission but the Department may instigate an investigation for potential breaches. It has the power to issue an enforcement notice at any time within four years of the date of the breach of the planning permission**.** Subsequently it may take enforcement action e.g., require demolition of a building. Failure to comply with an enforcement order is a criminal offence.

ROADS

4.10 The Department for Regional Development is responsible for roads in Northern Ireland and Roads Service is the Agency within the Department which is the authority which manages public roads, footways, bridges, street lighting and public car parks. The adoption of roads is governed primarily by the Private Streets (Northern Ireland) Order 1980 No. 1086 (N.I.12) ('the 1980 Order').

4.11 When planning permission is issued for the development of land, where roads are an essential part of the development and there are more than four dwellings in the development, the planning permission will include a requirement for the laying out of construction of the roads / streets. In such cases, a Private Streets Determination is issued under Article 3 of the 1980 Order which clearly identifies the areas of roads / streets which will be adopted by the Department after they have been constructed to the required standard by the developer. Generally, it is the intention of the developer that the new roads / streets in the development giving access on to the existing main road, once constructed, will be adopted and maintained as public roads by the Department.

4.12 Until the roads are taken over by the Department they remain as private roads. Whilst they are in private ownership, the roads may be part of the common areas of the development or in the absence of any other arrangements, may be owned by the frontagers who have properties fronting the road. In some cases, for example where there is a small development of less than four houses, or where there is a gated community the roads may remain in private ownership without ever being adopted. It is becoming more common for the internal roadways within the development not to be adopted.

4.13 The Private Streets (Construction) Regulations (Northern Ireland) 1994 No. 131 as amended by the Private Streets (Construction) (Amendment) Regulations (Northern Ireland) 2001 No. 73 together prescribe the minimum standards and detailed requirements for the construction of Private Streets. They include details of the materials to be used and methods of construction. They also provide for the deposit and approval by the Department of plans and specifications and for the developer to give notice of the commencement and completion of the various stages of work.

4.14 In addition to the legislation, developers must comply with requirements in the current design guide, 'Creating Places: Achieving quality in Residential Developments'. They must design a development layout in accordance with the design guide and reach agreement with Roads Service on the extent of the roads and footways that will be determined for adoption. Developers have a duty to consult with Roads Service on the design of roads / streets to ensure that the design meets the required standards.

4.15 Prior to construction of the development, a developer is required to enter into an Agreement with the Department under Article 32 of the 1980 Order to provide the roads, footways and street lighting to the Department's standards[14]. This Agreement is secured by a road bond in the estimated cost of the street works. As the developer constructs the approved streets, Roads Service Inspectors carry out regular inspections to ensure that the required standards are being met. It is the developer's responsibility to co-ordinate the appropriate statutory authorities and

[14] Prior to 1 April 2007 Departmental bonds for roads and water were administered solely by Roads Service. Since that date, Roads Service has provided the road bonds but NI Water Limited has been become responsible for water and sewerage.

others who will place equipment, such as street lighting, within the adopted areas. As the work progresses, the road bond can be reduced

4.16 When all the street works have been completed and the road has been maintained by the developer for at least 12 months in accordance with the Article 32 Agreement, the developer will correct any final defects that are identified and the Department will formally complete the adoption. At this point the Department may issue a certificate that the work is complete and responsibility for maintenance will be transferred to the Roads Service. Where a private street is not properly constructed within a reasonable time, the Department may initiate enforcement action under Article 11 of the 1980 Order requiring the developer to complete the works within a specified time. Where the notice is not complied with, the Department may execute the works and recover the costs from the developer or from the surety under the bond.

4.17 However the Department cannot take over responsibility or demand possession of a development which has not been completed where there is no bond in place. In such a case it is the frontagers owning the properties fronting the road who become responsible for it. Some bonds allow the development to remain private and not to be adopted as public roads at any stage. This is quite popular, for example in the case of gated developments. In these cases, the frontagers would continue to remain responsible for the upkeep of the roads after completion of the development.

WATER AND SEWERAGE

4.18 Northern Ireland Water Ltd (NI Water) is a government-owned company for which the Department for Regional Development (DRD) is

responsible. It was established under the Water and Sewerage Services (Northern Ireland) Order 2006 No. 3336 (N.I. 21) ('the 2006 Order') and appointed as the sole water undertaker and sewerage undertaker for the whole of Northern Ireland. Following the establishment of NI Water, separate bonds are now required for roads and sewers (from 1 April 2007).

4.19 When undertaking development, developers must make a request for the construction of water mains, water connections and approval for adoptable sewers from NI Water designs. It is a requirement to construct capital works such as pumping stations, sewers, water mains and all associated apparatus to provide developments with the necessary infrastructure on time to meet anticipated demand. Either NI Water will provide water mains or the developer can assist in the provision of new water mains by undertaking agreed works. Agreed works are subject to inspection by NI Water. All costs in supplying new water mains are met by the developer but when constructed, the water mains are owned and maintained by NI Water.

4.20 A developer can opt to construct the sewers for a new development using approved materials and do so to the standard required for adoption by NI Water. For this purpose, the developer must enter into an Agreement with NI Water under Article 161 of the 2006 Order for the development of sewers. The developer submits a drainage layout to NI Water and an Article 161 Agreement is authorised when all of the required information and bond security has been provided. Where a developer undertakes agreed works or constructs sewers under an Article 161 Agreement, inspection is carried out by NI Water to ensure the works meet the terms of the Agreement. A Final Certificate of Adoption and a Declaration of Vesting complete the formal procedures for sewer adoption.

BUILDING REGULATIONS

4.21 Building control is completely separate from planning permission and is an additional means by which development is controlled. When constructing new houses a developer is required to apply for building regulation approval for the building work as well as planning approval for the development. Building Regulations are intended to ensure that construction work is done to a high standard. They are mainly concerned with the structural quality of buildings and ensuring they are safe and suitable for human habitation.

4.22 The Building Regulations (Northern Ireland) Order 1979 No. 1709 N.I. 16) (as amended 1979 and 2009) is the primary legislation governing building control in Northern Ireland. This is supplemented by the Building Regulations (Northern Ireland) 2000 No. 389, as amended, which impose certain mandatory requirements in relation to specific aspects of building work. Although issued by the Department of the Environment, the building regulations are enforced by the 26 local councils.

4.23 The Regulations are very detailed, but the matters which they cover include: materials and workmanship, resistance to moisture, condensation, structure, fire safety, conservation of fuel and power, sound insulation, stairs and ramps, solid waste in buildings, ventilation, heat-producing appliances and liquefied petroleum gas installations, drainage, sanitary appliances and hot water storage systems, access and facilities for disabled people, and glazing.

4.24 Technical booklets have been drafted by the Department of Financial and Personnel which supplement the regulations and provide specific detail on compliance with the regulations. There may be

further regulations in specific instances, for example in relation to the installation and safety of gas appliances[15]. It should be noted, however, that there is no obligation to comply with the specifics set out in the technical booklets as long as the regulations are followed.

4.25 In the case of a development an application for building control approval is made by submitting full plans to the local council for approval at least 48 hours before building work commences. Plans are assessed for compliance with Building Regulations and if satisfactory an Approval Certificate will be given. Work can commence as long as a valid application has been made and the council is notified of the start date and appropriate notice has been given. Inspections will be completed at various stages of building work, from commencement to completion. It is the duty of the applicant or builder to inform the council when various stages have been completed e.g. foundation inspection, damp proof, drains and sewers and final completion. Emphasis is placed on site inspections to ensure that the works are in compliance with applicable construction performance standards.

4.26 Once a development is completed a council inspector will carry out a final inspection and if satisfied issue a Building Control Certificate of Completion. A completion certificate verifies that a property complies with legal guidelines and has been subject to inspections. If there is a contravention of building regulations the councils have legal powers to address this.

[15] Gas Safety (Installation and Use) Regulations (Northern Ireland) 2004 No. 63.

HOME BUILDING WARRANTIES

4.27 When a development is being constructed the developer will normally provide each purchaser with a building warranty which gives the purchaser rights additional to those available under the contract. A building warranty confers protection against major defects due to faulty work on the part of the builder but it does not compensate for all types of loss. There are various conditions of cover and there are financial limits on the compensation available. It is essential to have normal house insurance as well.

4.28 Most lenders insist that, in order to make a loan to a purchaser, the construction of a new property is carried out by a builder which has registered with one of the building warranty providers. There are several building warranty and insurance schemes currently operating in Northern Ireland. For example NHBC, Zurich, HAPM, Premier and Building Life Plans. As an alternative to the provision of a building warranty, an architect's certificate may be acceptable if the building work is supervised by an architect who is covered by appropriate professional indemnity insurance and will issue a certificate of inspection of the building work.

4.29 Under a building warranty a builder will guarantee to build the house or apartment in accordance with the requirements specified and if this is not done the purchaser can make a claim for compensation within the guarantee (for example, 10 years) for loss suffered as a result of a failure to complete the house in accordance with those requirements. Building warranty cover may be cancelled in certain circumstances. For example if a bankruptcy order is made against the builder or if the builder is a company which goes into liquidation.

ENERGY PERFORMANCE CERTIFICATES ('EPCs')

4.30 Since 30 December 2008, under the Energy Performance of Buildings (Certificates and Inspections) Regulations (Northern Ireland) 2008 No. 170 (as amended), all properties are required to have an energy performance certificate when constructed or being marketed for sale or rent[16]. The Regulations require an EPC to be made available when the property is being marketed. It must be supplied free of charge to any prospective purchaser or tenant at the earliest opportunity before a contract to sell or rent is entered into. The recommendation report accompanying an EPC is for advisory purposes only. The vendor or landlord is not required to carry out any work mentioned in the report and the purpose of the report is to inform the prospective buyer or tenant about the energy efficiency of the property so that different buildings can be compared and informed decisions can be made about potential running costs.

[16] This is the result of a European initiative, the Energy Performance of Buildings Directive, which was implemented in Northern Ireland by amending the Building Regulations (Northern Ireland) 2000 No.389.

CHAPTER 5 – PURCHASE OF AN APARTMENT

INTRODUCTION

5.1 The purchase of an apartment in a new development involves going through a type of conveyancing process that differs from that where the property is older. The primary reason for this is that there are a number of special requirements for new property and documentation or certification that has to be obtained by the developer confirming compliance with statutory regulations.

5.2 Before making a decision to buy an apartment, whether new or already existing, a purchaser should consider the best means of arranging the finance for the purchase of the apartment. Often the funds for the purchase will be raised by way of mortgage. However, it is also important to have additional money available for the deposit as well as costs and outlays. This Chapter will not consider finance or mortgages but will concentrate on the aspects of the purchase which relate to acquisition of ownership.

BUYING A NEW APARTMENT

5.3 When a purchaser is considering buying a new apartment it may be either off-plan before the construction has commenced, or it may be at a slightly later point after the building work on the development has begun.

Going to an estate agent

5.4 The first port of call for anyone interested in a new apartment is normally either the site office on the development or an estate agent. Larger developments may have an office on site for prospective buyers to visit. In other cases, new developments are often marketed by an estate agent who will act for the developer in marketing and selling the houses and apartments. The prospective purchaser will usually also visit the development itself and perhaps go round the show apartment before making the decision to proceed.

5.5 At the outset a purchaser will be given some documentation and information by the developer and / or the estate agent. Normally this information will include a brochure for the new development containing information regarding the developments as a whole, a site plan and also some more specific information about the finishing standards in each apartment. There is usually very little information at this stage about the arrangements for management of the development or the level or nature of the service charges.

5.6 The purchaser should be given a copy of the National House Building Council Consumer Code for Home Builders[17] by the developer or the estate agent. The Code sets out mandatory requirements that all home builders must meet in their marketing and selling of homes and their after–sales customer service. The Code is a voluntary form of self-regulation for the construction industry which also sets out the levels of service that home buyers can expect. It applies to

[17] Second Edition, which applies from 1st April 2010. This only applies where the developer has registered with the National House Building Council.

houses as well as to apartments but does not apply to second-hand properties.

5.7 It may be necessary to pay a booking fee to the estate agent or the developer to reserve a particular apartment or site. It seems that £500 is a standard amount in this respect but the sum may vary. The booking fee is often retained by the developer as security for reservation of the particular site or apartment. It is refundable, less any administration fee, if the purchaser subsequently wishes to withdraw from the transaction.

Going to a solicitor

5.8 When a purchaser has made the decision to commit to buying a property, it is time to instruct a solicitor. The purchaser should contact a solicitor to let the solicitor know about the apartment or property which is to be bought. At the same time the estate agent will send a note to the solicitor with brief particulars of the sale agreed. This will take place while construction is still ongoing and it may be several months before the apartment is scheduled to be completed.

The conveyancing process – at the outset

5.9 When a residential property is bought or sold and the ownership of it is transferred to someone else, the procedures which take place as part of that transfer make up the conveyancing process. In the case of an apartment, the conveyancing process involves the transfer of the title to the apartment from the developer to the apartment owner.

5.10 A solicitor acting in the purchase of any residential property is required by the Law Society of Northern Ireland to comply with the requirements of the Home

Charter Scheme ('HCS')[18]. The HCS promotes good practice and uniformity of processes. Under the HCS all solicitors are obliged to observe the procedures recommended and to keep the client informed at each stage of the transaction[19]. The solicitor will write to the client with details of the work that will be undertaken by the firm in buying the property, the terms and conditions of business and an estimate of the costs that will be involved[20].

5.11 The Law Society of Northern Ireland has published two leaflets: 'Buying and Living in an Apartment' and 'Buying & Living in a Property with Common spaces' which explain to clients the issues involved in apartment living or buying a property in developments with common spaces and common facilities. It is helpful for purchasers to be given a copy of these leaflets when they are buying an apartment.

Documents and information required

5.12 In the case of the purchase of an apartment, the solicitor acting for the purchaser will write to the solicitor for the developer requesting the following documentation:

1. A copy of the title documents

5.13 Title is the right to ownership of property. The purchaser's solicitor has a duty to investigate the title to new property in the same way as for existing property. The purchaser's solicitor has to check the

[18] The Home Charter Scheme is a quality assurance scheme operated by the Law Society of Northern Ireland. It is compulsory for all solicitors to adhere to it.

[19] There is more detail in Chapter 9 about the information that will be provided to a purchaser under the HCS.

[20] In accordance with the Solicitors' (Client Communication) Practice Regulations 2008.

title to ensure that good title can be vested in the purchaser.

2. The building agreement and agreement for lease

5.14 These two documents together form the contract for the purchase of the apartment or property. They may be in separate but interdependent documents or in one amalgamated form.

3. Draft lease

5.15 The title to the new apartment will be by way of creation of a new long lease[21]. The leases of all the apartments in the development will normally be in substantially the same terms. The purchaser's solicitor is required to check the provisions of the lease to ensure that the physical perimeters of the apartment are properly defined and that the necessary rights of the apartment owner will enjoy are included. The solicitor will also ensure that the lease contains appropriate covenants and that the obligations of the developer, the management company and the apartment owner are clearly set out in it. It is important to ensure that a management company is in place and that there is a proper framework for management of the common areas.

4. Planning permission

5.16 A copy of the planning permission for the development issued by the Department of the Environment should be furnished[22]. The purchaser's solicitor should check that it covers the building of the apartment in question

[21] See Chapter 6 for more detail regarding the lease of an apartment.

[22] The Department of the Environment is responsible for planning control. Planning permission is required for the development of land under Article 12 of the Planning (Northern Ireland) Order 1991 N.I. 11. See Chapter 4 for obligations of the developer.

and pay particular attention to any conditions imposed.

5. Building control approval

5.17 In addition to planning permission, the developer's solicitor should also provide a certificate of approval issued by the local council confirming that the plans for the building work comply with building regulations[23]. As the construction work progresses, it is subject to inspection by a building control inspector from the council. If satisfied with compliance when the work has been completed, a final certificate will be issued. This should also be made available to the purchaser's solicitor in due course.

6. Road bond and Article 32 Private Streets Agreement

5.18 Where new roads are being constructed giving access to the development from the existing main road, the purchaser's solicitor should be satisfied that a road bond and Article 32 Private Streets Agreement are in place[24]. The Agreement is made between the Department of Regional Development, which is responsible for roads, and the developer. Under the Agreement the developer undertakes to construct and complete the roads to the satisfaction of Roads Service. The Agreement is secured by a road bond in

[23] The Building Regulations (Northern Ireland) Order 1979 No. 1709 (N.I. 16) (as amended 1979 and 2009) is the primary legislation governing building control in Northern Ireland. This is supplemented by the Building Regulations (Northern Ireland) 2000 (No. 389), as amended, which impose certain mandatory requirements in relation to specific aspects of building work. Although issued by the Department of the Environment, the building regulations are enforced by the 26 local councils.

[24] The adoption of roads is governed primarily by the Private Streets (Northern Ireland) Order 1980 No. 1086 (N.I. 12) ('the 1980 Order') as amended by the Private Streets (Amendment) (NI) Order 1992 No. 131. Article 32 provides for road bonds. See Chapter 4 for developer's responsibility in relation to roads.

the estimated cost of the street works. After the work has been completed and the road has been satisfactorily maintained for at least 12 months, it will be adopted by the Department and become a public road. Until such time as it is adopted, the road remains a private street. Whilst they are in private ownership, the roads may be part of the common areas of the development

5.19 As well as the road into the development, there may be a section of roadway which will remain in private ownership. This will be the case for example, where there are less than four houses in the development or where there is a gated community. Until the roads are taken over by the Department they remain as private roads. It is becoming more common for the internal roadways within the development not to be adopted.

7. Article 161 sewer agreement

5.20 Northern Ireland Water ('NI Water') is responsible for water and sewerage services and will ensure that arrangements to provide the necessary infrastructure for the development are put in place[25]. For this purpose, a developer must submit a drainage layout to NI Water and enter into an Article 161 Agreement for the development of sewers[26]. A purchaser's solicitor should be furnished with a copy of the Article 161 Agreement. As with the roads, after completion and a final inspection to ensure compliance, the sewers will be adopted.

[25] NI Water is a government-owned company for which the Department for Regional Development is responsible.
[26] Water and Sewerage Services (Northern Ireland) Order 2006 No. 3336 (N.I. 21), Article 161.

8. NHBC or other building warranty

5.21 The developer will normally be registered with a provider of building warranties, such as NHBC (the National House Building Council)[27]. The warranty scheme will ensure that the construction is of a required standard and will provide insurance cover for building defects for a specified period, e.g. ten years after completion of the building work. The purchaser's solicitor should be given the certificate to show that the property is covered by the warranty. A purchaser's solicitor should verify the matters covered by the insurance.

5.22 On occasion, a developer will not have registered with a home warranty provider but will have employed an architect who will have supervised the construction work. In these circumstances, the architect can provide a certificate which the purchaser can rely on should structural problems arise within a specified period.

9. Energy performance certificate

5.23 An energy performance certificate (EPC) provides information about the energy efficiency of a property[28]. An EPC must be made available to a prospective purchaser when a building is being constructed so it should be forwarded to the purchaser's solicitor as soon as it is available. An EPC is valid for 10 years.

[27] See Chapter 4 for more detail about building warranties.

[28] In accordance with Energy Performance of Buildings (Certificates and Inspections) Regulations (Northern Ireland) 2008 No. 170 as amended. See Chapter 4 for more detail about developer's obligations to provide EPCs.

10. Documents to verify powers of developer (if a company)

5.24 Where the developer is a company, a copy of the certificate of incorporation should be furnished to show that it has been properly established as a company. A copy of the memorandum and articles of association should also be provided as evidence of the constitution of the company and to demonstrate that it has the power to buy and sell land, to develop land, to grant leases and such other powers as may be appropriate.

11. Documents relating to the management company

5.25 Similarly, a copy of the certificate of incorporation of the management company should be provided to the purchaser's solicitor along with copies of its memorandum and articles of association. These will confirm that the company is properly established and has the necessary powers to own property and to act in the management of the property specified. On completion of the purchase the purchaser's solicitor will also ask for the share certificate for the purchaser's one share in the management company. An estimate of the amount of service charge the purchaser will be required to pay for the initial period should also be provided.

12. Certificate of insurance

5.26 A purchaser should request a copy of the certificate of insurance for the whole building and ensure that it is properly insured.

13. Property certificates

5.27 The developer's solicitor will provide property certificates from the Department of the Environment

and the local council in respect of the property. In the case of a development, the certificates normally relate to the whole of the development and not to the individual property.

5.28 The Department of the Environment property certificate will provide information in respect of roads, planning, water and sewerage. The important points to note concern: the question whether the road is adopted, if the road is a public or private road, whether there are road works that may affect the property, whether the property is served by a public water main and whether the property is served by a public sewer. In relation to planning the solicitor will be looking for confirmation of the appropriate planning permission granted. The solicitor should check the other planning consents detailed for their relevance to the development.

5.29 The local council property certificate provides information relating to building control and other statutory matters administered by the council. In the case of the purchase of a new property in a development, a purchaser's solicitor should check to confirm that the building regulation approval for the development is recorded as having been issued.

14. Searches

5.30 Various searches against the title, the owner of the land and the developer must be provided to the purchaser's solicitor. Searches are essential because of the risk that some other interest in the land may be registered prior to that of the purchaser which will take priority over that of the purchaser. It is important to check that there are no mortgages, charges or judgments of any kind that would affect the ability of the developer to sell the property to the purchaser.

15. Pre-Contract Enquiries

5.31 The object of pre-contract enquiries raised by a purchaser is to elicit information about a wide range of matters concerning the property which are of importance to the purchaser but which a developer might not otherwise provide. The replies to the enquiries provided by the developer may affect the decision of the purchaser as to whether or not to proceed. However, the replies are of limited value in the case of a development because the property which the purchaser is buying is not complete at the time the replies are given and the information is of a very general nature. The replies may usefully give information about issues such as the anticipated amount of service charge or draw attention to a particular feature of the development such as the requirement for an amended road layout at a future date.

The conveyancing process – entering into a contract

5.32 The purchaser's solicitor will take full instructions from the purchaser and explain the content of the documentation provided by the developer's solicitor. It is generally advisable for the purchaser to be given a copy of the lease setting out all the rights and obligations relating to the apartment, as well as copies of all relevant plans of the apartment and the development. When the purchaser's solicitor has made all necessary checks and is satisfied both with the information obtained and of the availability of the necessary finance, the purchaser will be advised to sign the contract. In the case of a new property this normally consists of the building agreement and agreement for lease.

5.33 The signed agreements are sent to the developer for acceptance and the contract becomes binding on both parties after notice of the developer's acceptance has

been communicated back to the purchaser. If the purchaser has agreed to pay a deposit, this is the stage at which the deposit becomes payable.

The conveyancing process – completion

5.34 When the building work has been finished, the final inspections have been made, all the enquiries have been answered satisfactorily and the finance is in place, formal completion can take place. The developer will send the purchaser's solicitor a final account indicating the date on which the property will be ready for occupation and requesting the amount due to the developer, detailing any extras payable. When the funds are paid over to the developer's solicitor, the keys will be released to the purchaser together with the lease and any other documentation executed by the developer.

5.35 After completion the purchaser's solicitor has further administrative matters to attend to such as paying any Stamp Duty Land Tax and registering the lease to the purchaser.

Snagging

5.36 Sometimes problems arise after the purchase has been completed because of building work which remains outstanding or defects appearing in the construction. If it is clear at the time of completion that there is outstanding or remedial work to be done, the purchaser's solicitor should if possible ensure that the necessary work is undertaken prior to completion. If that cannot be agreed, it should be made a condition of completion that the work is done. Examples of problems that might arise include cracks in ceilings or walls, unfinished plaster or painting, loose wiring, crooked light switches, leaking pipes, missing parts of utilities or unfinished landscaping.

5.37 Such items are often set out in a 'snagging list' which may be agreed between the parties and their solicitors. In the absence of agreement, where there may be potential for dispute, an architect or chartered surveyor may be engaged to inspect the property and identify the problems. It may be more problematic if the defects become apparent some time after the purchaser has moved in. In such circumstances if the builder does not attend to the problems, the purchaser should seek professional advice from an architect, chartered surveyor or solicitor. Where disputes over the snagging list cannot be resolved amicably, the parties can seek redress and rely on their remedies under the contract.

5.38 Under the Law Society of Northern Ireland standard building agreement, which is widely used, the dispute can be referred to any of the conciliation, dispute resolution or adjudication services offered by or on behalf of NHBC or by any other insurance backed warranty scheme. If the matter has not been resolved within 30 days of such referral the matter may, on request, be referred to formal arbitration. Any other building agreement used is likely to contain similar provisions.

BUYING AN EXISTING APARTMENT

5.39 Again, when buying an existing apartment, a purchaser will agree the sale through an estate agent. At that point, the purchaser may have little information about the apartment and the arrangements for managing it. When the price and basic details have been agreed, the estate agent sends the sale particulars to the solicitors for the vendor and the purchaser.

5.40 A purchaser of an existing apartment is strongly recommended to obtain a full structural survey of the property to find out as much as possible in relation to the physical condition of the property before proceeding. This is a detailed report on the condition of the building and is of much more benefit than a mortgage valuation report which merely confirms the value of the property for mortgage purposes. The survey should reveal, for example, if there is any structural work which should be done, repairs that are necessary or damp to be treated[29].

5. 41 It should also identify work that has been done and advise that the purchaser should request the necessary certificates from the vendor to verify that the work has been completed to the required standard. If a new gas heating system has been installed the purchaser should also check that there is a building control completion certificate available. If the appliance has been fitted by a Gas Safe registered engineer they should provide a Gas Safety Record or Certificate. Depending on the age of the boiler there should also be proof that the boiler has been maintained accordingly i.e. yearly servicing. This would normally be recorded in the Gas Safety Record.

Documents and information required

5.42 The purchaser's solicitor should ask the vendor's solicitor for substantially the same information as for a new apartment.

1. A copy of the title documents

5.43 The Purchaser's solicitor has a duty to investigate the title to ensure that good title can be vested in the purchaser. The title will consist of the title deeds to the development and to the apartment itself. The long

[29] For example, an RICS Home Survey.

lease of the apartment to the first purchaser will be assigned and transferred to the second or subsequent purchasers. Again the purchaser's solicitor should check the provisions of the lease carefully to ensure that the physical perimeters of the apartment are properly defined and that the necessary rights that the apartment owner will enjoy are included. The solicitor will also ensure that the lease contains appropriate covenants and that the obligations of the developer, the management company and the apartment owner are clearly set out.

5.44 It is important to ensure that a management company is in place and that there is a proper framework for management of the common areas. The purchaser's solicitor should also find out whether the title to the reversion, the structure of the building and the common areas has been transferred to the management company. This transfer vests ownership of the relevant areas of the property in the management company.

2. Contract

5.45 The contract for the sale and purchase of existing property takes the form of The Law Society of NI General Conditions of Sale (3rd edition) (2nd revision) instead of a building agreement and agreement for lease which are appropriate only for new build property.

3. Planning permission

5.46 A copy of the planning permission for the relevant phase of the development should be furnished.

4. Building control approval

5.47 By the time of the sale of the apartment by the first purchaser a building control completion certificate

should be available as well as the initial certificate of approval.

5. Roads, water and sewers

5.48 Similarly, the roads and sewers should have been made up and adopted. If they have not been, this may not be an issue of concern as long as an appropriate Article 32 agreement for roads and Article 161 agreement for sewers is in place[30]. If an appreciable length of time has passed, the purchaser's solicitor should look further into the reasons why progress on making up the roads and sewers has been slow.

6. NHBC or other building warranty

5.49 If the apartment is being sold within 10 years of completion of its original construction it should still be covered by a building warranty and a copy of the insurance cover should be made available.

5.50 If, alternatively, there is an architect's certificate which is still valid, the purchaser's solicitor should arrange for the benefit of that certificate to be assigned to the purchaser.

7. Energy performance certificate

5.51 As an EPC is valid for 10 years, it may not be necessary to renew the certificate obtained when the property was first constructed.

8. Documents to verify powers of developer (if a company)

5.52 A copy of the certificate of incorporation of the company as well as the memorandum and articles of

[30] See above – as for new property.

association should be with the documents of title furnished.

9. Documents relating to the management company

5.53 Similarly, a copy of the certificate of incorporation of the management company along with copies of the memorandum and articles of association should be available. In addition, the purchaser's solicitor should request the share certificate for one share in the management company, which will be transferred to the purchaser. A request should also be made for copies of the last three years of accounts for the management company and details of the service charge that has been paid. The purchaser's solicitor should find out if there is a sinking fund and whether contributions have been paid into it.

10. Certificate of insurance

5.54 A purchaser should also ask for a copy of the certificate of insurance and confirmation that the building is properly insured.

11. Property certificates

5.55 The purchaser's solicitor should be provided with up-to-date property certificates from the Department of the Environment and the local council in respect of the individual apartment itself, not the development as a whole. The Department of the Environment property certificate will provide information in respect of roads, planning, water and sewerage. The important points to note concern: the question whether the road is adopted, if the road is a public or private road, whether there are road works that may affect the property, whether the property is served by a public water main and whether the property is served by a public sewer. By the time of the sale of the apartment

to the second or subsequent purchaser, the roads and sewers are normally made up and adopted. The road should be a public road; the property should be connected to a mains water supply and be on a mains sewerage system.

5.56 In relation to planning the solicitor will be looking for confirmation of the appropriate planning permission granted. The solicitor should check the other planning consents detailed for their relevance to the development.

5.57 The local council property certificate provides information relating to building control and other statutory matters administered by the council. By the time of the second or subsequent purchase, the issue of the final certificate for building control should be recorded on the property certificate.

12. Searches

5.58 Various searches against the title, the owner of the land and the vendor must be provided to the purchaser's solicitor. Searches are essential because of the risk that some other interest in the land may be registered prior to that of the purchaser which will take priority over that of the purchaser. It is important to check that there are no mortgages, charges or judgments of any kind that would affect the ability of the owner of the apartment to sell the property to the purchaser.

13. Pre-Contract Enquiries

5.59 The object of pre-contract enquiries raised by a purchaser is to elicit information about a wide range of matters concerning the property which are of importance to the purchaser but which a vendor might not otherwise provide. The replies to the enquiries provided by the vendor may affect the decision of the

purchaser as to whether or not to proceed. However, the replies should be specific to the apartment and the experience of the owner during the period of ownership. The replies may usefully give information about any problems that have arisen but the owner's solicitor may try to limit the detail of the information provided.

14. House in Multiple Occupation

5.60 It is important to be aware that where property is converted into apartments, the requirements regarding Houses in Multiple Occupation (HMO) may apply. A purchaser of a flat or apartment which is part of an HMO should be furnished with a copy of the HMO certificate on completion of the purchase. An HMO is defined in Article 143 of the Housing (Northern Ireland) Order 2003 No. 412 (N.I. 2) as "a house occupied by more than 2 qualifying persons, being persons who are not all members of the same family". A 'qualifying person' is a person whose only or principal place of residence is the HMO.

5.61 The majority of apartments by their nature will not come under this definition. However Article 75(2) of the Housing (Northern Ireland) Order 1992 No. 1725 (N.I. 15) states that a house includes any part of a building which was originally constructed for occupation by a single household. Therefore any apartments which have arisen as a result of a house conversion are deemed to be an HMO[31].

[31] For more details about HMOs see Chapter 6 – Title to Apartments

CHAPTER 6 – TITLE TO APARTMENTS

INTRODUCTION

6.1 Property developments can be complex and this in turn can cause the conveyancing to be fraught with potential problems. There is currently no dedicated piece of legislation governing title to or containing legal rules which are tailored to the specific context of apartment developments. However, land law and conveyancing practice in Northern Ireland have evolved to meet the requirements demanded of them as changing structures of ownership emerge. The system operates in such way that the owner of an apartment will have an individual interest in the apartment itself and a separate interest in the common parts of the building.

FORM OF TITLE

6.2 Land law and conveyancing law in Northern Ireland is very complex and arcane. Although reform has been on the agenda since the 1960s[32], and several piecemeal provisions have been introduced to address specific issues[33], no major reform has taken

[32] Report of the Committee on the Registration of Title to Land (1967), Survey of the Land Law of Northern Ireland (1971), Final Report of the Land Law Working Group (1990), Northern Ireland Law Commission Report on Land Law (NILC 8 (2010)).

[33] Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 c.7, Property (Northern Ireland) Order 1978 No.459 (N.I. 4), Registration (Land and Deeds)(Northern Ireland) Order 1992 No. 811 (N.I. 7), Property (Northern Ireland) Order 1997 No. 1179 (N.I. 8), Ground Rents Act (Northern Ireland) 2001 c.5, Compulsory Registration of Title (Northern Ireland) Orders 1995-2002, Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 No.1452 (N.I. 7).

place and the recommendations made for substantial modernisation have not yet been implemented[34]. However, there has been a general policy to simplify title and move towards freehold title. Some steps have been taken towards achieving this aim, notably under the Property (Northern Ireland) Order 1997 No. 1179 (N.I.8). One of the measures introduced with this objective in mind was a prohibition on the creation of new long leases of dwelling houses for terms in excess of 50 years, which took effect from 10 January 2000[35].

6.3 The grant of a long lease of a flat is one of the exceptions to the general prohibition on new long leases[36]. As a consequence, new apartments continue to be sold by way of long lease for terms well in excess of 50 years, even in circumstances where other forms of residential accommodation are sold by way of freehold. Leases of new apartments are often granted for a very long period of several hundred years and sometimes as much as several thousand years. Since the term of the lease is often for such a very long period, the grant of a long lease is often regarded as equivalent to a freehold title in the sense that it is virtually forever[37].

6.4 The leasehold estate has traditionally been the most common form of grant of title in Northern Ireland and has been widely used in private residential developments. It is widely accepted as being suitable for this particular purpose and is a useful means of creating a framework of rights and obligations

[34] Final Report of the Land Law Working Group (1990), Northern Ireland Law Commission Report on Land Law (NILC 8 (2010)).
[35] Property (Northern Ireland) Order 1997 No. 1179 (N.I.8), Article 30(1).
[36] Property (Northern Ireland) Order 1997 No. 1179 (N.I.8), Article 30 (5) (e).
[37] It is recognised that a lease, notwithstanding that it is virtually for ever, is subject to leasehold law and to the provisions of the Landlord and Tenant Law Amendment (Ireland) Act 1860 c.154 (Deasy's Act).

between the parties. It also provides a means of imposing identical obligations on all the apartment owners. Where the lease is well-drafted and sufficient provision has been made for the management arrangements, leasehold works well in practice.

6.5 At the time when apartments first began to appear, either as a result of the conversion of existing houses or as purpose built accommodation in the 1970s, the leasehold was the most common form of tenure for residential properties. The advantage of the long lease was that it created the relationship of landlord and tenant between the parties and such relationship is governed by the Landlord and Tenant Law Amendment Act (Ireland) 1860, otherwise known as Deasy's Act. In the days before planning law emerged as a distinct body of law, it was also recognised that a lease could be used as a means of controlling the use of land, largely through the imposition of positive and negative covenants.

6.6 By granting a lease, no matter how long the term, a landlord is able to retain a freehold or residuary interest in the property and may also charge a ground rent. As a consequence of retaining a legal interest in the property, the landlord can enforce the covenants and continue to exercise the rights reserved in the lease. Covenants may be positive; stipulating the performance of an act such as a covenant to repair; or may be negative or restrictive, forbidding the commission of an act, such as a covenant not to use the land for the purposes of a business.

6.7 In the past, one of the main advantages of using leasehold tenure in preference to freehold was that positive covenants were easier to enforce under a lease. Freehold positive covenants did not bind successors in title and an obligation of a positive nature could not pass to the next owner when the property was sold. In order to change this position,

legislation was required[38]. By contrast, leasehold positive covenants were easier to enforce against successors in title and, since this option was available without the need for new legislation, leasehold conveyancing continued to predominate.

6.8 Each lease is drafted by the solicitor acting on behalf of the developer and contains provisions relating to the management scheme which may apply either to the individual block of apartments or to the whole development. Normally, the developer, the management company and each apartment owner are parties to the lease. The lease plays a predominant role in providing the rules which govern the management arrangements of all developments, including those which consist entirely or to some degree, of apartments. The leases are generally fairly standard though the development, with variations for individual characteristics, such as use of access.

THE ROLE OF THE LEASE

6.9 In looking at the existing legal framework, some explanation is needed on how leasehold applies in the context of apartments. A number of key aspects are outlined below. The role of the lease is very important in a development of apartments because of the nature of the physical characteristics of apartments and the existence of shared common areas and facilities.

6.10 Each apartment is part of a larger building and is dependent for support on other apartments or parts of the structure. Certain parts of the building are also owned in common and must be maintained in

[38] Property (Northern Ireland) Order 1997 No. 1179 (N.I.8), Article 34, provides for the running of freehold covenants and the enforceability of freehold covenants in documents created after the operative date (10 January 2000).

common for the benefit of all owners. It is this element of interdependence which distinguishes apartments from houses because it requires decision-making on maintenance to be taken on a collective basis. Consequently, the arrangements for apartment management set out in the lease inevitably contain a scheme of rights and responsibilities, and processes for collective decision-making.

6.11 Since it contains the details of how the development is to be managed on a day-to-day basis, the lease is a document of fundamental importance with which apartment owners must be familiar if the development is to operate smoothly. In theory, the lease should provide the answer to everyday issues such as the enforcement of rights and responsibilities, how to reach decisions on a collective basis, the setting of service charges, and how disputes are dealt with. In this respect, the lease takes on the role of a fundamental constitutional document for the development in question.

TITLE OF DEVELOPER

6.12 When a developer or landowner grants a lease of an apartment to a purchaser, the new lease will be for a shorter term than that which the landowner or developer holds itself. The interest which the developer or landowner retains is a reversionary or superior interest. Such an interest may be either a freehold or a leasehold interest for a longer term than the lease of the apartment. When an apartment development is being built, the developer will sell the apartment units by way of the grant of new leases and will retain ownership of the structure and common areas until the development is complete and all the units have been sold.

6.13 Whilst the ownership and control of the structure and common parts remain in the hands of the developer, the management company has only a licence to enter the common parts of the development and to permit third party contractors to do the same. This does not normally present any difficulties, and it is important for the developer to retain ownership to facilitate completion of any outstanding works. There is also an argument that until the last apartment is sold, the reversionary interest in the development is not fully formed and therefore should not be transferred to the management company.

TITLE OF MANAGEMENT COMPANY

6.14 The management company must be incorporated before the lease of the first apartment is created because it is a party to the lease. In that capacity it enters into covenants with the purchaser and benefits from its entitlement to receive payment of the service charges.

6.15 The lease to the apartment owner usually provides that when all the units have been sold the superior interest of the landowner or developer in the land will be transferred to the management company along with the common parts. It is normally intended that in due course after the transfer of ownership, the management company will become the owner of the common areas and take over responsibility for them. Likewise, the management company will become the owner of the structure of the building and the reversionary interest in the apartment leases so that it can enforce the covenants contained in the leases. It is of note, however, that there is no legal obligation on the developer to transfer title or to do this at any particular point in the process, except as provided in the lease.

6.16 On completion of the development, ideally, the members of the company will be the apartment owners. They are therefore the owners of the management company and responsible for its activities. Whilst the apartment owners each take a share in the company, it is unlikely that they will have full voting rights until such time as all units within the development have been sold. Thus it is common practice for the developer to retain control of the company at least until the last units in the development are sold. In practice, the transfer by the developer often does not take place as intended after completion of the development and the legal title remains vested in the developer, sometimes many years after the development was completed.

6.17 When the developer transfers its interest in the reversion and the communal areas to the management company, the representatives of the developer who have taken the subscriber shares in the management company should also transfer their shares. The management company will then be run by the residents who have to appoint a company secretary and director(s), have annual accounts prepared, organise annual general meetings and make the necessary returns to the Companies Registry.

CONTENTS OF THE LEASE

6.18 The lease is the main legal agreement between the purchaser of an apartment (the lessee) and the developer / landowner (the lessor). Usually the management company is a party to the lease as well and the lease sets out the responsibilities of the management company in relation to the structure of the building and common areas.

6.19 The main purpose of the lease is to:

- specify the physical perimeters of the apartment;
- grant rights, in the form of easements, to the apartment owner;
- reserve rights (such as right of entry for repairs etc) to the lessor (by way of exceptions and reservations);
- stipulate the covenants of the lessee, including obligation to pay service charge;
- stipulate the covenants of the lessor including covenant to perform the services subject to the lessee paying the service charge; and
- make related provision on matters such as procedure, enforcement and dispute resolution.

DESCRIPTION OF THE APARTMENT

6.20 The lease of each apartment will specify and define the apartment as granted by the lease. This is done by describing the physical perimeters of the apartment in words and by referring to a map / plan delineating the boundaries of the apartment. In some cases an apartment may have a designated parking space which is included in the title to the apartment; in other cases, parking spaces are not owned individually but on a shared basis. The lease should be clear as to whether items such as walls, floors and ceilings are included in the purchaser's title to the apartment. The owner of the apartment (lessee under the lease) is responsible for the maintenance and repair of all such elements.

6.21 The lease should also be clear as to the elements which are common structural parts of the building of which the apartment forms part. The common or structural parts of the development should also be described in words and by reference to a separate map / plan showing the building / development as a

whole. The roof, exterior and structure of the building normally form part of the common structural parts which are owned by the developer and later the management company. It is the responsibility of the developer or management company to carry out maintenance and repairs to these parts. The management company should recover the cost of all such work by way of the service charge which is payable by all the apartment owners in the block.

EASEMENTS

6.22 The apartment owner will have a number of rights which are granted as easements in the lease. These normally include:

- an easement to gain access to the apartment block over the common areas of the development;
- an easement to gain access to the apartment via common stairways, lifts, entrance halls, etc.;
- the right to use the common areas inside and outside the building, and to use shared facilities;
- any further rights, for example, to use a particular space or area for parking, keep dustbins or hang washing;
- the right to support and shelter from the rest of the building;
- the right to use service media running through the building;
- the right to enter other apartments and the common parts to maintain the service media and the apartment itself.

EXCEPTIONS AND RESERVATIONS

6.23 The developer or landlord (lessor) will reserve a number of rights to itself by way of exceptions and reservations. These normally include:

- rights of support and other easements enjoyed over the land in which the lessor retains an interest;
- such rights of access to and entry into the apartment as may be necessary for the proper performance of its obligations;
- the right to use the service media from and to other parts of the development.

COVENANTS

6.24 The lease also sets out the obligations or covenants, which each party has to observe. Amongst others these normally include:

6.25 Covenants by the apartment owner (lessee) –

- to pay the ground rent (often a nominal amount) and any other rents due;
- to pay rates;
- to pay the service charge;
- to keep the apartment in good repair;
- to decorate the interior;
- to use the apartment only as a private residence;
- not to make any structural alterations;
- not to sublet part of the apartment as distinguished from the whole;
- not to make an undue level of noise;
- not to hang out washing other than in approved areas;
- not to display signs or external aerials;
- not to decorate the exterior other than in a specific manner;

- not to keep pets;
- not to do anything which would invalidate the insurance cover.

6.26 Covenants by the lessor –

- to grant to lessees of other apartments leases in substantially the same form;
- to allow the lessees quiet enjoyment without interruption;
- to provide management services and observe the covenants imposed on the management company until responsibility is transferred to the management company;
- to transfer all its remaining estate and interest in the development to the management company subject to the leases as soon as practicable following the sale of the last apartment in the development.

6.27 Covenants by the management company -

- to keep the whole property insured;
- to maintain, repair, redecorate and renew all the structural parts and common areas of property (described in detail);
- to employ managing agents and to pay their fees;
- to keep proper accounts of costs, services and expenses;
- to take reasonable steps to enforce the observance and performance of the covenants entered into by each of the lessees;

GROUND RENTS

6.28 A ground rent arises when property is held under leasehold or fee farm grant title. It is essentially a regular annual payment made by the leasehold owner to the freeholder. The vast majority of ground rents in

Northern Ireland are small amounts, below £20 per annum. However, ground rents for apartments may be higher, for example £50 - £200 per annum, because the property is newer and the developers saw an opportunity to create an income. The right to collect a ground rent is normally always present in a lease, although it may not always be collected. In some cases ground rents can provide a significant income stream for the freeholder, and it is not unusual for a third party to buy the right to collect a ground rent from the freeholder. Apartment owners may therefore be required to pay a ground rent in addition to a service charge and contribution to a sinking fund.

6.29 If the developer has transferred his reversionary interest in the individual units to the owners' management company, as well as transferring his interest in the common areas, then the owners' management company assumes the position of the freeholder. In this instance a ground rent should not be collected as the owners would essentially be paying the rent to themselves. However, if the developer or third party retains the reversionary interest in the individual units, then a ground rent may still be collected.

SERVICE CHARGES

6.30 The lease usually contains a schedule setting out all the costs and expenses to which the apartment owner will have to contribute through payment of a service charge.

6.31 Normally a service charge covers such matters as:

- buildings insurance;
- maintenance and repair of the structure of the building,

- maintenance and repair of the common areas, both interior and exterior;
- maintenance of all landscaped areas;
- refuse disposal;
- lighting and heating of common areas;
- window cleaning;
- compliance with Fire Authority Regulations;
- managing agents' and accountants' fees;
- contributions to a sinking fund – this is a reserve against future liabilities.

6.32 The lease will set out how the service charge is to be assessed and collected, and how it is to be apportioned between the apartment owners.

6.33 In well organised developments, a proportion of the money collected by way of the annual service charge should be placed in a sinking fund. This is a fund established to deal with exceptional expenditure and capital projects. It is advisable to set aside funds for this purpose in order to ensure the long-term sustainability of the development.

ENFORCEMENT OF COVENANTS

6.34 The lease contains an extensive network of rights and obligations on the part of the apartment owner and management company which are necessary for the maintenance and management of the development. These take the form of easements (i.e. rights) and covenants (i.e. obligations).

6.35 Ultimately, the ability to enforce covenants depends on the transfer of the developer's title in the property and the common areas, to the management company for the arrangements to work. Where this does not happen, the management company does not own the common areas but has only a power to raise money

for maintenance and repairs. In law, the consequence of this is that covenants are very difficult to enforce as the arrangements depend on this piece of the jigsaw being in place.

6.36 Where transfer of title to the management company takes place, covenants can be enforced by the management company through an action for breach of covenant in which damages may be awarded. Such an action is normally taken by a managing agent on behalf of the management company against an individual apartment owner. An equitable remedy may also be available such as a prohibitory or mandatory injunction, or specific performance. Forfeiture of the lease (i.e. forfeiture of the property) may be an option in theory but only where express provision has been made in the lease. This remedy is most unlikely to be awarded however, because relief from forfeiture is normally granted by the courts.

6.37 Finally, obligations in the lease can be expressed as conditions, with the grant of the lease being conditional on compliance with the obligations contained therein. Where there is a breach of condition, the lease is voidable although, as with forfeiture, it is unlikely that the lease would be voided as other considerations would be taken into account.

6.38 Enforcement of covenants between apartment owners is possible to an extent and indirectly although this depends on particular drafting techniques being employed in the lease[39]. Remedies which apartment owners can seek for breach of covenant by the management are rarely used. This may be because formal legal remedies such as actions for damages or an injunction pursued through formal and often lengthy legal processes are not suitable to the type of

[39] Covenants should be enforceable if a building or estate scheme is set up. See Elliston v Reacher [1908] 2CH 374.

dispute involved. The fact that they are not used gives rise to an imbalance in the enforcement of obligations contained in the lease, with only apartment owners generally being pursued.

6.39 Instead of taking an action for a breach of covenant, there is an alternative means of securing payment of outstanding service charges, but it may not produce a quick result. An inhibition can be placed on the owner's title in the Land Registry which will restrict their ability to sell the property until the outstanding amount has been paid in full. However a sale may not occur for several years and in the meantime, the management company is not receiving the income. There is also a danger that if the non-payment of the service charge is a symptom of wider financial difficulties, there may be a risk of the owner's mortgagee taking possession of the apartment for non-payment of the mortgage.

REGISTRATION OF TITLE

6.40 In Northern Ireland there is a policy of extending registration of title in the Land Registry as part of an overall move towards reform of land law and property ownership. The Compulsory Registration of Title (Northern Ireland) Orders 1995-2002[40] made it compulsory for a purchaser of property to register the title in the Land Registry if it has not previously been registered.[41] Accordingly, the lease to any new

[40] Compulsory Registration of Title Order (Northern Ireland) 1995 No. 412, Compulsory Registration of Title Order (Northern Ireland) 1999 No. 455, Compulsory Registration of Title Order (Northern Ireland) 2000 No. 312, Compulsory Registration of Title Order (Northern Ireland) 2001 No. 237, Compulsory Registration of Title Order (Northern Ireland) 2002 No. 400 and Compulsory Registration of Title (No. 2) Order (Northern Ireland) 2002 No. 401.

[41] See Land Registration Act (Northern Ireland) 1970 c.18, section 25 (1) and schedule 2, part 1, entry 2. Compulsory registration was rolled out on

apartment must be registered and it is very likely that the lease to an existing apartment will already be registered.

6.41 When the title is registered, the title is guaranteed by the Land Registry. Entries on the title are proof of the title shown. The register of title consists of a series of folios. The folio is the title to the land. Each folio is numbered and refers to the county in which it is situated. For example, folio AR 12345 county Armagh.

6.42 A land certificate may be issued for the folio. It is a paper copy of the folio that contains exactly the same information as the folio. Up until recently the land certificate was considered to be the title deed to registered land but now a land certificate is not essential to prove title and it is the folio itself which is the only evidence of the title[42].

HOUSES IN MULTIPLE OCCUPATION

6.43 It is important to be aware that where property is converted into apartments, the requirements regarding Houses in Multiple Occupation (HMO) may apply. An HMO is defined in Article 143 of the Housing (Northern Ireland) Order 2003 No. 412 (N.I. 2) as "a house occupied by more than 2 qualifying persons, being persons who are not all members of the same family". A ‘qualifying person’ is a person whose only or principal place of residence is the HMO.

6.44 The majority of apartments by their nature will not come under this definition. However Article 75(2) of

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a geographic basis. Since 1 May 2003, when it was extended to cover Belfast and County Antrim, it has been compulsory across the whole of Northern Ireland.

[42] See Land Registration (Amendment) Rules (Northern Ireland) 2011 (No. 141).

the Housing (Northern Ireland) Order 1992 No. 1725 (N.I. 15) states that a house includes any part of a building which was originally constructed for occupation by a single household. Therefore any apartments which have been constructed as a result of a house conversion are deemed to be an HMO. A purchaser of a flat or apartment which is part of an HMO should be furnished with a copy of the HMO certificate on completion of the purchase.

6.45 All HMOs must be registered through the Northern Ireland Housing Executive (NIHE). A fee is required on registration, which is based on the number of occupants. The registration must then be renewed every 5 years. A person who fails to comply with the registration scheme is guilty of an offence.[43] The owner or the person managing the property would be responsible for registering the property.

6.46 NIHE require that the property is fit for human habitation and has certain standards which all HMOs must meet such as the space standard i.e. stipulation of room sizes depending on the number of occupants. NIHE will also assess if there are adequate facilities for storage, preparation and cooking of food, the disposal of waste water, personal washing facilities and sanitary conveniences, lighting, ventilation and a suitable means of escape from fire and other fire precautions.

6.47 If an apartment is an HMO then when the apartment is first registered there must be proof of a valid electrical certificate (issued within the last 5 years) , and where applicable a certificate issued within the last year by a Gas Safe registered installer, covering gas installation and appliances. There must also be confirmation that the fire detection and alarm system, the emergency

[43] Article 75 of the Housing (Northern Ireland) Order 1992 No. 1725 (N.I. 15)

lighting system, (if any) and all fire extinguishers and fire blankets have been serviced and maintained.

6.48 Once the property is registered there are ongoing obligations to ensure that parts of the house in common use are well maintained, in a clean condition and in good order[44]. NIHE will carry out inspections each year on a sample of up to 10% of registered HMOs to check for full compliance with all HMO Regulations.

[44] Outlined in Housing (Management of Houses in Multiple Occupation Regulations (Northern Ireland) 1993 No.38.

CHAPTER 7 – THE COMPANY LAW FRAMEWORK

INTRODUCTION

7.1 In addition to leasehold law, company law is an area of law of primary relevance to the management of apartments. This is because the apartment owners are normally incorporated into a company for the purpose of managing the development, as long as it comprises four or more units. The management company is generally incorporated as a private limited company, which means that if it accrues large debts, the liability of the residents will be limited. In theory, the advantages of being organised into a company are that it is a structured statutory model which can facilitate management arrangements in a democratic manner. It can elect directors, take major decisions by way of resolutions, can present members with annual reports and accounts, it can hold an annual general meeting and generally provide an organised framework for the management of the development.

MANAGEMENT COMPANIES

7.2 A management company is a standard private limited company established for the purpose of managing the development. Although it does not trade and has fairly limited functions, a management company is treated in law like any other company. As it currently stands, there are no tailored legislative provisions for this type of company so the general provisions of company law apply. It is set up as a private limited company to shield its members from personal liability for the

unsatisfied debts of the company. As a private limited company the liability is limited to the capital originally invested, i.e. the nominal value of the shares in the case of a management company.

THE COMPANIES ACT 2006

7.3 The main legislation governing companies in Northern Ireland is the Companies Act 2006 (2006 c.46) ('the 2006 Act'), most provisions of which came into operation on 1 October 2009. The 2006 Act, which applies across the United Kingdom, represents a major restatement and revision of company law. The previous provision on company law for Northern Ireland, contained primarily in the Companies (NI) Orders, has largely been repealed. Although the 2006 Act was enacted at Westminster, company law is a transferred matter, i.e. it is within the legislative competence of the Northern Ireland Assembly.

7.4 **Outline of relevant provisions**

- constitutional documents (sections 17, 29, 39);
- articles of association (sections 18–28);
- registered office (section 86);
- officers / directors (sections 154, 167);
- removal of directors (section 168);
- directors' duties (sections 170-180);
- filing of accounts and annual returns (sections 441-444 and 854-855);
- failure to meet filing obligations (section 453);
- failure to deliver an annual return (section 858);
- accounting records (sections 386-389 and 394-396);
- exemption for small companies regarding accounts (section 444);
- circulation of accounts to members (section 423);
- resolutions / decision-making (sections 281–313);
- meetings (sections 303, 305, 318, 324, 355, 358); and

- striking off, dissolution and restoration (Part 31 of the Act).

CONSTITUTIONAL DOCUMENTS

7.5 When a development is being built, the developer should instruct its solicitor to prepare the legal documentation to form a management company. An application to register the company is then filed at Companies House along with a copy of the memorandum of association and the articles of association. Together these form its constitution and provide the constitutional rules of the company which govern the company's operation. The management company only has capacity to act within the powers of its constitution. Usually, the articles of association are based on model articles provided by subordinate legislation.[45] Although these can be modified or alternative provision made, the normal practice is to adopt the standard company law provisions with little or no modification.

INCORPORATION AND INTERIM PROVISIONS

7.6 When a company is formed it must issue one or more subscriber shares to its initial members. In the case of a management company, it is common practice for representatives of the developer to take the first two shares in the company. The company may increase its capitalisation by the issue of further shares. As the development progresses and each apartment is sold, the owner of each property is issued with one new share in the management company. The share certificate should be available to the purchaser on completion of the apartment. When the last two

[45] The Companies (Model Articles) Regulations 2008 No. 3329.

apartments are sold the shares held by the representatives of the developer will be transferred to the apartment owners. The issued share capital of the company is the total number of shares existing in the company multiplied by the nominal value of each share.

7.7 On incorporation of a management company, the developer must appoint at least one director to manage the company's affairs. It is the usual practice to appoint a company secretary as well, although it is not compulsory. During the early stages of the development interim provisions are often made to run the company until all the apartments have been sold and the management company is fully operational. In this interim period, representatives of the developer may be directors of the management company. Those directors appointed by the developer are normally issued with one share each. Provisions can be made in the articles of association that these subscriber shares will be the only shares with voting rights until such time as control of the company is transferred to the apartment owners.

7.8 On completion of the purchase of each apartment the owners are issued with one share and become members of the company. The purchaser of each apartment in a development would normally expect to be given a copy of the certificate of incorporation of the company as well as its memorandum and articles at the outset. When the development is complete, the developer should make arrangements for the transfer of control of the management company to the apartment owners. At that point the apartment owners should have full voting rights and they should nominate a director(s) and secretary from amongst their own number to take over responsibility from the developer's nominees.

7.9 Difficulties may emerge if the interim arrangements last for a significant period of time, particularly in the current economic climate when developments are taking much longer to complete and the owners in occupation face issues related to incomplete work. In some cases, the interim arrangements continue for a number of years because the developers are reluctant to cede control or because of a lack of urgency, the full transfer of the title to the management company has not taken place. During the period up until the final unit is sold, the developers' nominees collect the service charge contributions from apartment owners who are in place. It is good practice for the developer to make some additional contribution towards maintenance for the units that remain unsold.

MEETINGS AND DECISION-MAKING

7.10 After the interim period has ended, it is for the members (shareholders) of the management company to appoint directors and arrange meetings. The 2006 Act does not require an annual general meeting. However, if such a requirement is included in the company's constitution, this prevails. It is usually advisable to hold an annual general meeting in the case of a management company in order to discuss issues of concern to the residents.

7.11 The rules on decision-making are found in the company's legal documentation and in Part 13 the 2006 Act. The 2006 Act provides for decision-making in the absence of any other specific provision made in the management company's constitution and legal documentation. Voting rights are normally provided in the lease / company's legal documentation.

7.12 Section 281 provides that a resolution of the members of a private company must be passed as a written

resolution or at a meeting of the members of the company. Resolutions are validly passed at a general meeting only if that meeting is quorate i.e. a certain number of people must be present. Section 318 fixes the quorum at two for general meetings in most cases. Under section 282 an ordinary resolution is passed if a simple majority of the members present and voting at the meeting are in favour of it.

THE APPOINTMENT OF DIRECTORS AND DIRECTORS' DUTIES

7.13 There are no requirements in the 2006 Act regarding the appointment of directors although provision may be made for this in the management company's constitution. With regard to the role of directors, they are responsible for the accounts and annual returns and for making the necessary returns to Companies House on time. In terms of decision-making, it is for the company to decide the extent of their authority. A company may decide, for example, that directors can take certain decisions on its behalf without its express authorisation, e.g. authorisation to sign cheques below a certain amount; alternatively, a company may decide that the role of directors should be more limited and they should only act with its express authorisation.

7.14 Directors act as representatives of the company and are required to comply with directors' duties contained in the 2006 Act. They must, for example:

- act within the constitutional powers of the company;
- act in good faith and for the benefit of its members;
- exercise reasonable care, skill and diligence;
- avoid conflicts of interest and declare any direct / indirect interest in a proposed transaction or arrangement with the company; and

- not accept benefits from third parties.

7.15 The 2006 Act does not specify the remedies available for breach of a director's duty but the consequences are those that would apply at common law or in equity.[46]

7.16 Members always have the right to remove a director from office at any time and a director can be removed by ordinary resolution of the company.

ACCOUNTS AND ANNUAL RETURNS

7.17 A company is required to deliver accounts and to file an annual return each year with Companies House so they can show and explain the company's transactions. The directors are responsible for ensuring that all the necessary documents are filed, even if the company is dormant. A copy of the accounts is required to be circulated to every member.[47] Failure to meet the statutory obligations is a criminal offence and may result in a fine for both the directors and the company. There is a facility to apply for extra time for filing accounts

7.18 Management companies will most likely fall under the small companies exemption which means that they will only be required to file abbreviated accounts which must include a balance sheet but not necessarily a profit and loss account. There are no requirements to have accounts prepared by a professional; similarly, there is no requirement to have accounts audited under the small companies' exemption. There may be additional requirements in the lease regarding accounts – e.g. it may require the accounts to be laid before a meeting of members or that they are audited.

[46] Companies Act 2006 c.46, section 178.
[47] Companies Act 2006 c.46, section 423.

7.19 A company is also required to submit an annual return. This is a snapshot of key information about the company such as directors, shareholders, registered office, etc. Failure to deliver an annual return is an offence.[48]

STRIKING OFF, RESTORATION AND DISSOLUTION

7.20 If the Registrar of Companies has reason to believe that the company is no longer carrying on business, steps may be taken to strike it off. This may arise for example, where accounts are not submitted, where the Registrar has not received the requisite returns from the company, where mail sent to the company's registered address has been returned undeliverable, or where there are no directors.

7.21 The consequences of being struck off can be particularly difficult for a management company because no legal transactions can take place and apartments cannot be bought or sold until it is reinstated. On dissolution, any assets of the company will be *bona vacantia*, i.e. they revert to the Crown, and the company's bank account will be frozen.

7.22 Where a company is struck off, it can apply to be restored to the Register. Under sections 1024 -1028 of the 2006 Act, a company can be restored by court order or through administrative restoration which is a more straightforward procedure. Where a company is restored, it is deemed to have continued in existence as if it had not been struck off.

[48] Companies Act 2006 c.46, section 858.

CHAPTER 8 – MANAGEMENT OF APARTMENTS

INTRODUCTION

8.1 The structure for the management arrangements for apartments can be complex for apartment owners since these derive from a lease which is often difficult to understand. Where there are more than four apartments in the development, the structure normally also involves a management company, with which the apartment owners are not necessarily familiar. In addition, the day-to-day management may be undertaken by a managing agent who may not communicate very much or provide any information in a helpful way. Taken as a whole this complex structure can be the source of some misunderstanding and confusion for the apartment owners.

8.2 The management of the development and the associated costs can be a source of considerable dispute both amongst the apartment owners themselves and with the management company. The source of some of the bewilderment of the owners may stem from the lack of available information or an explanation of the structures being given to purchasers at the time when they buy an apartment.

MANAGEMENT COMPANY

8.3 The management company is usually a company established initially by the developer and controlled by it while the development is being built. There is normally a provision in the lease that when all the

units have been sold the developer's interest in the developments, including the common areas, will be transferred to the management company. The members of the company will be the purchasers of the apartments and on completion of the development control of the company should be passed to them.

8.4 The lease for each apartment contains the apartment owners' responsibilities in relation to the common areas, including the responsibility to pay a service charge. It is the management company's collection of that service charge which then provides the funds which allow for the maintenance of the common parts and provision of the services. Each apartment owner will receive one share in the management company on purchase of the apartment, as will all the other owners in the development.

8.5 On completion of the development, ideally, the members of the company will be the apartment owners. They are therefore the owners of the management company and responsible for its activities. Whilst the apartment owners each take a share in the company, it is unlikely that they will have full voting rights until such time as all units within the development have been sold. Thus it is common practice for the developer to retain control of the company at least until the last units in the development are sold. In practice, the transfer by the developer often does not take place as intended after completion of the development and the legal title remains vested in the developer, sometimes many years after the development was completed.

8.6 The apartment owners may not be aware of the failure to transfer the developer's interest to the management company until a particular problem arises.

MANAGING AGENTS

8.7 It is important not to confuse the managing agents with the management company. The residents who are the members of the management company are unlikely to wish to undertake the day to day maintenance of the development themselves and they often instruct a managing agent for this purpose. Unlike the management company, which has both a legal interest in the common parts of the development and a legal responsibility for the proper management of them, the managing agents have no ownership of the property, and as agents do not have any legal responsibility for the management of the development.

8.8 Managing agents are firms who are instructed by developers or management companies to ensure the upkeep and maintenance of developments. The responsibilities of the managing agents should be formally specified in a contract or agreement with the management company. The services provided vary from development to development but ideally the services and performance criteria should be recorded in detail in a management agreement. The managing agents should be appointed for a defined term and their efficiency should be scrutinised by the management company.

8.9 The managing agent usually collects the service charge from the apartment owners on behalf of the management company and holds it for the payment of the services supplied. Importantly, this should include the contributions for the sinking fund. The monies should be held in a separate designated account so as not to be mixed with other funds and to ensure that they are used solely for the purpose for which they are intended.

AGREEMENT TO PROVIDE SERVICES

8.10 The nature of the services provided by a managing agent should be specified in a contract or service agreement between the management company and the managing agent. The services provided vary from development to development but should specify a number of matters including the following:

- The property in respect of which the services are to be provided;
- The commencement and expiry date;
- The directors' authority to enter into the contract;
- Service levels;
- Arrangements for termination by either party;
- Arrangements for renewal;
- The procedure for calculating the agent's fees;
- The procedure for dealing with disputes;
- The procedure for collecting charges and fees;

8.11 Above all, it should provide a comprehensive list of services which the managing agent is to provide, so it is clear to all parties, including individual apartment owners, the matters for which the agent is responsible.[49] For example: maintenance of communal services, such as electricity, sewerage, heating, lighting, lifts and security systems.

8.12 The managing agent may have its own personnel or contractors to provide services or carry out repair works. Where significant repairs are necessary, such as fixing the roof of the building, the repairs may be funded from the sinking fund. In that case, the managing agent should receive direction from the management company and a tendering or procurement exercise may take place.

[49] See the *Consumer Property Standard Contract Terms and Conditions checklist* at www.consumerproperty.ie.

REGULATION OF MANAGING AGENTS

8.13 Currently, there is no specific legal regulation of managing agents in Northern Ireland. Managing agents are not required to be a member of a professional body such as Royal Institution of Chartered Surveyors (RICS), the National Association of Estate Agents (NAEA), the National Federation of Property Professionals (NFPP) or the Association of Residential Managing Agents (ARMA), although some choose to become members. Nor is there a licensing scheme in place. This means that anyone can set up a business as a managing agent. There are also no legal requirements in relation to the holding of client money (in this context, service charges, sinking fund contributions and other fees).

8.14 Where a managing agent is a member of a professional body such as RICS, they must comply with the standards and any guidelines set by that body. Each of the four bodies above has developed standards in this area, for example, relating to the setting of service charges, the holding of client money, and the use of client money bonds.[50] Managing agents who are not members of a professional body are subject only to any relevant provisions of existing law.

8.15 The NFPP, NAEA and ARMA have all been vocal in support of greater regulation of property professionals to promote greater consumer protection. However there is little support within Government for such a change, so the position in Northern Ireland and England and Wales is that regulation is still on a voluntary basis.

[50] See, for example, the *RICS Service Charge Residential Management Code* (1997), currently under review.

8.16 This is in direct contrast to the position in Republic of Ireland and Scotland where regulation of managing agents has been the subject of legislation under the Multi-Unit Developments Act 2011 (No. 97 of 2011) and the Property Factors (Scotland) Act 2011 asp 8 respectively.

SERVICE CHARGES

8.17 An important aspect of the management of apartment blocks and developments is the requirement for apartment owners to pay a service charge to meet the expenses of managing the common areas. These include charges for items such as maintenance, repairs, insurance, lighting and cleaning. Apart from such regular expense, another important consideration is meeting the cost of substantial capital expenditure which will arise from time to time. It is inevitable that parts of a building will wear out, cease to function or require replacement. The need to build up a fund to meet such capital expenditure sometimes referred to as a 'sinking fund' or 'reserve fund' or otherwise make provision for such expenditure is of vital importance to the apartment owners.

8.18 The lease contains a covenant on the part of the lessee (i.e. the apartment owner) to pay a service charge. It also specifies the manner in which service charges are apportioned, e.g. a percentage based on the number of units in the development. A schedule is often included which lists the items which may be the subject of a service charge. Service charges are normally paid in advance. In larger developments, there can be different service charges for different categories of unit owner, depending on the level of service provided.

8.19 If the management company self-manages the property it will have an account to hold the service charge. More commonly, where a managing agent is employed that agent will collect the service charges and should hold the monies in a separate account in the name of the management company. By doing so the fund does not form part of the assets of the managing agent and there will be less of a problem if the agent becomes insolvent.

8.20 How service charge monies are spent is a matter for the management company and this is approved at an annual general meeting (AGM) or other meeting. Where a managing agent is employed, a draft budget is prepared for approval by the management company.

SERVICES PROVIDED

8.21 A managing agent will normally do the following tasks[51]:

- collect service charges from owners;
- recover unpaid service charges;
- prepare and submit service charge statements;
- pay for general maintenance out of funds provided and ensure that service charge monies are used for the purposes specified (usually in the lease itself);
- provide annual spending estimates to calculate service charges and reserves as well as administering the funds;
- produce and circulate service charge accounts;
- administer buildings insurance if instructed and authorised (subject to FSA regulations);

[51] In accordance with guidance issued by the Royal Institute of Chartered Surveyors (RICS), *Service Charge Residential Management Code*, 2nd edition.

- supervise staff, e.g. if there is a concierge on the development;
- arrange and manage contracts regarding plant and machinery such as lifts, boilers, etc.;
- visit property and deal with minor repairs;
- deal with enquiries from owners / occupiers;
- keep records;
- keep the owners advised regarding statutory requirements;
- file appropriate returns with HMRC and the Companies Office, and any other bodies as required; and
- any other matters reasonably required under the service level agreement with the management company.

NON-PAYMENT OF SERVICE CHARGE

8.22 Where an apartment owner fails to pay their portion of the service charge, an action may be taken in the small claims court for non-payment of a contract debt[52]. This action is normally taken by a managing agent acting on behalf of the management company. If such action does not result in payment of the amount due, there is an increasing practice of registering an inhibition on the apartment owner's title in the Land Registry (where the title is registered) as a method of securing payment of outstanding service charges.

8.23 Where no action has been taken against a defaulting unit owner, a breach of covenant can pass to successors in title (i.e. the new owner of the property). In view of this, a purchaser's solicitor should never

[52] In theory, non-payment also constitutes a breach of covenant under the lease and a notice under section 14 of the Conveyancing Act 1881 c.41 could be served. This theoretically could result in forfeiture of the lease although the courts normally grant relief against forfeiture.

advise a client to buy a property where there are unpaid service charges unless an undertaking is given to repay the outstanding amount out of the sale proceeds.

SINKING FUNDS

8.24 The lease may make provision for a sinking fund. This is used to accumulate funds to pay for major repairs / refurbishment which arise over time, e.g. replacement of the roof. Where such a fund is not built up over time, large-scale expenditure of this nature can be difficult for apartment owners to meet in addition to day-to-day running costs which are paid out of service charges. Any contribution towards a sinking fund is collected from the apartment owners as part of the service charge.

8.25 Although the lease may make provision for a sinking fund, it will usually only provide an ability to collect sinking fund contributions. This power will only be exercised on the instruction of the management company. There is, therefore, no obligation to have a sinking fund; this is a matter for the management company to decide. In practice, some management companies do not have a sinking fund. Since most apartment developments in Northern Ireland were built in the early 2000s and are still in relatively good condition, it may be difficult for some owners to persuade others that it should be treated as a priority item.

INSURANCE

8.26 The lease normally includes a covenant for the management company to insure the entire property as defined in the lease. The property includes the land,

the buildings and the apartments. The responsibility for insurance lies with the developer or lessor until ownership of its remaining estate and interest (which includes the common areas) has been transferred to the management company. The covenant is to insure the property against loss or damage by fire and such other risks as the lessor or the company think fit for the full reinstatement cost. In the event of the property or any apartment being destroyed or damaged, the insurance monies must be used in the rebuilding or reinstatement of the apartment or the property. The lease also provides for insurance to be taken out against public liability and occupier's liability in respect of any common areas. Provision is normally made in the lease to recover the cost of the insurance through the service charge.

SMALL DEVELOPMENTS

8.27 There are situations where it is not appropriate to establish a management company, with all that this entails, or to employ managing agents. Where the number of units is relatively small, say less than five, some other way of dealing with the problems of interdependence may be appropriate. Such a situation may arise for example where a large house has been converted into two or three self-contained apartments. Although there are few apartments there may be the same problems deriving from sharing parts of the building and the facilities and services associated with them as with larger developments. There will be a need for management to some degree and arrangements have to be made for the maintenance and upkeep of shared areas like the entrance hall, stairs, landings, footpaths and gardens. Provision also has to be made for repair and insurance of the roof and other external parts of the building.

8.28 Where there is a small development and it is not considered necessary to set up a management company, the lease to the purchaser requires careful drafting. Each apartment owner will be granted a long lease of the apartment which will be described in terms which confine it to the internal surface of walls, floors and ceilings of the apartment itself, but excludes the exterior and structure of the building. The apartment owner may be granted a share of the ownership in the structural and exterior parts as well as the common areas or the developer may transfer its interest in the entire building to the apartment owners collectively. This joint interest of the common parts is usually held in the form of a tenancy in common. In addition to the apartment, the apartment owner will therefore own an interest in the rest of the building and its surrounding property.

PHASED DEVELOPMENTS

8.29 Larger developments are normally built in phases. In such cases, the general practice is to establish a management company for the different blocks as each phase is completed. This is usually reflected in the title of the company, e.g. Riverside Management Company (No. 1) and (No. 2). It is not unusual to have several management companies operating within a single development. The same firm of managing agents is normally appointed to provide management services for all the companies in the development.

CHAPTER 9 – INFORMATION AND DOCUMENTATION

INTRODUCTION

9.1 With the growth of private home ownership individuals have taken over responsibility for their own housing. In conjunction with rights of ownership the owners also take on specific responsibilities. One of the major issues with the increase in apartment living is that the owners often do not appreciate the distinction between ownership of a unit in multi-occupied accommodation and ownership of a more traditional type of housing. In a detached, semi-detached or even a terraced property, there is no need to involve anyone else in a decision affecting the property and the owner has a high degree of autonomy.

9.2 In contrast, the owner of an apartment has individual responsibility only for the interior of the unit. The exterior and structure of the building as well as the access, entrances, landings, corridors, lifts, and services are managed by a third party for the benefit of all the apartments in the building or the development. Many of the problems experienced by the owners and occupiers of apartments arise from the physical interdependence of the units and the shared use of facilities. Furthermore, there is much confusion about the roles of the different parties involved – the developer, the management company and the managing agent, for example.

9.3 In this context it is important that purchasers should be fully informed in advance of the rights and responsibilities they will have when they buy a

particular apartment. A range of information and documentation is currently available in accordance with current practice and procedure.

MARKETING INFORMATION

9.4 At the outset a purchaser will be given some documentation and information by the developer and / or the estate agent. The agent will normally prepare a brochure for a new development which contains information regarding the developments as a whole, a site plan and also some more specific information about the finishing standards in each apartment. It may for example detail the type of heating system and built-in appliances. There may be marketing information presenting the individual apartment as well. It is likely to provide specific information regarding the size of the rooms and the facilities to be provided. There is usually very little information provided at this stage about the arrangements for management of the development or the level or nature of the service charges.

THE CONSUMER CODE FOR HOME BUILDERS

9.5 The Consumer Code for Home Builders[53] is a consumer protection code which applies to all home buyers who reserve or buy a new or newly converted home which has been built by a home builder under the insurance protection of one of the home warranty bodies. It is a voluntary form of self-regulation for the construction industry which also sets out the levels of service that home buyers can expect. It does not apply to second-hand properties. The Code sets out mandatory requirements that all home builders must meet in their marketing and selling of homes and their

[53] Second Edition, which applies from 1st April 2010.

after–sales customer service. The aim of the Code is to ensure that home buyers are treated fairly and know what service levels to expect. They must also be given reliable information upon which to make their decisions and know how to access dispute resolution arrangements if they are dissatisfied.

AN APARTMENT[54]

9.6 When a purchaser of an apartment instructs a solicitor it is important to find out and understand exactly how the apartment is defined. The definition will be set out in the lease and it will describe in precise terms the unit of accommodation of which the purchaser will have exclusive ownership. The apartment will normally comprise the internal structures, the internal walls, the floors and the ceilings. For reference purposes the purchaser should ask for a copy of the lease as well as a map or plan of the apartment and of the development.

9.7 Along with the other apartment owners, a purchaser will also be responsible for a share of the upkeep, maintenance, repair and insurance of the common areas, amenities and services.

LAW SOCIETY OF NORTHERN IRELAND REQUIREMENTS

9.8 The Law Society has issued two leaflets entitled 'Buying and Living in an Apartment' and 'Buying and Living in a Property with Common Spaces' which solicitors are encouraged to make available to purchasers. These leaflets provide general information about the principles of living in an apartment and recommend that any prospective purchaser should

[54] See Chapter 2 – What is an Apartment? - for more detail.

discuss all aspects of the purchase with their solicitor including the management, service charge, and other issues.

9.9 A solicitor acting in the purchase of any residential property is required by the Law Society to comply with the requirements of the Home Charter Scheme ('HCS')[55]. The HCS promotes good practice and uniformity of processes. Under the HCS all solicitors are obliged to follow the procedures recommended and to keep the client informed at each stage of the transaction.

9.10 There are recommended procedures for use by a solicitor when acting for a purchaser of a site in a building development. There are a number of documents which are of particular relevance and interest to a purchaser of an apartment. The solicitor should inform the purchaser of the content and detail as appropriate.

9.11 At the time of receiving the contract documents the purchaser's solicitor should seek to obtain other specified documentation from the developer's solicitor including[56]:

- A legible copy estate / location plan of sufficient size and accuracy to identify the site and its position on the title documents;
- Draft site map defining the site and boundaries;
- Evidence of planning permission for the development;
- Building control approval;
- Department of the Environment property certificate;
- Local authority property certificate;

[55] The Home Charter Scheme is a quality assurance scheme operated by the Law Society of Northern Ireland for conveyancing transactions. It is compulsory for all solicitors to adhere to it.

[56] See Chapter 5 – Purchase of an Apartment – for more detail relating to these documents.

- Road bond documentation;
- Article 161 sewer agreement;
- Standard form pre-contract enquiries with replies;
- NHBC documents or documents issued under any other insurance backed warranty scheme.

9.12 It is also essential to provide an Energy Performance Certificate as evidence of the energy rating of the property.

9.13 On or after completion of the transaction, the purchaser's solicitor should seek to obtain further documentation from the developer's solicitor including:

- Final maps, suitable for registration in the Land Registry;
- Confirmation that the premises have been built substantially in accordance with the specified planning permission;
- Final certificate of compliance with building control requirements.

ESSENTIAL INFORMATION

9.14 A purchaser of an apartment should ask questions to find out about and obtain information relating to:

The common areas, amenities and services

9.15 These may include the roof of the building, access and entrance ways, gardens and amenity space, passageways, corridors and stairwell, a lift, external walls and structure of the building, sewage and drainage systems, electricity and gas supplies.

Management of the apartment block

9.16 Normally a management company is set up to be responsible for the upkeep, maintenance and insurance of common areas, amenities and services. The management company will be owned by the apartment owners and each apartment owner will have one share in the management company. The management company may employ managing agents to undertake provision of the services on its behalf.[57]

The service charge

9.17 A service charge is a fee that apartment owners pay as a contribution towards the maintenance, upkeep and insurance of the common areas, amenities and services. It is important for a purchaser to make enquiries about the service charge. For example:

- How much is the service charge?
- How much is it estimated to be in future?
- Are there any arrears? (if it is not a new apartment)
- How is it paid – annually / twice yearly / monthly?
- What services does it cover?
- Is it a reasonable amount?
- Is there a sinking fund?

9.18 A purchaser should also ask for a copy of the certificate of insurance and confirmation that the building is properly insured.

The management company

9.19 In the case of a new apartment in a new development there may not be any information about the running of the management company because it will not have

[57] See Chapter 8 – Management of Apartments – for more detail on management.

begun to operate. However, if a purchaser is buying an existing apartment in an established development the following should be requested:

- Minutes of the latest meetings;
- Three years accounts;
- Details of the sinking fund (if any);
- Details of any planned expenditure;
- A copy of the current certificate of insurance;
- Information relating to any managing agents appointed.

A sinking fund

9.20 In a development which has common areas it is advisable for the management company to set aside a portion of the service charge each year in a separate fund. The aim of such a fund is to make provision for future major repairs to avoid large one-off service charge demands. As the building ages and its condition begins to deteriorate it becomes particularly important to have a sinking fund out of which substantial items of capital expenditure can be paid. For example, the replacement of the lift or repair of the roof.

9.21 If there is no sinking fund at the time the work becomes necessary the owners will be responsible for funding it. This can be a significant burden and it may be difficult for some of the apartment owners to fund.

Involvement in the management company

9.22 Each apartment owner is responsible for paying their share of the service charge and also has a general responsibility as a member of the management company to be actively involved in the work of the management company. This means attending any meeting, contributing to discussions and decisions

relating to the management of the development and monitoring the expenditure by reading the accounts.

House rules

9.23 The house rules are the rules in a particular development which set out the standards and rules for living in the development. These are usually contained in the lease of each apartment but may also be in a standalone document. It is very important that apartment owners should be aware of them. Examples include restrictions on noise levels, a ban on the keeping of pets, restrictions on hanging laundry from balconies, rules on refuse disposal, car parking etc. It is important for an apartment owner to have a copy of the lease for reference in the event of any misunderstanding or dispute.

CHAPTER 10 – OPEN SPACES

INTRODUCTION

10.1 Many blocks of apartments and residential housing are located in developments which have external landscaped areas, outdoor amenity lands or open spaces. Some of these have been created as a requirement of the planning permission which the developer has obtained to develop the land. The open spaces may form part of the common facilities and common areas for the enjoyment of the residents of the development and their visitors, or they may be open spaces intended for the benefit of the general public.

PLANNING POLICY

10.2 In exercise of its responsibility for planning control in Northern Ireland, the Department of the Environment assess development proposals against all planning policies and other material considerations that are relevant to it. Planning Polices set out the main planning considerations that the Department will take into account in assessing proposals for the use of land. The Government has been conscious to ensure that as the move towards higher density housing takes place, sufficient provision is made for open spaces in developments as a whole. Planning Policy Statement 8 (PPS8): Open Space, Sport and Outdoor Recreation[58] sets out the Planning Service's policies for the protection of open space, in association with

[58] Published February 2004.

residential development and the use of land for sport and outdoor recreation.

10.3 Planning Policy OS 2 Public Open Space in New Residential Development provides that the Department of the Environment (Planning Service) will only permit proposals for new residential developments of 25 or more units, or on sites on one hectare or more, where public open space is provided as an integral part of the development. In smaller residential schemes the need to provide public open space will be considered on its individual merits. There is a normal expectation that the open space will be at least 10% of the total site area, 15% for larger developments. In all cases developers will be responsible for the laying out and landscaping of public open space required under this policy.

10.4 The Department will attach appropriate planning conditions to planning permission granted to address the following:

- The laying out and landscaping of the open space;
- The timing of its implementation; and
- The permanent retention of the open space.

10.5 An exception to the requirement of providing public open space will be permitted in the case of apartment developments or specialised housing where a reasonable level of private communal open space is being provided. An exception will also be considered in cases where residential development is designed to integrate with and make use of adjoining public open space.

10.6 There may be occasions where the provision of open space in association with residential development can only be facilitated by the applicant entering into a Planning Agreement under Article 40 of the Planning

(NI) Order 1991. Where this is the case, the Planning Agreement needs to be completed before planning permission is granted.

PROVISIONS FOR MANAGEMENT AND MAINTENANCE IN PERPETUITY

10.7 The provisions for the management and maintenance of the open space are a key material consideration in the determination of planning applications. The Department will not adopt such open areas. The onus, therefore, rests on developers to ensure that such land will be made available and subsequently retained, managed, and maintained in perpetuity as public open space. Planning permission will not be granted until the developer has satisfied the Department that suitable arrangements will be put in place for the future management and maintenance in perpetuity of areas of public open space required under this policy.

10.8 There are three approaches that the Department is satisfied provide reasonable assurance that such open space can be managed and maintained in perpetuity.

10.9 Arrangements acceptable to the Department include:

1. A legal agreement transferring ownership of and responsibility for the open space to the local district council;

2. A legal agreement transferring ownership of and responsibility to a charitable trust registered by the Charity Commission such as The Woodland Trust or the Greenbelt Foundation, a management company supported by such a trust; or

3. A legal agreement transferring ownership of and responsibility for the open space to a properly constituted residents' association with associated management arrangements. In this case the ownership of the open space is divided equally among incoming residents who then employ a management company on their behalf to maintain the open space. The developer will be responsible for setting up a resident's association, putting in place the initial management regime and ensuring this matter is clearly set out in the sale agreement. Any developer intending to follow this approach will also be required to demonstrate to the Department's satisfaction what alternative measures will take effect in the event that the resident's management arrangements were to break down.

10.10 In the case of apartment developments and specialised housing adequate provision of open space is required to meet the needs of future residents and to help integrate the development and promote a more attractive environment. In cases where communal gardens are proposed as an integral part of the development, the Department will not require separate provision of public open space.

TRANSFER OF OWNERSHIP OF OPEN SPACE

10.11 In relation to public open spaces, planning policy provides for legal agreements to be made to transfer the ownership and responsibility for the open space to a third party which will manage and maintain it. However, in the case of private space, in most cases the developer will also wish to transfer ownership and pass on responsibility for the ongoing maintenance.

10.12 The party which takes on the ownership of and responsibility for the open space is often a

management company. It may be the same management company which manages the block of apartments or it may be a separate company. Alternatively, it may be a charitable trust such as The Greenbelt Company.

MAINTENANCE COSTS

10.13 The cost of maintaining the amenity areas is usually met either by payment of a one-off sum by the developer to the Company or by reimbursement by the residents of the annual costs incurred by the company. Developers tend to prefer that all the costs are borne by the residents. If a developer has to contribute a capital sum this may be a significant financial burden which adds to the total construction costs of the development.

10.14 If the company is seeking to recover the maintenance costs from the residents in the development, this will be by way of service charge. Each owner will have entered into a covenant in the lease or transfer to pay such annual sum as is attributable to each house or apartment[59]. The owner will be notified in advance of the estimated amount payable and the means by which it will be collected.

10.15 Given the sums involved, it may not be economical for the company to enforce payment of the maintenance charge by resort to the courts. The Greenbelt Company, for example, prefers to control payment of the maintenance charge by requiring an inhibition to be registered on the title in the Land Registry[60]. An inhibition can prevent registration of any subsequent dealings with the title to the property unless the person who has registered the inhibition consents and

[59] See Chapter 6 – Title to Apartments.
[60] Land Registration Act (Northern Ireland) 1970 c.18, section 67.

provides written confirmation that all charges due to date by the apartment or house owner have been paid. This means that when an apartment or house is sold, any arrears of maintenance costs or service charge are paid.

10.16 If there are no sums outstanding on sale and all the charges have been paid to date, the Company will release the vendor from the covenant with it and enter into a new covenant with the purchaser to pay the maintenance costs.

CHAPTER 11 – LAW REFORM IN NORTHERN IRELAND

INTRODUCTION

11.1 Although problems relating to living in multi-owned high-density property have recently attracted much publicity, the question of reform of the law has been on the agenda for several decades. There has been a growth in the development of apartments and flats across the world and many other jurisdictions have also had experience of considering the best legal structure for such developments. The fundamental question is how to devise an ownership arrangement whereby the rights of the individual to a unit of property are protected but is also able to accommodate collective responsibility for the whole building and the areas commonly owned.

11.2 In Northern Ireland the possibility of introducing standard statutory provisions was first considered in 1971 and has subsequently been revisited. As time has passed, the prevailing view as to the most appropriate solution to the problems has changed. However, none of the proposals or recommendations have been implemented and the legal position is the same now as it was when the debate began.

PROPOSALS FOR A STATUTORY SCHEME FOR THE OWNERSHIP OF FLATS

Survey of the Land Law of Northern Ireland (1971) ('the 1971 Survey')

11.3 The Survey acknowledged that, apart from conversions of existing houses and comparatively minor developments, privately owned flats were relatively uncommon at the time it undertook its research. However it anticipated that the number of 'substantial modern developments' would increase in the future.

11.4 The Survey treated the questions which can arise in relation to flats (as they were then more commonly known) in a restricted manner. It took the view that there was no serious problem in relation to the ownership of leasehold flats and confined itself to recommending the imposition of certain minimum statutory obligations. It proposed that these obligations would apply not only to flats but also in any case where buildings or their services were mutually interdependent. The obligations related to the provision of rights of support and shelter, a right of free passage for water, sewage and other services and an ancillary right of entry for the purpose of carrying out repairs.

Land Law Working Group: Discussion Document No. 4 – Conveyancing and Other Miscellaneous Matters

11.5 In Discussion Document No. 4 the Land Law Working Group ('the Group') indicated that it was important to give some detailed thought to the problems involved in the ownership of flats. Its view was that the two main issues were the tenure of apartments (freehold or leasehold) and the question whether there should be a statutory scheme for flat ownership or at least statutory minimum standards for privately devised schemes. The Group noted the growth in the development of owner-occupied flats in Northern Ireland and commented that leases shown to it were of a high standard.

11.6 The Group had previously suggested that very long leases of hundreds or thousands of years should be made incapable of being created in the future, making freehold tenure the standard method of owning land.[61] However, it reserved the question whether long leases should be allowed for flats.[62] If a compulsory flat-owning scheme were not to be adopted, then the Group took the view that developments should be capable of being carried out by the sale of either freeholds or long leases. In that respect flats would be a special exception to the general phasing-out of long leases.[63]

Final Report of the Land Law Working Group (1990) ('the Final Report')

11.7 In the Final Report the Group found itself in complete accord with the recommendations of the Aldridge Report[64] in favouring the introduction of a statutory commonhold scheme for the regulation of flats in the future[65]. Commonhold is a new statutory form of freehold ownership created under legislation.[66] The statutory scheme places responsibility for the common areas in a corporate body which operates within a controlled regulatory environment.

11.8 If such a scheme had been introduced it would have imposed standardisation of regulations and documents on the unit owners; their rights would be automatic and standard and their position would not

[61] Land Law Working Group Discussion Document No. 1.
[62] Land Law Working Group Discussion Document No. 1, paragraph 1.5.
[63] Land Law Working Group Discussion Document No. 4, paragraph 5.21.
[64] Commonhold: Freehold Flats and freehold ownership of other interdependent buildings (Cm. 179), a Report of a working group of officials chaired by a T.M. Aldridge, Law Commissioner, Law Commission of England & Wales, published in 1987.
[65] Final Report, paragraph 3.1.11.
[66] For more information on commonhold see Chapter 12 – Neighbouring Jurisdictions.

depend on the skill and negotiating power of a particular lawyer. The title to each of the commonhold units (the flats) would be substantially the same and this would make it easier for the prospective purchasers' solicitors to check the title. Units in a building would be held by their owners subject to clearly stated obligations and with the benefit of clearly stated rights. The common parts of the building, such as entrances, stairs and passages, would be owned by an incorporated association of which all the unit owners would be clearly stated; there would be protection for minorities and majorities; and conveyancing would be simplified because each unit would be numbered and its transfer by reference to its number would put its purchaser in the shoes of the vendor.

11.9 In summary, the most important of the recommendations made in the Final Report were to the effect that –

- A commonhold should be capable of being created where land is divided into two or more freehold units, with or without common parts[67];

- The creation of a commonhold should be compulsory for freehold flats consisting of four or more units with common parts[68];

- A commonhold scheme should be registered in the Land Registry with a declaration that the whole of the land described with all buildings erected or to be erected on it constitutes a commonhold[69].

[67] Final Report, paragraph 3.2.14.
[68] Final Report, paragraph 3.2.14.
[69] Final Report, paragraph 3.3.11.

11.10 There were further proposals relating to the details of the commonhold[70]. However the proposals for the introduction of a commonhold system of statutory ownership were not taken any further.

GROUND RENTS

11.11 The subject of reform of ground rents has also been on the agenda for a long time as a feature of the wider general reform of land law. There are an abundance of residential ground rents in Northern Ireland and over the years, several possible schemes have been proposed to enable them to be redeemed. After consideration of a number of possible options by the Survey in 1971 and by the Group in 1990 (see above), legislation was eventually enacted in 2001 to implement a voluntary redemption scheme. However, this has been relatively ineffective in addressing the issue and most ground rents continue to survive.

The Property (Northern Ireland) Order 1997 No. 1179 (N.I.8)

11.12 The 1997 Order originally contained a scheme for the redemption of ground rents based on recommendations made by the Group in 1990 but the scheme was not implemented because, after extensive consultation, it became apparent that it was very cumbersome and complex, likely to prove expensive, and potentially incompatible with Article 1 Protocol 1 of the European Convention on Human Rights. That scheme was subsequently replaced by a simpler and more straightforward process which is contained in the 2001 Act (below).

[70] E.g. Final Report, paragraph 3.3.11, 3.4.22, 3.5.17, 3.6.11, 3.7.15, 3.8.12.

11.13 Measures were also introduced in the 1997 Order which took a first step towards simplification of title. Article 28 provided that, from the appointed day (10 January 2000), no new fee farm grants or fee farm rents could be created. Article 30 similarly provided that there were to be no new long leases (in excess of 50 years) of dwelling-houses. Correspondingly, no new leasehold ground rents can be reserved in such circumstances. However, long leases and ground rents of flats are still permitted as a specified exception to the general prohibition.

Ground Rents Act (Northern Ireland) 2001 c. 5 ('the 2001 Act')

11.14 The ground rent redemption scheme contained in the 1997 Order had to be revised and this Act sets out a new scheme. It provides initially for a voluntary scheme (sections 1 & 4) which allows rent payers under a fee farm grant or a long lease of a dwelling-house to redeem their ground rents by paying a capital sum to the Land Registry, using a multiplier of nine times the ground rent.

11.15 However, there are a range of situations (section 3) in which a rent payer cannot avail of either the voluntary or compulsory redemption schemes. The exceptions include cases where the ground rent is payable in respect of a flat (section 3(6)). Therefore the owner of an apartment or flat is currently not eligible to redeem the ground rent.

11.16 It was envisaged that after the voluntary scheme had been in effect for a while and the process had become familiar, a compulsory element would be introduced (section 2). In due course, it was intended that a purchaser of a dwelling-house would be required to buy out the ground rent on purchase before the title could be registered in the Land Registry. As time passed, it became evident that there was little

enthusiasm for the scheme and there had been a low take up of applications for redemption, for a range of reasons[71].

11.17 It was clear that the voluntary redemption scheme was not working efficiently or facilitating a move towards freehold ownership. A review of the operation of the scheme analysed the evidence of the number of redemptions going through the system. On the basis of the information obtained it was apparent that there were various shortcomings in the operation of the voluntary scheme and the conclusion was reached that it would not be appropriate to recommend the introduction of compulsory redemption[72]. Following that review, the issue of ground rent reform was referred to the Commission.

Supplementary Consultation Paper on Land Law – Northern Ireland Law Commission (NILC 3 (2010)) and Report on Land Law – Northern Ireland Law Commission (NILC 8 (2010))

11.18 At the time of the referral of ground rent reform, the Commission was involved in a review of the land law and conveyancing law of Northern Ireland. The issue of ground rents and associated covenants was accommodated as part of the broader land law reform project. In considering the matter, the Commission acknowledged that more positive action was required to achieve wider freehold ownership and recognised that a new approach to redemption of ground rents was necessary[73]. It gave considerable thought to

[71] Northern Ireland Law Commission, Supplementary Consultation Paper on Land Law (NILC 3 (2010)) paragraph 3.26.
[72] See Office of Law Reform (Department of Finance and Personnel) Review of the Operation of the Ground Rents Act (NI) 2001 Discussion Paper 1/05, November 2005 and subsequent Analysis of Reponses to Discussion Paper on the Ground Rents Act (NI) 2001 (Department of Finance and Personnel).
[73] Paragraph 3.35.

devising a scheme which had the potential to be cheaper, faster, and easier to administer than the current scheme.

11.19 One of the first questions it considered was the categories of land to which the redemption proposals should apply, because the current redemption scheme is only available for lessees and rent payers of dwelling-houses. Amongst other issues, the Commission raised the question of whether the definitions in the 2001 Act should be amended so that the provisions for the redemption of ground rents would apply to all properties, including business properties and flats[74]. However the responses to that particular question expressed such a wide range of views that it was not possible to draw any conclusions from them.

11.20 On the wider issue of redemption more generally, the Commission acknowledged that it was important to deal with the issue of ground rents in order to achieve a more straightforward model of title and ownership. To this end it gave consideration to the possibility of accelerating a move towards freehold ownership and reducing the number of existing ground rents. It recognised the difficulty in devising a solution that would be suitable for all ground rents because of the wide variation in the monetary value of the ground rents paid under existing leases (from purely nominal amounts of £0.05 up to £500.00 per annum).

11.21 As a possible means of addressing the problem the Commission suggested that it might be appropriate as a starting point to introduce provisions to extinguish smaller ground rents first. Virtually all the consultees supported the proposal in principle but there was a wide range of views on the value to set for the smaller rents. As a result, the Commission recommended

[74] Question 20.

amendment of the 2001 Act to provide for automatic redemption of small ground rents of £10.00 or less.

11.22 On balance, the Commission considered that the new redemption scheme should apply to dwelling-houses only, but that there should be provision for extension of the scheme to ground rents of other types of property, such as commercial premises or apartments, at a later date. One of the difficulties that has to be taken into account in considering the redemption of ground rents for apartments is the nature of the interest acquired on redemption and the way that affects ownership of the whole building.

11.23 The overarching objective of redemption is to enable a lessee or rent payer to attain a freehold interest in property, which presents no difficulty in the case of a dwelling-house. However, the situation is more complex in developments where there may be two or more parties (for example the apartment owner and the management company) with interdependent ownership interests which have to be taken into account. There is an argument that it is essential to the fundamental concept of reciprocity that all owners should hold their title for the same interests or estate. For this reason it is not generally thought to be beneficial for owners of leasehold flats or apartments to be permitted to redeem their ground rents unilaterally and acquire isolated freehold interests.

11.24 There have been no further developments since 2010 when the Commission made its recommendations for reform.

MANAGEMENT OF APARTMENTS

11.25 With the increase in the numbers of apartment developments and the speed in which much of the

work has been done, it is not surprising that issues which had not been anticipated at the beginning have emerged. Many of the new owners of apartments are not familiar with the degree of interdependence and sharing of facilities which are involved in living in a building with which others have a common interest. It has become particularly evident that one of the areas in which the owners of apartments are experiencing most difficulties is in relation to the management of the developments in which they are living. When there has been no satisfactory means of resolving a complaint or appropriate forum in which to address it, the issues have been raised with elected representatives. In the Northern Ireland Assembly, concern has been expressed about the inadequacies in the current law governing aspects of the ownership of private apartments and townhouses, and there has been some debate about the possibility of introducing legislation to improve the situation.

Apartment Developments' Management Reform Bill

11.26 On 9 November 2009, the Northern Ireland Assembly passed a motion calling for the regulation of multi-unit developments. At the conclusion of this debate, the Minister for the Department of Finance and Personnel, Mr Sammy Wilson MP MLA, undertook to establish a Cross-departmental Working Group to consider the issue. Kieran McCarthy MLA, having proposed the original motion, introduced a Private Members Bill into the Northern Ireland Assembly on 8 December 2010 with a number of provisions relating to the management of apartment developments[75]. The Bill has generated significant interest in the issue of apartments and the case for reform.

[75] The Bill was withdrawn on 15 December 2010 but. Mr McCarthy has maintained an interest in management issues relating to apartments.

11.27 The Bill proposed a number of reforms of the law relating to the management of apartments. In particular it imposed an obligation on a developer to ensure that the common parts of a development would be transferred to an owners management company (OMC) within 6 months (in the case of existing developments, whether completed or not completed) or within 6 months of completion (new developments). It also made provision for the running and administration of OMCs. Disputes could be referred to mediation or by taking proceedings in the county court. An obligation would be imposed on the developer to provide certain information and to hand over specified documentation in respect of the development to the OMC.

11.28 This Bill identifies the most pressing problems that are experienced by apartment owners and seeks to address them by making suitable provisions. This is a laudable aim and focuses on enabling existing residents to resolve the disputes which are proving so challenging. These issues are considered in more detail in Chapter 17 – Options to Address Management Problems.

The Law Society of Northern Ireland – Discussion Paper

11.29 The Law Society acts as the regulatory authority which governs practising solicitors in Northern Ireland by virtue of the Solicitors' (Northern Ireland) Order 1976. The Law Society lays down rules and regulations relating to professional conduct, procedure and competence to enable solicitors to provide a quality service to their clients. In February 2010 the Law Society had become concerned by anecdotal reports about poor management of blocks of apartments and multi-unit developments, so in February 2010 it decided to set up a Working Group to investigate the public interest issues involved.

11.30 In February 2011, the Working Group, which was comprised of practising solicitors, published a Discussion Paper as its initial contribution to the debate relating to the management and maintenance of multi-unit developments. The Law Society drew on the experience of managing agents and conveyancing solicitors, identifying areas where it believes change is needed to protect the long-term interests of property owners. In summarising its research findings, the Law Society highlighted that the views it was expressing were simply preliminary observations.

11.31 To complement the Discussion Paper, the Law Society also published leaflets for prospective owners of apartments or houses with common areas. These are intended to provide the public with some basic information and questions they need to ask before buying a property. The Law Society indicated that it looks forward to further engagement with key parties as the debate continues.

CHAPTER 12 – LAW REFORM IN OTHER JURISDICTIONS

INTRODUCTION

12.1 As apartment ownership became more common in general, it became apparent that it was necessary to develop a framework of law under which it is possible to create suitable models for the ownership and management of interdependent properties. Statutory regulation seemed to be the obvious answer as a means of putting the necessary structures in place and many countries brought in legislation creating forms of strata titles or condominium ownership for this reason[76]. With the experience of time, many of these countries now have up to five generations of apartment ownership statutes, responding to the deficiencies of the first attempts at legislation and to the changing needs of society.

REFORM OF TITLE

12.2 In each of the neighbouring jurisdictions there has been experience of similar problems which have arisen for residents living in accommodation with elements of shared ownership. The development of a law suitably tailored to meet the requirement has presented common challenges but a range of different measures have been introduced to address them.

[76] For example, France, Belgium, Germany, New Zealand, Australia, South Africa and the USA among others.

ENGLAND AND WALES

12.3 In England and Wales, with the growth in the development of leasehold apartments came a corresponding increase in the number of complaints about both legal and management issues. One of the reasons that there were more serious legal problems with the ownership of flats in England and Wales was because leases of flats were more commonly sold for shorter terms than in Northern Ireland and there were also difficulties with the enforceability of covenants. Typically, leases in England are for terms of 99 to 125 years which means that they are less permanent than those in this jurisdiction and the landlord is in a position to extract a premium as the price for a lease extension.

12.4 Lessees in England were concerned about the wasting value of their leases as assets and also about the lack of control which they had over management arrangements. The management company structure does not appear to be commonly used in England and the lessees have little involvement with decisions relating to repair or maintenance. In consequence, one of the first steps towards improving the position was to make an argument for enfranchisement of ownership.

12.5 Much thought was given over many years to consider all the issues and to improve and regulate the ownership and management of apartments[77]. An early milestone was reached during the 1970s when the government began addressing the issue of the regulation of service charges and introduced

[77] The history of the proposals for reform in England and Wales up to 1990 is detailed in Final Report of the Land Law Working Group (1990) Part 3 paragraph 3.1.3 to 3.1.10.

legislation to that effect[78]. This legislation produced a regulatory code for the management of residential buildings and the administration of service charges.

12.6 Throughout the 1980s there was increasing concern at the widespread complaints of poor management and excessive service charges, particularly blocks of flats. This led to the publication in 1985 of the Report of the Committee of Inquiry on the Management of Privately Owned Flats (the Nugee Report). Its principal recommendations were incorporated in the Landlord and Tenant Act 1987 which provided increased statutory control on the imposition of service charges and the landlord's ability to recover them[79].

12.7 A right for qualifying tenants to acquire the freehold or an extended long lease of the property was first introduced by the Leasehold Reform Act 1967 c.88. However, this right was very limited in its application and was restricted to dwelling houses, excluding flats or apartments. After lengthy debate about freehold enfranchisement the Landlord and Tenant Act 1987 c.31 eventually included the first steps towards collective enfranchisement (also in very limited circumstances). Later, the Leasehold Reform, Housing and Urban Development Act 1993 c. 28 conferred on the leasehold owners of residential flats the right to compel their landlord to sell the freehold to them at the market price[80].

[78] The Housing Finance Act 1972, then the Housing Act 1974 c.44 replaced by the Housing Act 1980 c.51 and re-enacted in the Landlord and Tenant Act 1985 c.70.

[79] Substantial amendments were made to the Landlord and Tenant Act 1987 c.31 Act by the Housing Act 1996 c.52.

[80] This right of collective enfranchisement has been extended by the Commonhold and Leasehold Reform Act 2002 c.15, Part 2 Chapter 2, which enables the freehold to be purchased by a Right to Enfranchise (RTE) Company.

12.8 Intermittently during the 1980s and 1990s comments were made suggesting that consideration should be given to the possibility of introducing a form of condominium ownership for flats and apartments, although the need for such legislation had first been highlighted as far back as the 1960s[81]. In principle, the question was whether to give thought to the establishment of a statutory scheme along the lines of legislation by then operating successfully in Canada and the United States as well as in Australia and New Zealand, under the name of strata title. However, it took many years for such legislation to reach the statute book.

Commonhold

12.9 Finally, after several consultation papers and much debate, the Commonhold and Leasehold Reform Act 2002 c.15 came into effect[82]. Part 1 of the 2002 Act, which makes provision for commonhold, became operative on 27 September 2004. Commonhold was designed to meet the perceived shortcomings of leasehold interests, particularly as viewed from the perspective of the lessee. It provides a tailor-made scheme that can be used and is suitable for developments consisting of apartment blocks.

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[81] The question was originally raised by the Committee on Positive Covenants Affecting Land (the Wilberforce Committee) in 1965. Almost 20 years later, the Law Commission of England and Wales published a report on Transfer of Land – the Law of Positive and Restrictive Covenants (Law Com. No. 127 (1984)) which recommended a new interest in land called a 'land obligation'. This reactivated the discussion and prompted suggestions for more far reaching reform such as a statutory scheme for interdependent buildings.

[82] Having first been recommended in 1987 by the Law Commission of England and Wales' Report on Commonhold – 'Freehold Flats and Freehold Ownership of the Interdependent Buildings'. (the Aldridge Report) (Cm. 79 (1987). This was followed by Commonhold: A Consultation Paper (1990) (Cm. 1345). A further consultation paper was published 1998 followed by a White Paper and draft Bill in 2000.

12.10 Commonhold is not a totally new concept but is a type of freehold tenure which can be used for buildings that are divided into units, whether used for residential or commercial purposes. It is a statutory framework for apartment ownership broadly based on the Australian concept of strata titles first introduced into New South Wales in 1961[83]. If an apartment building is to become a commonhold, it has to be registered as such under the statutory regime.

12.11 Each apartment owner has title to a commonhold unit (for example, an apartment) which is equivalent to a freehold and not time limited. In addition each owner is entitled to be a member of the commonhold association (a limited company). The commonhold association as the registered proprietor owns the freehold title in the common areas and manages the building. A commonhold community statement deals in detail with the rights of the unit holders and their relationship to the commonhold association, providing a comprehensive framework of rights and obligations necessary for the management and maintenance of the property.

12.12 Commonhold may exist only in relation to registered land and only in respect of land registered with absolute title. A commonhold can arise either on the application of the registered freehold proprietor of a new development or by conversion of an existing development. A developer can choose whether or not to adopt a commonhold model for a new development, because it is voluntary. If existing leaseholders wish to convert to a commonhold, there must be 100%

[83] The Conveyancing (Strata Titles) Act 1961 No. 17 of 1961. This model has been adopted in other several other countries including Canada, South Africa, the Philippines, Argentina, Singapore, New Zealand and Malaysia.

agreement among them to do so[84]. This is a very high threshold and the number of commonhold estates created has proved to be exceptionally low[85]. Despite all the time taken to work out the detail and the work that went into the legislation, commonhold is not proving to be a popular option. It is apparent that almost all apartment buildings, both new and established in England, have remained in a leasehold structure and have not become commonholds.

Right to manage

12.13 The other aspect of the 2002 Act that is of interest is Part 2 because it provides, as a supplement to the commonhold scheme, a right to manage for leaseholds. Under established practice in England & Wales, landlords and developers often retain ownership of the common parts and charge the unit owners a service charge. There is no management company device in this framework and the leaseholders have little influence over management decisions. Part 2 of the 2002 Act addresses this deficiency and provides a procedure whereby existing lessees of a self contained building consisting of two or more units holding under a long lease may obtain the right to manage the property in place of the developer or lessor.

12.14 The aim of the right to manage policy is to strengthen the rights of residential leaseholders and encourage good management. By exercising the right under Part 2 the lessees may set up a Right to Manage (RTM)

[84] For the practical difficulties in respect of existing buildings being converted into commonhold, see P F Smith, 'The Purity of Commonholds' [2004] *Conv*. 194.

[85] A Parliamentary Question stated that as of June 2009 there were 12 commonhold residential developments comprising of 97 units in England and one commonhold development, comprising of 30 units in Wales i.e. 13 developments and 127 units in total in England and Wales. It has proved difficult to obtain more up-to-date statistics.

Company, which must be a private company limited by guarantee. To establish a Company, over 50% of the qualifying lessees must agree to be members and provision must be made for all remaining qualifying lessees in the development or block of apartments to become members.

12.15 The RTM Company takes over the management functions from the landlord and the power to exercise the rights in the leases such as the right to collect the service charge. There is no compulsion for the contracts relating to the provision of services to transfer with the responsibility for management. Once the RTM company is set up and the right to manage becomes exercisable it can be protected by the registration of a caution against the title in the Land Registry specifically relating to the right to manage.

SCOTLAND

12.16 In Scotland, multi-occupied buildings are commonly known as tenements. At common law in Scotland a tenement is any building comprising of flats, whether new or old, purpose-built or converted. Although there have been tenement buildings in Scotland since medieval times, especially in Edinburgh, there were no formal sources of law for tenements. Scots law has a mostly Roman civil-law framework for property and developed, from the seventeenth century onwards, a law of the tenement through conveyancing practice and the widespread use of real burdens (a type of freehold covenant).

12.17 This law of the tenement was noticeable for its practical rather than its principled approach. It evolved into a special and self-contained set of rules governing the ownership and maintenance of tenement buildings. The arrangements for a particular tenement were usually set out in the title deeds to the property.

The result was a pragmatic system which, to the conveyancers who operated it in practice, was workable and comprehensible. Despite the lack of clearly stated principles, the law was very much settled and there was almost no formal legal development of the subject until the latter part of the twentieth century.

The Tenements (Scotland) Act 2004 asp 11

12.18 Nevertheless there was some pressure to modernise and to introduce comprehensive legislation which would make the law more transparent, accessible and easier to understand for everyone. Problems were encountered where the common law principles conflicted with title deeds. Although progress was very slow, after some years of deliberation, legislation for tenements was eventually enacted in the form of the Tenements (Scotland) Act 2004[86]. As the strengths of the existing system were recognised, the 2004 Act was introduced simply to provide greater clarity in the law on tenements. The most important aim of the reforms was to ensure that the existing law would be improved by the introduction of default management provisions. It was not intended to provide an equivalent of commonhold in England nor to create a new form of tenement ownership.

12.19 The 2004 Act restated the pre-existing common law rules which demarcated ownership in a tenement. It also introduced a simple default statutory management scheme for all tenements which was expected to be of assistance where the individual title was silent. That scheme, which is known as the Tenement Management Scheme (TMS), automatically applies to all tenement and apartment schemes in Scotland, whether built before or after 2004. Unlike

[86] The Scottish Law Commission published a discussion paper in 1990 and a final report with draft bill in 1998.

apartment ownership statutes in other countries, the 2004 Act allows individuals virtually complete freedom to vary the terms of the TMS statutory ownership scheme. There is no need to register for a TMS or to opt-in in order for the statute to apply the default provisions.

12.20 A TMS is limited to the physical boundary of one tenement building or to part of a building which can be regarded as a tenement. The statutory TMS provisions do not provide for the tenement to be run by a management body, although one may be established under the terms of the title deeds. Instead it proceeds on the basis of a series of voluntary and formally unrelated scheme decisions made by the owners collectively. A scheme may be proposed by one owner and then decided upon, generally speaking, by the majority of all owners. The onus is on the person who wants a scheme decision to follow the statutory procedures. A decision can be reached by going round the doors and counting votes, or by holding a formal meeting.

The Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 No. 729 (S.2)

12.21 Provision was also made in Scotland for another new type of management scheme, more similar to the English commonhold type. The Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009[87] enables a development management scheme (DMS), to be set up in new developments. An owners' association is automatically established on the day that the DMS takes effect. Again, DMS is a voluntary system and very flexible. It need not be limited to one building or any type of building, but can encapsulate a development with tenement buildings, independent houses, shops, and

[87] Which came into force on 1 June 2009.

commercial units, shared common facilities, and many other things.

12.22 Where a DMS is in operation, an owners' association is established automatically at the same time as the DMS scheme. Although it is a body corporate, it is not subject to the strict regulations and formalities of a company. The function of the DMS is to manage the development on behalf of the members. It is given express permission, amongst other things, to own any part of the development, carry out maintenance of and improvements / alterations of shared facilities, charge a service charge and engage employees. The DMS must have a manager such as a professional property management firm and the specific duties of the manager are set out in the DMS.

12.23 To set up a DMS the owner of land (usually a developer or builder) registers a deed of application in the appropriate property register. There is no statutory form of deed of application and no special wording is required. Developers are free to adopt the scheme as they see fit in the circumstances or their particular development. They can choose to vary it or to disapply it as they wish. In theory, there is nothing to stop a DMS from being applied to an existing development. Adoption must be unanimous and the deed of application would have to be signed by the owners of each individual unit.

12.24 It was expected that in practice the requirement for unanimous consent would be one of the reasons why relatively few developers would use the DMS. However, the possibility of a low conversion rate was not considered a matter of too much concern.

Property Factors (Scotland) Act 2011 asp 8

12.25 As well as the reform of title to tenements and the establishment of a framework for statutory management of tenements, Scotland has introduced a statutory framework for managing agents through the Property Factors (Scotland) Act 2011. This Act establishes a compulsory register for property factors, a code of conduct and a new statutory dispute resolution mechanism called the Homeowner Housing Panel.[88]

12.26 A homeowner can apply to the panel for determination of whether a property factor has failed to carry out the required duties and has failed to comply with the property factor code of conduct. The Panel will decide whether to make a property factor enforcement order requiring the property factor to execute such action as it considers necessary and where appropriate make reasonable payment to the home owner. The order must specify a period within which action is required and may specify particular steps to be taken.

REPUBLIC OF IRELAND

12.27 Land law and the law of property in the Republic of Ireland share common origins with that in Northern Ireland and historically also developed along very similar lines until well into the twentieth century. In both jurisdictions property developments were set up with many of the same features and leases have commonly been granted for very long periods of several hundred or several thousand years. With exponential growth in the development of apartments from the early 1990s in Ireland it became apparent that there were significant difficulties in the management and regulation of developments

[88] The 2011 Act came into effect on 1 October 2012.

particularly in relation to the common areas. Problems with service charges were just one of a number of issues that were giving rise to serious concern. A range of other problems reflected the absence of appropriate regulation at national level.

12.28 Consumer associations and apartment owners' resident groups were increasingly highlighting the significant difficulties in the management and regulation of residential housing developments. The general impression was that these difficulties largely arose from a combination of poor governance arrangements and an understanding deficit amongst the residents of apartments. When buying property, purchasers seemed to be unaware of the particular features and consequences of buying an apartment in a development in contrast to a detached dwelling.

12.29 In 2006 the Irish Law Reform Commission published a Consultation Paper which provided a comprehensive review of the legal issues concerning residential multi-unit developments, including blocks of flats or apartments, and mixtures of townhouses and apartments[89]. It was suggested that the law had developed without consideration for the distinct company, property, planning and consumer issues relating to this type of property[90]. The lack of a tailored regime addressing the complex interlocking issues gave rise to uncertainty in the law which created scope for misunderstanding, mismanagement and abuse. The Consultation Paper was followed in 2008 by a Report on Multi-Unit Developments with recommendations for suitable legislative reform[91].

[89] ILRC CP 42-2006.
[90] The Irish Law Reform Commission published a Consultation Paper on Multi-Unit Developments in 2006 (ILRC CP 42-2006) followed by a Report on Multi-Unit Developments (ILRC 90-2008).
[91] ILRC – 90 2008.

12.30 When the question of the tenure of apartment ownership was considered it was concluded, with little dissent, that there was no need for a statutory scheme. There was a general recognition that the leasehold framework operated satisfactorily and that there was no obvious advantage in encouraging a move towards freehold ownership of apartments. However, legislation was considered to be necessary in order to address concerns relating to the management of apartments.

Multi-Unit Developments Act 2011 (No. 97 of 2011)

12.31 The Multi-Unit Developments Act 2011[92] was enacted to amend the law relating to ownership and management of common areas of developments, and to facilitate the fair, efficient and effective management of bodies responsible for the management of such common areas. The Act applies to residential multi-unit developments where there are apartment blocks, a mix of apartments and townhouses, in housing estates or otherwise and also to mixed use (residential /commercial) developments where commercial units form part of the development, sharing amenities, facilities and / or services. Generally, the provisions apply where there are five or more residential units.

12.32 Under the 2011 Act, developers of a multi-unit development must establish an owners' management company (OMC) and transfer ownership of the common areas to it. In the case of new multi-unit developments such a transfer is required to take place before any apartment is sold; in the case of existing developments it was to take place within six months of the relevant section coming into effect (by 30 September 2011). The owners of the apartments will

[92] Which came into effect on 21 January 2011 and became operative on 1 April 2011.

be entitled to receive a copy of the annual report and each will be a member of the OMC with full voting rights. They will also be entitled to attend the annual general meeting which must be held at a reasonable time and within reasonable proximity to the development. In addition the OMC must make House Rules to facilitate the quiet and peaceful occupation of the apartments.

12.33 In relation to new developments, the 2011 Act contains provisions requiring a contract between the developer and the OMC outlining their respective obligations including statutory requirements, completion of common areas, retention monies and dispute resolution. It deals with management of the common areas by the OMC and the internal governance and operation of such a company. The OMC must establish a transparent scheme for the calculation and collection of a management fee. Service charges in respect of any unsold units must be paid by the developer. The OMC must make proper provision for a sinking fund by 30 September 2012 or 3 years from the date of transfer of the first unit in the development, whichever is the later date. Each unit owner will be required to pay a minimum contribution of €200 per annum into the sinking fund.

Multi-disciplinary approach to other reforms

12.34 The problems associated with living in apartments and developments with common areas have also been addressed by looking beyond the narrow legislative framework which governs the establishment of developments. The Report on Multi-Unit Developments (see above) contained provisional recommendations covering a broad and connected range of areas associated with multi-unit developments. As well as issues relating to the role of the management company (notably for a new type of OMC); title and conveyancing issues (such as

covenants and house rules) (described above), these included planning law and its enforcement; the role and regulation of estate agents and property managing agents, and connected consumer issues, and suitable arrangements to assist developments that are in difficulty (rescue provisions)[93].

12.35 Taking all the difficulties into account when the issues were first considered it was clear that solutions were required across a range of agencies. During 2007 and 2008, a number of interested bodies and Government Departments undertook initiatives aimed at assisting the owners of apartments. In 2007 the Minister for Justice, Equality and Law Reform established an interdepartmental working group on multi-unit developments. Arising from the deliberations of the working group a number of important proposals emerged which were enhanced by extensive public debate on the matter.

Planning

12.36 One of the first outcomes that materialised was a set of guidelines for residential developments in relation to planning issues published by the Department of the Environment, Heritage and Local Government[94]. More recently, in June 2012, the Minister for Housing and Planning has published a planning review report making several recommendations, one of which specifically addresses management plans and another recommends an urgent review of planning legislation.

[93] Land and Conveyancing Law Reform Act 2009 (No. 27 of 2009) also implemented legislative reform in the property sector on a wider basis.

[94] *Apartment Design Guidelines* (2007), *Quality Housing for Sustainable Communities* (2007), *Development Management guidelines for Planning Authorities* (2007), *Taking in Charge of Residential Estates Guidelines* (2007), *Draft Sustainable Residential Development Planning Guidelines* (2008) and *Urban Design manual: A Best practice Guide* (2008).

Reform of company law

12.37 Another strand of potential reform has been taken up by the Company Law Review Group which is currently undertaking a review and consolidation of company legislation. The review is intended to include provision for a new type of company to be known as a designated activity company (DAC). It is considered that a management company could more appropriately be a designated activity company instead of being treated as a trading company which is the case at present.

National Property Services Regulatory Authority

12.38 A National Property Services Regulatory Authority was originally proposed in 2005 and was eventually put on a statutory basis on 3 April 2012[95]. It has taken over the licensing of Auctioneers / Estate Agents and letting Agents and is also licensing Managing Agents for the first time (see below for more detail).

Provision of information to consumers

12.39 Significantly, one of the major issues identified as contributing to the failure to resolve many of the problems was recognised as being a lack of awareness and a knowledge deficit among apartment owners. It was clear from the difficulties experienced by residents of apartments that there had to be a substantial increase in the provision of information about the practicalities of living in accommodation with shared facilities. In response to the comments made, the Office of the Director of Corporate Enforcement outlined a strategy to increase public awareness of the role of management companies. This approach underlined the benefits of active engagement by

[95] By Order of the Minister for Justice and Equality under the Property Services Regulation Act 2011 (No 40 of 2011).

apartment owners in the management company and also the pitfalls of inaction.

12.40 As a means of identifying solutions to some of the key issues concerning service charges and the relationship between management companies and property managing agents the National Consumer Agency (NCA)[96] established a Consumers Forum on apartment complexes. The NCA has since published a guide to Buying and Living in a Multi-Unit Development Property in Ireland (September 2008). This guide highlights the key issues and provides detailed information for consumers about buying an apartment, the management company, managing agents, service charges and sinking funds.

REGULATION OF MANAGING AGENTS

12.41 The issue of the regulation of managing agents has been considered in neighbouring jurisdictions as one of the methods by which some of the management issues can be addressed.

England and Wales

12.42 In England and Wales there are a number of organisations that are keen to promote greater regulation of property professionals to ensure better protection for consumers[97]. However, it seems that

[96] An independent national agency established by the Irish government under the Consumer Protection Act 2007 (No 19 of 2007).

[97] RICS, *The Carsberg Review of Residential Property* (2008) recommended that managing agents should be subject to appropriate regulatory requirement. This approach was echoed by the Rugg Review of the Private Rented Sector (2008), undertaken at the request of the Government. The Law Commission (England & Wales) published a Report on Encouraging Responsible Letting (2008) which recommends better regulation in the private rented sector. The National Federation of Property Professionals, the National Association of Estate Agents, the Association of Letting Agents, the Association of Residential Managing

Government does not currently favour regulation[98]. There is a concern about the cost of funding regulation and the increased levels of bureaucracy that would be introduced. Across the property management and rental sector there is a high level of dissatisfaction with the current position and lack of regulation but it seems there are doubts about the most effective way of taking forward any proposals for regulation and the Government does not currently view this as a priority.

12.43 At present the only legislation making provision in relation to property agents is the Estate Agents Act 1979[99]. However, this is fairly restrictive in scope and relates only to the provision of certain information for estate agents acting in the sale and purchase of property[100]. It does not amount to regulation in any meaningful sense and for most purposes, the property sales and management sector remains largely unregulated.

12.44 One of the organisations that is campaigning for improvement in the legislation governing the leasehold sector is the Association of Residential Managing Agents (ARMA), which is a trade body for managing agents managing private residential leasehold blocks

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Agents and the Residential Landlords Association would encourage improved regulation.

[98] Grant Shapps, Housing Minister (2010). In April 2012 there was debate in the House of Lords calling for regulation of managing agents but there is little support for it from the present Government.

[99] The Act extends to Northern Ireland.

[100] Other legislation and codes of practice placing obligations on estate agents include: Property Misdescriptions Act 1991 c.29, Consumers, Estate Agents & Redress Act 2007 c.17, Consumer Protection from Unfair Trading Regulation 2008 No.1277, Estate Agents (Provision of Information) Regulations 1991 No.859, Estate Agents (Undesirable Practices)(No 2) Order 1991 No. 1032 and the code of Practice for Residential Estate Agents.

of flats in England and Wales[101]. ARMA is promoting higher standards of leasehold management by providing advice, training and guidance to its member firms of managing agents. It is currently working on its own proposals for enhanced self-regulation to further improve standards in the industry.

12.45 There is also a voluntary redress scheme operated by the Property Ombudsman (TPO) which aims to provide redress for consumers and is not a system of regulation[102]. It does not have authority to take regulatory or legal action, but has power to reach a resolution of unresolved disputes in full and final settlement. Where appropriate, it can make an appropriate award of financial compensation or other action for example make an apology.

12.46 The service provided by TPO to resolve disputes is free and independent. Its jurisdiction covers disputes regarding leasehold management arising between TPO scheme members (registered firms of letting agents or property management agents) and consumers (buyers, sellers, landlords, or tenants) relating to residential property in the United Kingdom[103]. TPO cannot consider disputes which are being dealt with by a court or a regulatory body, unless both parties have agreed to place that action on hold. It will not normally review a case until the internal complaints procedure of the agent has been exhausted.

12.47 TPO also issues codes of practice which make general provisions as to good practice in property

[101] Membership of ARMA comprises around the managing agent for approximately 50% of all leasehold flats in England and Wales.

[102] The Property Ombudsman came into being on 1 May 2009. It was formerly the Ombudsman for Estate Agents (OEA). The name change was made to reflect the broader jurisdiction in relation to Complaints e.g. sales, lettings, commercial and overseas.

[103] TPO has some members who are located in Northern Ireland.

management. The codes of practice cover matters such as requiring an in-house complaints handling process, having professional indemnity insurance in place, holding client money separately etc but the scope is fairly limited.

Scotland

12.48 In Scotland, statutory licensing of managing agents has recently been introduced by the Property Factors (Scotland) Act 2011[104]. Previously, there had been moves to introduce voluntary accreditation for managing agents but this was ultimately scrapped in favour of compulsory registration. The Act establishes a compulsory register for property factors, a code of conduct and a new statutory dispute resolution mechanism called the Homeowner Housing Panel. A property factor who offers property management services while unregistered is guilty of an offence.

12.49 A homeowner can apply to the panel for determination of whether a property factor has failed to carry out the required duties and has failed to comply with the property factor code of conduct. The Panel will decide whether to make a property factor enforcement order requiring the property factor to execute such action as it considers necessary and where appropriate make reasonable payment to the home owner. The order must specify a period within which action is required and may specify particular steps to be taken.

12.50 The Scottish Government has also produced a statutory Code of Conduct for registered property factors under Property Factors (Scotland) Act 2011. It sets out minimum standards of practice which all registered property factors are required to comply with. The Code came into effect on October 2012.

[104] The 2011 Act came into effect on 1 October 2012.

Republic of Ireland

12.51 In the Republic of Ireland the recently established National Property Services Regulatory Authority is responsible for the regulation of property managing agents and promotion of consumer awareness[105]. Its primary role is the licensing and regulation of auctioneers, estate agents and letting agents. It maintains a public register of licensees, including managing agents, which took effect from 6 July 2012.

12.52 The Authority also ensures that all client monies, including service charges and sinking funds, are held by licensed agents in clients' accounts. Rigorous conditions are set for applicants for licences. These include proof that the applicant has the required level of professional indemnity insurance as well as certification by a suitable qualified person that proper financial and control systems are in place for the protection of clients' money.

12.53 The Authority has produced a Code of Practice for Property Services Providers which is currently voluntary, although there is a power to make it legally binding. If it is not complied with a complaint can be made to the Authority and the licensee will be subject to the disciplinary procedures of the Authority. The Authority's remit includes investigation and adjudication of complaints made against property service providers.

12.54 Operation of a property management agency in the absence of a licence is an offence. Investigations can be made into the practices of managing agents in order for the Authority to satisfy itself of compliance with the standards that are set. Any person can make a complaint in writing against a licensee in relation to the provision of a property. The Authority will establish

[105] See Chapter 12 – Law Reform in other Jurisdictions.

a property services compensation fund to which all licence holders are required to contribute so clients can be compensated for losses caused by licence holders' actions.

UNFINISHED HOUSING DEVELOPMENTS

Republic of Ireland

12.55 In the Republic of Ireland there have been serious issues with unfinished housing developments, which have been very problematic for residents. The government sees this as a matter of national concern and has taken the decision to prioritise it. As a first step, in order to establish a proper evidence basis for action, a national survey was undertaken. The survey inspected 2,876 development sites and of these found 2,066 unfinished.[106] Unfinished developments are defined as housing schemes that have been commenced but have not been completed in that building works are outstanding. These developments have been distinguished from those older completed estates that may have more minor defects and are not in such serious need of a rescue plan.

12.56 An Advisory Group was set up to advise on actions to ensure the effective management and resolution of the unfinished housing developments. In May 2011 the Advisory Group published its report, following which the government announced a range of actions to address the problems. Not all of the 2,066 unfinished housing developments were found to be seriously problematic. Local authorities were asked to categorise the unfinished housing developments in their areas, under the following headings:

[106] It recorded 701 as effectively complete and 109 as having no substantial works commenced.

- Category 1: Developer present and active;
- Category 2: Developments where a receiver had been appointed;
- Category 3: Developer present but not active;
- Category 4: Abandoned developments (no developer present) with serious public safety issues.

12.57 From the start of the initiative on unfinished housing the initial focus was to establish effective co-ordination mechanisms at national and local levels in particular and to create a more strategic approach across a range of agencies and bodies to finishing housing developments. A related priority was the development of site resolution plans to bring significant improvements in living conditions to residents on unfinished developments.

12.58 In addition, the government, working with local authorities, immediately prioritised action on improving public safety on 128 developments in category 4 with further developments targeted for action through NAMA[107], and the Health and Safety Authority. Actions were also taken on developments that were not regarded as being as problematic as the category 4 developments but which had not been completed in line with the original planning permission. In many cases, it was recognised that such developments might need a longer term to resolve them, including amendments to the original planning permission.

12.59 In July 2012 an Interim Progress Report on Actions to Address Unfinished Housing Developments was published. The government recognised that, while it would take some time to progressively deal with

[107] National Asset Management Agency.

developments with significant completion issues, co-ordination of key stakeholders – developers, funders, state agencies, local authorities and local residents would start to yield tangible results immediately. It also reported on the particular forms of action taken.

Completed developments and ongoing work

12.60 The Progress Report confirmed that, at the end of April 2012 the local authorities, under the direction of the National Co-ordination Committee on Unfinished Housing, had provided statistics showing:

- 136 developments have had site resolution plans completed with a further 75 unfinished housing developments being completed and taken over by the relevant authority for future maintenance purposes;

- 523 developments are currently being resolved through action by the developer / receiver;

- 137 category 3 sites, held by NAMA as security for loans, are being assessed for future site resolution plans;

- 636 developments are the subject of current legal enforcement proceedings, statutory notices, etc.

Public safety initiative

12.61 The government recognised that the most serious public safety issues should be given priority and it targeted funding of remedial work for this purpose. Whilst it was acknowledged that it was difficult to make every site safe, considerable efforts were made to ensure that the owners of development sites were made to honour their obligations from a public safety perspective. In some cases, the relevant local

authorities had to step in to address public safety concerns.

12.62 In relation to public safety work it was reported that:

- 128 developments have been approved for funding;

- 29 developments are having urgent remedial works funded by NAMA through debtors / receivers to address public safety related concerns;

- 20 sites have been addressed through action by the Health and Safety Authority in ensuring that developers are complying with statutory health and safety requirements.

Social housing benefit

12.63 Notwithstanding the priority of public safety issues, government action was also focused on bringing vacant housing into beneficial use including identification of opportunities to purchase and / or lease suitable houses for social housing. It has been reported that NAMA has identified 3200 homes as being available for potential use for social housing purposes and are being progressively assessed by housing authorities and approved housing bodies.

Other initiatives

12.64 A range of other initiatives have also been activated:

- The government has published a best practice guidance manual for managing and resolving unfinished housing developments coupled with an agreed code of practice and a guide for residents;

- NAMA has instituted a dedicated process that works with local authorities, developers / receivers and the

government in ensuring that effective site resolution planning is carried out in respect of the developments that come within the remit of NAMA;

- The government has issued a circular to permit local authorities to impose a derelict sites levy on unfinished developments which can be accumulated to enable the acquisition of abandoned sites if necessary; and

- Work is progressing in developing further guidance on the roles and responsibilities of receivers and local authorities and a more standardised approach to planning securities and bonds.

New priorities

12.65 For the year ahead, from July 2012, in addition to continuing the ongoing positive work, new priorities will include:

- Monitoring to ensure effective implementation and translation of the various enforcement and site resolution planning activities into practical impact on the ground;

- Continuing to ensure vacant homes that are in suitable locations and in good condition are brought into beneficial use to meet housing needs;

- Identifying any residual cohort of developments that may not be capable of long term beneficial use and, in conjunction with their owners, funders and the relevant authorities develop and implement proposals for these developments, including clearance where necessary;

- Further improving the data on unfinished housing developments and focus on those portions of the

developments in a seriously problematic condition; and

- Finalising clearer standard guidance on matters such as development bonds, the phasing of developments and relevant matters to avoid a repeat of the past as and when the housing development sector starts to recover and there are housing developments commencing into the future.

CHAPTER 13 – MANAGEMENT PROBLEMS

INTRODUCTION

13.1 The majority of apartment developments were built between the mid-1990s and 2007 when the construction industry was enjoying a period of expansion and growth[108]. Most apartments are relatively new and provide a form of modern living arrangements with elements of shared ownership. It seems that, to begin with, some of the owners did not appreciate the distinction between owning an apartment in such a development and ownership of a more traditional form of housing. The lack of information and explanation about rights and responsibilities continues to create some problems. Other problems, including those of a more practical nature, stem from the management arrangements.

LIVING IN AN APARTMENT

13.2 At an early stage of this Project the Commission sent out a questionnaire to evaluate the legal and practical arrangements which are used for the ownership and management of apartments. The questionnaire also asked for evidence of the problems experienced in practice. From the responses to the questionnaire and from further stakeholder involvement, the Commission was able to identify a number of key issues that relate to the management of common areas, shared facilities and services. The Commission also liaised with a range of individuals with experience in this area both in a professional and personal capacity, which was

[108] See Chapter 1.

extremely helpful in assessing the problems in practice.

13.3 Although the evidence of the problems that have been experienced by residents raises concerns about the current structures that are in place to provide for the maintenance and upkeep of communal areas and services, this experience is not universal. It is worth noting that there were a number of responses to the questionnaire where the replies indicated that the development was working well without major problems. This often seemed to be the case in smaller developments or where there were a number of owners willing to take an active interest in the running of the management company and the maintenance of the development.

13.4 It seems that for some owners there is much confusion about management responsibilities and obligations in residential developments generally, but more especially in blocks of apartments. This lack of understanding in relation to roles is further compounded when owners completely misconstrue the nature of their own ownership interest.

PROVISION OF INFORMATION

13.5 In the first place, when buying a new apartment, the information available to prospective purchasers may be misleading. Although a majority of respondents to the Commission's questionnaire confirmed that they had details of the scheme relating to the apartment development clearly explained to them, there was only one instance where an agent prepared a guide to living in the apartment development detailing the obligation of the management company and the obligations imposed on the owners[109].

[109] Victoria Square in Belfast, operated by Property One.

13.6 Many of the purchasers are first time buyers with no prior experience of owning property. Others are older people who are downsizing and wish to purchase a property for which they have less responsibility. Yet others are investors who are primarily concerned about securing a good income but have not thought sufficiently about the financial outgoings required. In all these cases misleading marketing may create an impression of the convenience and affordability of apartment ownership which can cause unrealistic expectations.

13.7 It is apparent that there is a need for some degree of co-operation and communication in the running of the development which some owners have not considered when choosing to buy an apartment with shared facilities and common areas. Often the owners imagine that apartment living is effortless and fail to appreciate that it requires certain mutual and collective responsibilities. When the development is marketed to attract potential buyers, developers may be reluctant to fully disclose all the costs and obligations in case it deters the purchasers.

13.8 Particular difficulties can emerge from lack of engagement where apartment owners are disinterested in their role as members of the management company. This may stem from the owners having a short term perspective on their ownership or have lives that are so busy they have no time to take an interest. In cases where the apartment owners are investors who do not live in the property, they may have little interest in the management and may keep a distance from the day-to-day issues. Also, some of the residents may be first time buyers who do not have a long term interest because they are planning to move on as soon as their circumstances permit.

MANAGEMENT – GENERAL

13.9 The present structure of apartment ownership is undoubtedly complex[110] and many purchasers are confused about the roles and responsibilities of the parties involved. There is particular lack of clarification in relation to the management company and the managing agents. Many of the problems relating to ownership of an apartment concern management issues as well as a lack of clarity surrounding the responsibility of the managing agents.

13.10 New problems have emerged since 2007 with a fall in the value of property and an oversupply of apartments in a prolonged period of economic difficulty. These factors, coupled with the personal financial challenges faced by apartment owners, have combined to put pressure on management arrangements. There is evidence that some developments are poorly maintained, showing features such as a lack of long term maintenance plans or provision and a shortage of finance to fund either improvements or repairs. If the apartment owners recognise the shortcomings of the managing agents or wish to alter the management arrangements in any way, they find it difficult to do so. They are not aware of their rights or the procedure to follow. They may find it difficult to contact the other owners, to arrange a meeting, to send out a letter or to obtain the necessary numbers to support a proposed change.

13.11 In Northern Ireland there is no compulsory regulation of managing agents or companies which provide property management services[111]. Apartment owners and occupiers feel that it is very difficult to obtain

[110] See Chapter 6.

[111] Any property management companies registered and operating in Northern Ireland can only be affiliate members of the Association of Residential Managing Agents, which is fairly limited in value.

redress for any grievances or to find a solution to alleviate the problems that they were experiencing. One recurring theme in the comments made in the responses to the Commission's questionnaire was that there are no organisations in Northern Ireland which can offer support or advice on the issue of apartments[112].

13.12 From the first moment that potential apartment purchasers look at the marketing for the development, the information can create a misleading impression. Some of the owners who responded to the Commission's questionnaire gave examples of being confused from the outset by agents or other professionals about the role of the management company and the managing agents. For example, they were told that the agents could not be removed or that the development could not be self-managed. It seems that the authority and role of the management company was not properly explained to them.

13.13 Although some developments are well managed and the residents are generally satisfied with the management arrangements, it was notable in the responses to the questionnaire that there is a range of attitudes towards becoming involved in the management decisions. A number of more active residents, or those with particular grievances, complained about the general apathy of other apartment owners and lack of desire to participate in the running the management company. There were also instances of the management company being controlled in an authoritarian manner by two or three dominant individuals who do not take the views of others into account.

[112] This service is not within the remit of the General Consumer Council, Citizens Advice Bureau or Housing Rights Service.

13.14 Issues relating to maintenance may be compounded by lack of communication between the parties. Some respondents commented on the difficulties of communication with the managing agents, and others indicated that it was not easy contacting one another, especially when apartments were sold and the identity of the new owner was not known. Examples were also given of a failure to return telephone calls and to respond to requests, as well as delay in addressing the issues.

13.15 Some owners reported that they were not given copies of the important documentation, such as the lease or financial information. They did not feel that they were properly informed about their rights and responsibilities and did not know how to deal with disputes. Further, there is perceived to be a lack of appropriate dispute resolution mechanisms and a failure to provide information for apartment owners about means of enforcement of obligations or pursuit of possible remedies.

13.16 There also appear to be particular difficulties during the interim period of the development prior to the sale of the final apartment when some owners have taken up occupation. That period may last for a significant time, especially in the current economic climate. The developer can be reluctant to give up control of the management company until the development is complete and all the apartments are sold. During this period the developer's nominees will collect service charge monies for the apartment owners who are in place.

13.17 It is good practice for the developer to make some contribution towards the maintenance of the development for the apartments that remain unsold but very often this does not happen, resulting in the costs of running the development being borne by fewer owners. Maintenance issues may arise during

the interim period and the service charge monies collected during this period may not be put to the best use. For example, the developer may use the service charge monies to deal with snagging issues which are clearly the sole responsibility of the developer and not the management company.

MANAGEMENT COMPANIES

13.18 A recurring them emerging from the responses to the Commission's questionnaire was the problems with the management structure and the ability of the apartment owners to address them[113]. As there is no legal obligation to establish a management company, even if its name appears in the documentation, the apartment owners may find that they are powerless and unable to take action when the appropriate arrangements are not set up from the start.

13.19 There was a lack of transparency in some instances about the boundaries between the management company and the managing agents. Sometimes the agents were taking decisions that were the legal responsibility of the management company to do so. This was not helped in situations where the articles of association of the company were too vague and general to deal with the issues required.

13.20 Several of the respondents considered that the corporate status and structure of management companies was excessively bureaucratic and cumbersome. The administrative obligations were viewed as very onerous and the responsibilities of the directors were often found to be time consuming for busy apartment owners who had taken on the role in a voluntary capacity. For others who had little

[113] See Chapter 7 – The Company Law framework.

engagement with the management company, there was no means of encouraging involvement.

13.21 The statutory requirements for a trading company were not regarded as suitable for the function and purpose of a property management company. Particular problems were experienced by apartment owners when a management company was struck off or accumulated penalties for non-compliance with its statutory obligations. There was also evidence that the formal structure of the company intimidated some apartment owners and that in turn led to apathy on their part.

13.22 A number of apartment owners highlighted a lack of meetings of the management company as one of their concerns. Others mentioned a failure of residents to attend meetings or to have a formal procedure. Details were given of instances where decisions taken at meetings were not followed up or were later overruled by the agent. Some respondents felt that it was difficult both to reach decisions and to enforce them. There was a perception of lack of enforcement mechanisms to challenge breaches of the rules of the development or covenants in the lease. This led to a conclusion that the rules had no teeth and could be ignored by defaulters.

13.23 In large developments the apartment owners might be members of more than one management company – for example, one management company for the block of apartments and one management company for the open spaces and amenity areas of the whole development. Owners in such situations pointed out that there could be drastic variations between the operation of the two companies. Due to its size, the management company for the whole development was likely to be more unwieldy and to have difficulty in obtaining agreement to reach decisions.

13.24 Particular difficulties arise when the management company ceases to operate because of lack of involvement by the apartment owners. When the situation deteriorates to the extent that the management company is struck off the Companies Register, significant effort is required on the part of the members of the company for it to be restored[114]. This is in nobody's interests and the consequences can be particularly difficult because no legal transactions can take place until it is reinstated. In the meantime the development may fall into disrepair because it is not being properly maintained. Apartments cannot be bought or sold while the management company is not functioning.

MANAGING AGENTS

13.25 The managing agent is employed by the management company and there should be a contract setting out the terms of the management agreement between them[115]. Very few of the respondents to the Commission's questionnaire stated that they were given a copy of the contract and some drew specific attention to the difficulty in gaining access to contracts or documentation. One response described a situation where the agent did not appear to have been appointed at all but simply appeared and carried out the necessary work. Undoubtedly there are practical difficulties in removing or changing the agent and there is potential for the existing agent to be obstructive by withholding information or documents.

13.26 Issues have arisen where apartment owners were dissatisfied with the level of service provided by the managing agent but were prevented from taking action to terminate the Management Agreement either

[114] See Chapter 7 – The Company Law Framework.
[115] See Chapter 8 – Management of Apartments.

by the terms of the management agreement itself or by being told it was not within their power to do so. Some respondents drew attention to a high level of management fees and a lack of guidance as to reasonable levels for the services provided. They also identified a problem in the absence of detail in the financial statements, the accounts, minutes of meetings and the calculation of the service charge. There appeared to be a widely held view that there was a lack of transparency in the work of the agent and the decision making process. There were communication issues and it was unclear for example how contractors (gardeners, painters, cleaners etc) were appointed.

13.27 In some cases, the apartment owners would prefer to manage the development themselves, particularly where it was a small development and there were not very many units. Although there is evidence that such an arrangement can work well in such cases, a few owners felt that they were being dissuaded from doing so. They were unable to understand the full reasons other than that the agents wished to charge a fee for continuing to manage the development. In contrast, there is also evidence of situations where management companies and apartment owners are disinterested in the maintenance of the development but the managing agents out of necessity, act with little guidance which may or may not be effective.

FINANCIAL

13.28 Some of the respondents to the Commission's questionnaire commented on a lack of transparency in financial arrangements and decisions relating to management of apartments. Some owners mentioned that they did not have any guidance by which to assess the reasonableness or otherwise of the

management fees. When the development was first established in some cases it appears that the initial financial costs were deliberately set at a low level in order to attract buyers, but were later increased. The residents had no means by which they could have known that the charges were unrealistic.

13.29 In addition, a number of examples were provided suggesting that managing agents were acting in their own best interests when instructing service providers. In some instances they had pre-existing arrangements which the apartment owners did not consider were necessarily best value or providing an appropriate level of service. A note of unease was expressed about invoices which are often made out to the managing agents. The result is that the management company and the members have no means by which to check them.

Service charges

13.30 A significant number of apartment owners also complained about not having any meaningful or detailed financial information and an absence of consultation, particularly in the case of increases to the service charge. If the managing agent did not have a separate designated account for the management company, the owners did not have access to the information about the account and they felt that they should have been entitled to it. Some concern was expressed about the holding of money paid by the apartment owners to the management companies because there was no requirement to pay interest on the funds held and in some circumstances it did not appear to be appropriately ring-fenced.

13.31 Where the service charge is paid to the agent's bank account there is more scope for abuse and apartment owners are not confident that they are being kept fully informed. Owners detailed particular instances when

they felt that increases were not being fully justified. On occasion they are asked for additional payments above and beyond regular service charges. They intimated that they are not able to obtain details of matters about which they are concerned and that they appear to have no right to verify the charges.

13.32 There also seemed to be a scarcity of knowledge and understanding about apportionment of the service charge between the apartments and whether all the apartments are equally liable for all the costs. For example, owners are not clear as to whether ground floor apartments are contributing to lift maintenance or non-car owners are paying towards parking spaces. In addition, owners are not clear as to whether the developer pays contributions for the apartments which have not been sold.

13.33 The point was made by some apartment owners that they had no information as to the best course of action to take when they had an issue in connection with the service charge. Often the first reaction is to refuse to pay the service charge as a means of expressing dissatisfaction with the level of service provided by the managing agent. Alternatives such as seeking legal advice, raising the matter formally with the management company, or calling an extraordinary general meeting of the company were rarely investigated.

13.34 When one apartment owner fails to pay their service charge, this can led to others following. This in turn can be the cause of protracted and acrimonious disputes between the apartment owners, the management company and the managing agents. In these circumstances, it seems that some management companies feel powerless and do little to address the situation whilst others may take proceedings against the recalcitrant apartment owners. In the worst cases it can result in the

complete breakdown of services which is in no-one's best interests.

Sinking fund

13.35 Although more than half of the respondents to the Commission's questionnaire confirmed that they make contributions to a sinking fund, they highlighted a number of points about the use of the money saved. There was some difficulty about reaching agreement on starting to contribute to a sinking fund, about the amount to be paid into it, about it being held in a separate account and the work for which it could justifiably be used. It was clear that there were some owners who would not or could not contribute to the fund. Those with a short–term perspective (see above) had no interest in the long term maintenance of the building.

13.36 Some complaints were made about saved funds being used inappropriately where the management company paid for repairs which should be the responsibility of the individual apartment owners and vice versa. There is another issue in relation to sinking funds in that there is no requirement for the monies to be ring-fenced or separately invested to ensure that they are retained to be used only for major capital items or emergencies.

Insurance

13.37 One particular issue that was raised by several respondents to the Commission's questionnaire was in relation to insurance for the block of apartments. There is no obligation in law to insure the property but a covenant should be imposed on the developer in the lease to do so[116]. This obligation is subsequently transferred to the management company and is one of

[116] See Chapter 6 – Title to an apartment.

the matters that the managing agent is contracted to arrange. However, apartment owners report that the rates obtained and the premiums paid are not always competitive. They say that the agents sometimes act as brokers and are paid a commission which may not be declared. There is no incentive to get a competitive quote and the issue is too much in the control of the agents.

Debtors

13.38 A number of respondents expressed concern about the effect of debtors on the general welfare of the development. They recognised one of the potential consequences of service charges falling into arrears was a lack of ability to keep the building in good repair. They worried about attracting liability for failure to maintain and were unclear about their own responsibility when the arrangement broke down. They were apprehensive about the effect on them individually of a fall in value of the property. A more immediate concern was of extra financial demands caused by insolvencies of other owners, repossessions of other apartments and short term lettings of vacant property in the development.

13.39 Currently there are a significant number of cases where managing agents issue proceedings in relation to outstanding debts. This can be a stressful experience for apartment owners who may have insufficient means to be legally represented or they may feel too intimidated to defend themselves However, managing agents feel that it is the only means to deal with debtors in the development.

UNCOMPLETED DEVELOPMENTS

13.40 There are clearly particular problems with developments which are uncompleted and developments where the developer has become insolvent. Apartment owners who live on such developments face serious difficulties. There are examples of cases where the roads have not been made up and are not adopted, as well as other elements of the infrastructure not being in place, such as the sewers. Some owners expressed concern about not being able to obtain certificates for their apartment, such as for building control, when the whole development was only partially complete.

13.41 When asked about any outstanding items which the developer failed to complete, respondents gave numerous examples. The nature of the complaints varies from the relatively trivial minor snagging issues (for example, poor finish, internal doors not closing properly, intercom not working, pillar caps not added to pillars on the front walls, car park spaces not marked out) through the quite considerable problems (for example, leaking roof, guttering not finished so causing blockages and leaks, car park not completed, waste ground not landscaped, remedial work outstanding, poor workmanship) to the fundamental (for example roads and sewers not completed, no street lighting, lift not installed living in a building site because other parts of the development still under construction).

CONCLUSION

13.42 This Chapter has highlighted the key issues drawn to the attention of the Commission by the respondents to the questionnaire. From this it can be seen that the current arrangements may work effectively if all the

parties co-operate and meet their respective responsibilities. However, there is a considerable body of evidence that suggests the current arrangements for management and maintenance of common areas and services in blocks of apartments, which are put in place by the developer, are either inadequate or ineffective.

13.43 The existing system for the maintenance and repair of apartments is dependent on the parties actively engaging on a collaborative basis with each other. Where this does not occur, shared amenities and common areas can quickly fall into disrepair. When the arrangements collapse, the ability of the apartment owners to enjoy their property is impaired and the value of the property may be adversely affected by the poor state of repair of the fabric of the building. In serious cases, the development may become dysfunctional when the parties are unable to meet their financial commitments or when co-operation and communication breaks down completely.

CHAPTER 14 – LEGAL PROBLEMS

INTRODUCTION

14.1 As well as the more practical problems experienced by the owners of apartments, there are difficulties in making best use of the legal structures to establish a framework under which a property development can effectively operate.

14.2 As described in Chapter 13, at an early stage of this Project the Commission sent out a questionnaire to evaluate the legal and practical arrangements which are used for the ownership and management of apartments.

LEASEHOLD TITLE

14.3 There were a range of different aspects of the lease on which the respondents to the Commission's questionnaire commented.

Documentation

14.4 Leases by their nature are complex legal documents and therefore may be drafted in archaic language that is opaque and may be difficult to understand. A number of the respondents commented on this because they had sought clarification of an issue by looking at the lease, but found it unclear or incomprehensible. A few respondents expressed a view that the definitions in the lease were insufficient or indistinct, especially in relation to the common areas and the apartments themselves. It should also be recognised that there are occasions where the

drafting is defective and adequate arrangements have not been made for ownership of the communal areas or responsibility for the shared facilities.

14.5 Several respondents drew attention to the importance of being furnished with copies of the legal documentation and in particular, a copy of the lease of the apartment, so that they were able to refer to it for assistance. They seemed to be looking for more guidance in general on the rules because not all the issues they considered relevant were covered by the lease. Some of these are issues that might be more appropriately covered by a set of house rules, for example, putting up washing lines, hanging clothes on balconies, leaving or storing items in the corridors.

14.6 On occasions it was not clear which party was responsible for rectifying the problem – the apartment owner, the managing agents or the management company. Some respondents mentioned they were aware that unanimity was required to amend the lease, but others were aware that it would be expensive and complicated, if it was possible at all.

Enforcement of covenants

14.7 The lease is a useful means of creating a framework of enforceable rights and obligations between the parties and this is one particular aspect that was highlighted by several respondents as being especially troublesome. They explained that the issue of the enforcement of covenants was important to them and expressed the view that they would like the process of enforcement to be more straightforward. They emphasised in particular the need to be able to enforce mutual covenants against other apartment owners. For example, covenants to repair or to make good any damage. They recognised that they were generally reliant on the management company acting on their behalf in this respect and also that successful

pursuit was dependent on the effectiveness of the management company.

Transfer of reversionary interest

14.8 Approximately one half of the respondents to the Commission's questionnaire confirmed that the developer's reversionary interest in the building and the common areas had been transferred to the management company. Others living in developments where all the apartments had been sold indicated that it had not been done, despite the fact that the developer was legally required to do so under the terms of the lease. A significant proportion of the respondents did not know whether the transfer had taken place.

Legal structures for ownership of open spaces

14.9 Several comments were made by the respondents in relation to the management and responsibility of open spaces in developments[117]. The developers who responded explained that from their perspective there is a limited choice of management arrangements. The costs involved in a transfer of the land either to a local district council or to a charitable company such as the Greenbelt Company, are expensive. Therefore, a transfer of the land to a management company is the preferred option for the developers.

14.10 In some cases the owners of the properties in the development were not aware of their own obligations in relation to the open spaces as members of the management company. In other cases, the fees seemed to be high in proportion to the low level of the services provided. A few of the respondents mentioned a lack of transparency about the maintenance arrangements for the open spaces. For

[117] For more detail see Chapter 10 – Open Spaces.

example, there was no information about the works carried out or the accounts. The problem of some owners or tenants not being interested in taking a long term view occurs again in this context. Frequently a significant number of the owners do not wish to be involved and it can be difficult to find the necessary numbers to reach a decision.

COMPANY LAW

14.11 The company law framework as a whole can be difficult for individual apartment owners to use. A few of the respondents to the questionnaire identified the legal structure of the management company as a constraint on resolving problems. They remarked that the standard articles of association are geared to covering all types of commercial and trading companies but the statutory default procedures are often not appropriate or necessary for property management companies.

Documentation

14.12 Like the lease, the management company's legal documentation can be complex and difficult to understand. There is the added complication that it must be read in conjunction with the lease. The standardisation of the documentation to comply with the statutory requirements has its drawbacks because the provisions are not specifically tailored to the requirements of a particular development. For example, the model articles of association which are usually adopted without modification are complex and lengthy; whilst many provisions are not relevant to the operation of a management company.

Company procedures

14.13 Some aspects of company law could be viewed as unnecessary, given the limited role of a management company e.g. filing obligations. On the other hand, the fact that there is no longer a requirement to hold a general meeting is perhaps unhelpful in the context of management companies, particularly where company law procedures are not well understood and apartment owners may not realise that they have the power to call a general meeting. Some respondents considered that it would be of benefit to have an annual general meeting.

14.14 Some company law provisions are unduly cumbersome, such as when a management company is struck off. The point was made by a few respondents that restoration is an expensive and slow process given the serious consequences. Also, the penalties are unduly punitive in this context.

14.15 The directors of a management company may innocently be failing to comply with requirements. Yet failure to comply has serious consequences for apartment owners. Apartment owners who take on the role of a director may also not be aware of the legal duties attached to this role and the consequences of not carrying out those duties.

CONCLUSION

14.16 Some of the responses to the questions about the legal structures employed lead to further questions about possible alternative forms of title. It is generally acknowledged that the structure of the framework under which developments are established is complicated. This raises further questions, such as whether the use of the long lease is the most

appropriate means of creating a framework of rights and obligations between the parties. There is also some doubt as to whether the present company structure is the most effective vehicle for a residential property management company. A simpler mechanism might be considered as a more suitable alternative to the existing current company law framework.

14.17 It is also recognised that all the documents, both those that relate to the title of the property and those that relate to the management company, are very complex and may be difficult to understand. However, any argument for simplification must be balanced against the need to provide an effective legal framework for the ownership and management of developments.

CHAPTER 15 – ALTERNATIVE LEGAL STRUCTURES FOR OWNERSHIP OF APARTMENTS

INTRODUCTION

15.1 Although living in apartments and other forms of multi-unit developments has become commonplace in Northern Ireland only comparatively recently, in other jurisdictions there has been experience of communal living over a much longer period, particularly in increasingly crowded cities and areas of high population density. The development of a law suitable for these structures has been problematic in many jurisdictions.

15.2 Statutory schemes creating new models of property ownership provided the obvious answer and variations on the theme have been introduced in several other jurisdictions, both common law and civil law[118]. While the concept of apartment ownership was unknown in Roman law, the need for statutory regulation has long been recognised in Europe. A statutory framework of strata title to govern private property in multiple occupation has been adopted as part of the civil code in many countries[119]. With a similar expansion of high rise buildings and increase in mixed use developments, legislation was also enacted in common law jurisdictions to facilitate such

[118] For more detail see Law Reform Commission of Ireland Consultation Paper on Multi-Unit Developments (LRC CP 42-2006), chapter 9.

[119] For example Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and Switzerland.

development[120]. In the United States of America comparable legislation was enacted for condominiums, which are developments comprising of units of individually owned accommodation with access to and use of common areas.

15.3 This new legislation generally enabled more flexible structures to be developed to adapt to situations where units or blocks or residential accommodation were constructed in conjunction with facilities for office accommodation and retail units. Many of these statutory codes were constantly evolving and being adapted to the changing needs of society. Some countries now have up to five generations of apartment statutes, responding to deficiencies in the first attempts. Despite experiencing similar problems with the ownership and management of apartments, there was no legislation relating to apartment ownership in England and Wales, Scotland or the Republic of Ireland until very recently[121].

15.4 Given the universality of the ownership and governance issues that are common to flats and other high density housing developments it is interesting to look at the way in which other countries have sought to address the same issues within the context of their own jurisdiction[122].

COMMON INTEREST STRUCTURES

15.5 Common interest ownership is a form of multi-ownership private housing that is prevalent in many

[120] Beginning in Australia with the NSW Conveyancing (Strata Titles) Act 1961 (No. 17 of 1961), followed by similar legislation in New Zealand, South Africa and Canada.
[121] See Chapters 12 and 13.
[122] See Douglas Robertson and Katharine Rosenberry (Joseph Rowntree Foundation) '*Home Ownership with Responsibility – Practical Governance Remedies for Britain's flat owners'* (2001).

other countries, such as Canada, Australia and the United States. There are different schemes with common elements in different jurisdictions, tailored to the distinct legal and cultural contexts in which each scheme is operating. Under such a scheme an apartment owner has a freehold interest in their individual property plus an ownership interest in the common parts, or a compulsory interest in the community association that legally owns and controls the common parts.

15.6 There are a variety of common interest arrangements, many of which share common features. The two distinct legal structures are condominium / strata title and co-operative schemes. There are other arrangements which may be more similar to one or other of these structures.

CONDOMINIUM OWNERSHIP

15.7 Condominiums are a form of statutory ownership and are a common form of ownership in many countries, such as the United States, Canada, Australia, India, Norway and Sweden and Denmark. The commonhold structure in England and Wales is a form of condominium ownership. In each country there are different statutory features. In general in a planned community the unit owner owns an individual freehold interest in the apartment together with an undivided co-owned interest in a corporation which holds the common areas in trust for the unit owners. A condominium is governed by a master document and usually also by a separate set of rules of governance. The common areas are managed by a homeowners association which has rules, covenants and restrictions for the use of the space. The association calculates the service charge and has the legal power to collect it.

HOUSING CO-OPERATIVES

15.8 The concept of the housing co-operative predates condominium legislation and provides a more flexible model of community living. The structure has been widely used in the United States, Canada, Australia and some European countries, such as Germany, Finland and Sweden. In a housing co-operative the entire structure is owned by a corporation, which is a distinct legal entity. Each apartment owner has a lease for a unit within the building coupled with an interest in the corporation.

15.9 Housing co-operatives may take different organisational forms and the lease of the units may be either short term or long term, with either equity or non-equity ownership in the co-operative association. Each resident or resident household has shares in the co-operative association. Co-operative ownership is distinct from condominium ownership because the unit owners are more involved in running the housing co-operative. The members may screen and select who may live in the cooperative and make their own arrangements for election of the board of directors.

15.10 The co-operative holds all the title to the property and structure of the buildings. It also bears the cost of maintaining and repairing the buildings. The shares in the co-operative may have a market value and shareholders may sell at the best price obtainable. Under some arrangements, it may be possible to raise mortgage finance on the co-operative interest.

DIFFERENCES BETWEEN CONDOMINIUM AND CO-OPERATIVE STRUCTURES

15.11 The principal difference between the condominium and co-operative systems lies in the arrangements

made for the common areas. If there is undivided co-ownership or jointly owned interest of the common areas it is a condominium structure. If a corporation owns both units and common areas it is housing co-operative. A planned community is similar to a co-operative but it is an association which owns the common areas under that type of structure rather than a corporation.

15.12 A condominium is a creature of statute and must follow the framework laid down in the legislation. This means it can be inflexible, in contrast to a co-operative which is more adaptable and capable of being modified to suit particular circumstances.

ADVANTAGES OF A STATUTORY SCHEME

15.13 The factors which influenced the introduction of statutory schemes in common law jurisdictions included a desire to simplify titles and to remove conveyancing difficulties. There was an objective to facilitate freehold ownership of individual units and apartments in developments and bypassing deficiencies in the common law in relation to the enforcement of freehold covenants. This caused particular issues in England and Wales and was a major incentive for reform of the law. In Northern Ireland this is not a particular problem because of the tradition of creating leases for very long periods and the enforceability of covenants under leasehold law[123].

15.14 Another benefit of a statutory scheme is that it imposes a strong element of standardisation and statutory regulation on the legal structure of a development. This ensures that individual apartment

[123] The Property (Northern Ireland) Order 1997 No. 1179 (N.I. 8), Article 34 sets out rules for the enforceability of new freehold covenants created after 10 January 2000.

owners have all the rights necessary for reasonable enjoyment. Thus most legislative models incorporate a scheme of mutual rights and obligations designed to regulate the relationship of the apartment owners between themselves.

15.15 The high degree of interdependence and sharing of common facilities gives rise to potential for disputes. There are also tensions in the management arrangements between the apartment owners and the management company. Effective enforcement of obligations, such as the observance of restrictions and payment of service charges, is crucial in the interests of the apartment owners as a whole. Many of the statutory schemes make provision for arbitration, mediation, and alternative dispute resolution.

CONCLUSION

15.16 Under all these arrangements the unit is owned in freehold, while the common parts of the building are either owned by all the residents or by an association, whose membership is composed of all the owners. These arrangements are set down in statute and regulations, and thus provide a degree of uniformity across all types of multi-owned dwellings. Having such a statutory management system in place has a number of benefits; purchasers are more likely to understand exactly what they have purchased; their role in the decision making process is clearly set out as is their responsibility for paying the monthly management costs; ongoing property issues are set within the wider realm of property governance. This arrangement also helps improve consumer confidence.

CHAPTER 16 – OPTIONS FOR THE LEGAL FRAMEWORK

INTRODUCTION

16.1 The central focus of this Project is to concentrate on the law and practice relating to apartments. The Commission is very aware of the pressing immediate problems of existing owners of apartments. It is examining the issues which affect apartments themselves as well as the structure of buildings and common areas in the development, both internal and external.

16.2 The intention now is to consider, as a matter of priority, offering solutions for people currently living in apartments and other developments with open spaces, who are experiencing difficulties with the management of the development. It is also important to consider options to address anticipated problems that may occur in future in respect of existing developments. A linked objective is to prevent the same problems occurring again on developments which have yet to be built.

16.3 There are a range of possible options for reform and improvement of the present system. The proposals may or may not extend to legislative change, and there may be more flexible solutions. It is important to think about new ideas and the provision of new mechanisms for dealing with disputes that have already arisen. The Commission is considering proposals that will enable people to resolve existing

problems as well as trying to ensure that the same issues do not arise in the future.

16.4 Any initiative should ensure that all parties are fully informed and are aware of their rights and responsibilities under the legal arrangements governing the development. Anyone interested in buying an apartment or other accommodation with shared facilities should be appropriately informed about the management arrangements for the development at an early stage before they commit to buying the property. They should be aware that living in this type of accommodation comes with responsibilities and involves a degree of engagement in the management arrangements. It is also important to ensure that developers and management companies recognise their own obligations and properly discharge their respective responsibilities

16.5 The obvious starting point for assessing a system of apartment ownership is its structure. One of the options for addressing the issues that currently arise in relation to apartments is to consider the introduction of legislation which would provide a statutory framework for the ownership and management of residential property with an element of shared services and facilities.

STATUTORY TITLE

16.6 As a basis for reform, the discussion should begin with a consideration of the adequacy of the existing forms of title and the degree to which the introduction of a statutory form of title might improve the situation for apartment owners. In effect, this means whether to propose legislation which would provide a statutory scheme of title for apartments, along the lines of the commonhold in England and Wales or the

condominium and strata title schemes in other parts of the world[124]. In order to consider this proposal, it may be useful to consider some of the motivating factors and objectives behind the specific legislation in other jurisdictions. These experiences are different from those in Northern Ireland in particular key respects.

16.7 As explained earlier[125], in Northern Ireland conveyancers have managed to facilitate creation of developments of apartments by using the well-established leasehold system. In this jurisdiction, apartments are sold by way of a lease for a very substantial term (which is virtually forever). Meanwhile, the freehold or residuary interest in the apartment and in the other common parts of the building remains vested in a landlord, usually the developer and subsequently a management company, to which the freehold interest is transferred.

16.8 In contrast with residential property, there has been no apparent demand for freehold ownership in the context of commercial multi-unit developments which have interdependent features of a similar nature to apartments, such as office blocks, or shopping centres. Indeed, quite the reverse is the case, because such commercial property is seen as an investment with a valuable income stream. The lessor, landlord or commercial property agent is normally content to retain an interest and accepts the responsibility for the property that goes with ownership.

16.9 In Northern Ireland[126], as in the Republic of Ireland, the leases are so long that the owners are unlikely to

[124] See Chapter 12 – Neighbouring jurisdictions.
[125] See Chapter 6 – Title to an apartment.
[126] It is recognised that not all ground rents are nominal, and that some particular developers have imposed quite substantial ground rents on the apartments they have built.

concern themselves with the issue of what happens when the lease expires. A lease of an apartment is commonly for a term such as 500 or 999 years at a nominal ground rent and therefore could not be considered as a wasting asset. The position of the apartment owners is very close to that of having the freehold and, therefore the length of the lease is not a factor which is driving an argument for freehold[127].

16.10 The other particular characteristic of apartment blocks and other residential developments with shared facilities or open spaces in Northern Ireland is that the management company is established at the outset as the body responsible for the upkeep and maintenance of the common parts. It is also the body to which it is intended that the reversion or freehold on the leases and the common parts will be transferred on completion of the development.

16.11 The apartment owners are the shareholders and members of the management company. As they own and control the management company themselves, the apartment owners are in a position to control what happens to the freehold, including what happens when the leases expire. Being members of the company owning the freehold of the entire development they could vote to sell the property for redevelopment or to have new leases granted in respect of their apartments.

16.12 Therefore, in theory at least, apartment owners in Northern Ireland already are in a very secure position. They have a high degree of control over their title and the way the development is structured from the legal point of view. Each resident directly owns a very long lease of the apartment and, as a member of the

[127] In England for example, the shorter terms of residential leases has led to greater problems with wasting assets and demands for leasehold enfranchisement.

management company, in which the freehold reversion in the apartment lease and the freehold of the common parts is vested, also owns, indirectly a share in the freehold.

16.13 Contrary to the position in other jurisdictions, there appears to be little appetite for freehold enfranchisement for apartments, because it is not perceived to be of any great advantage. There would be few benefits in the introduction of a freehold system or for a statutory scheme that developers would in future be compelled to use. There is a danger, as can be seen from the experience in England & Wales, that a compulsory statutory model would impose an undesirable rigidity[128]. There is an argument that developers, professional advisers and apartment owners should retain a large element of flexibility in the sort of schemes which they devise to their requirements in the circumstances of each individual development.

16.14 There is also the point that any new statutory scheme of title would require major legislation and would only be available for new developments after it came into operation. There would be issues about retrospective application or the conversion of existing developments to a new regime and its suitability for that purpose. Unless it was simple and patently greatly advantageous, existing owners would be unlikely to convert on a voluntary basis. It would be completely impractical to suggest compulsory conversion without undertaking a proper analysis of all the legal and practical issues involved. Overall, it is relatively improbable that a radically different and elaborate scheme would ultimately be the most attractive solution to present apartment owners.

[128] See Chapter 12 – Schemes in Neighbouring Jurisdictions.

Q1: The Commission is not inclined to propose the introduction by legislation of a new statutory form of strata title for apartments. Do consultees agree?

COMPANY LAW

16.15 Another potential area for reform is the legal structure of the management company. In Northern Ireland it is common practice for a management company to be set up to take on the responsibility for the repair and maintenance of the common parts of each building and of the development. In other jurisdictions, such as England & Wales, and Scotland, it does not appear to have been common practice to incorporate a management company, intended to be owned and run by the residents, as part of the legal framework of the development at common law. As a result, part of the solution in those jurisdictions has been to confer statutory rights by way of legislation on the apartment owners to enable them to set up such a company should they wish to do so.

16.16 Although there does not appear to be strong opposition to the current arrangement whereby responsibility for management of the development lies with the management company which is owned by the apartment owners, it is apparent that the company structure is cumbersome. There is also evidence of a lack of understanding amongst residents about running a company and a lack of information as to taking an active part in its work. The structure of the private limited company may not be a suitable vehicle for a company which does not trade and the sole purpose of which is to manage a private residential housing development.

16.17 In Northern Ireland management companies are usually private limited companies limited by shares. This means that the company has shareholders and that the liability of the shareholders to creditors of the company is limited to the capital originally invested (the nominal value of the shares). If it is thought that there is a risk of being held liable to a greater extent than is acceptable by using a company limited by shares, there may be an alternative model. As a matter of practice, there may be some merit in considering a private limited company limited by guarantee as an alternative, because it has some attributes that may be more suitable to management companies[129].

16.18 A company limited by guarantee is a model sometimes used for non-profit making organisations such as members clubs (e.g. sports clubs), professional societies and charities. With a company limited by guarantee the members guarantee, in the event of the liquidation of the company, that they will pay a specified sum to the creditors, usually £1. Their liability is limited to that amount. Thus, the members are not shareholders as there are no shares and no capital. The members do not receive any dividend. The benefit to the members is not a direct financial one of receiving dividends, but the broader one of being a member of the organisation and at the same time being protected by limited liability.

16.19 In the Republic of Ireland the Company Law Review Group is undertaking a review of company law in that jurisdiction which is intended to include provision for a new designated activity company which would more closely suit the needs of a residential property

[129] In the Republic of Ireland, some management companies are currently set up as private limited companies limited by guarantee (Irish Law Reform Commission, Consultation Paper on Multi-Unit Developments (LRC CP 42-2006), chapter 4).

management company[130]. Reform of company law to introduce a new simpler structure that would be specifically tailored for management companies is an issue that could be considered in principle. This leads to the question of how existing companies could be converted into the new form of company.

16.20 The aspects of the present company law framework that merit consideration with a view to creating a simpler more suitable form of company for residential property management purposes are:

- modified legal documentation with specifically tailored memorandum and articles of association for residential property management purposes;
- the prohibition of managing agents being appointed as directors;
- less onerous filing obligations;
- a quicker more straightforward procedure to restore a company that has been struck off;
- reduced penalties for non-compliance with administrative tasks;
- an obligation to hold an annual general meeting;
- the requirement for the secretary to be an individual (not a corporate body); and
- generally improving information and awareness of structures, processes and obligations.

Q2: The Commission is inclined to the view that for residential property management companies

[130] See Chapter 12 – Law Reform in Other Jurisdictions.

the introduction by legislation of a simpler more suitable form of company should be considered. Do consultees agree? If so, what provision should be made for the conversion of existing management companies to the new format?

16.21 Even if a new legislative model for a management company is not viewed as a practical proposal, it may be of benefit to consider improving particular aspects of the administration of the company. For example, it seems that some apartment owners experience difficulties in persuading sufficient numbers of the other residents to participate in the decision making process. This could be addressed by introducing lower thresholds for certain decisions. Another option would be to restrict or exclude apartment owners from the decision making process if they have outstanding debts to the management company (above a specified value or longer than a specified period).

Q3: If the proposal for a new form of company is not supported, the Commission favours the introduction of provisions to improve and facilitate the administration of management companies. Do consultees agree?

A STATUTORY MANAGEMENT SCHEME

16.22 There is clear evidence that many of the problems experienced by residents in property developments stem from the inadequacy or inefficiency of the arrangements that have been put in place for management. It is widely accepted that a properly structured organisation is necessary for the proper management of apartment ownership. The issue to consider is whether it would be effective to introduce a scheme of statutory provisions for the management of

apartments and other residential property with elements of shared ownership or open spaces.

16.23 Apartment owners in Northern Ireland have voiced their concerns about their problems to their elected representatives and drawn their problems to the attention of the Northern Ireland Assembly. In December 2010, a Private Members' Bill was introduced by Kieran McCarthy MLA with the objective of addressing current inadequacies in the laws governing aspects of the ownership of certain types of private properties which comprise part of multi-unit developments, including townhouses[131]. Although the Bill was withdrawn, its aims were commendable and the option of legislation to govern the way in which management companies should operate is one which should be considered.

16.24 In this context it may be useful to consider the approach taken in the Republic of Ireland where the structures are similar to our own[132]. The Multi-Unit Developments Act 2011 seeks to address problems relating to the ownership and management of the common areas of multi-unit developments and to facilitate the fair and effective management of bodies responsible for the management of such areas.

16.25 In considering a requirement for the introduction of any new legislation the primary focus should be on the areas of greatest concern to apartment owners. Clearly management issues are the source of many of the most pressing complaints. However, if a statutory management scheme is to be considered as an option, it should take into account the fact that, where it is considered appropriate, the deeds to the development will generally have set up a management company. In the vast majority of cases some provision

[131] See Chapter 11 – Law Reform in Northern Ireland.
[132] See Chapter 12 – Schemes in Neighbouring Jurisdictions.

will already have been made in the title deeds for management of the development. The cases where it may not be considered necessary are situations where there are no apartments and the development consists of townhouses, detached and semi-detached dwellings. Where there are a small number of apartments (e.g. four or less), it also may be possible to set up the development without a management company.

16.26 The source of many of the difficulties lies not in an absence of arrangements for management, but in a lack of clarity in the arrangements or a breakdown in their operation. Instead of creating a completely new statutory management scheme, it may be more beneficial to consider default management provisions which would apply where the title deeds fail to make suitable provision. This was the preferred option for existing apartments in Scotland[133]. However, the basis of that legislation is rather different; the context is unique to Scotland and the legislation does not provide for a management company to be established.

16.27 In Northern Ireland, particular issues of concern can be easily identified. For example, there are numerous complaints about the common areas not being transferred to the management company or a sinking fund not being established. These problems can arise even where there is suitable provision to that effect in the title deeds. The cause of the problem is not the absence of a statutory requirement, but the lack of an effective remedy for failure to comply with provisions in the title deeds that impose legal obligations.

16.28 Therefore, although default management provisions may be of some assistance, and may rectify omissions from individual titles, they will not provide solutions in all cases. If a statutory default

[133] See Chapter 12 – Schemes in Neighbouring Jurisdictions.

management scheme is to be provided it should be kept simple and not be too prescriptive. The objective should be not only to ensure that all apartment owners have appropriate rights and powers in relation to management issues, but also that those rights and powers can be effectively exercised.

Q4: Do consultees consider that it would be helpful to introduce a statutory default management scheme for blocks of apartments or other residential developments?

SPECIFIC MANAGEMENT ISSUES

16.29 Although a default management scheme may be one solution, an alternative option may be to consider legislation to address specific matters of concern. One of the issues may be to impose a statutory obligation on the developer or owner of the land to transfer the structure of the building and common areas in a development to the management company. Although there is generally provision in the lease to this effect, there are instances where it has not been done. Currently where a transfer is not effected in accordance with the provisions in the lease, the apartment owners have no means to compel the developer to make the transfer.

16.30 However, when considering the introduction of a provision to compel a transfer, it is important to be aware of the complexities involved. First there is the matter of defining the point at which the transfer should occur. It may seem simple to impose a time limit (for example, 6 months) from an event, such as the sale of the first or last apartment within which the transfer is required to take place, but there are questions as to how to calculate the point from which time starts to run. There may be valid reasons why the

developer may not wish to make the transfer until the development is complete, such as a need to retain ownership to finish the work. If it is from the date of completion of the development, 'completion' and 'development' have to be defined, which may not be straightforward. This illustrates that although it may be very obvious in principle how a particular issue ought to be addressed; once it is examined in more detail it becomes apparent that it is not as straightforward as might originally have been supposed.

Q5: Instead of a full statutory default management scheme, it may be an option to consider legislation to address specific matters of concern. For example, this might provide for the transfer of common parts or the provision of a sinking fund. The Commission is not opposed to this in principle but is conscious of the drafting difficulties involved. It is inclined to the view that means other possibilities should be examined. Do consultees agree?

16.31 Another provision that might be considered in this context is the possibility of requiring a compulsory contribution to be made to the sinking fund on sale. This could be seen either as a provision that could be made in the title deeds or a matter that could be the subject of a default statutory provision.

Q6: Do consultees think there is merit in considering a provision for a small percentage (e.g. 1%) of the proceeds to be paid into the sinking fund on the sale of an apartment, such amount to vary according to the length of the ownership?

CREATION OF A RIGHT OF ACTION

16.32 As an alternative to attempting to prescribe for procedures in legislation, it may be more effective to address the issues which affect matters of title by giving the parties a right to take an action in a court or tribunal (for example, the Lands Tribunal). This right would be available to the each party by virtue of their interest in the property under the title (i.e. the apartment owner as the lessee and the developer or management company as the lessor or the successor to the lessor).

16.33 By this means an apartment owner would have the right to make an application for an order that the developer be directed to make the transfer of common parts in accordance with the terms of the lease. Such action could be taken at a time when the apartment owner considers that it is necessary. The court or tribunal could take all the relevant factors into account in making the decision based on the particular facts in question.

16.34 There would also be other instances where an omission in the lease might ground an application by either party for amendment. Unfortunately it is sometimes the case that the lease under which an apartment is held is defective in its drafting in some respect. This might arise where there was no provision in the lease for a sinking fund or the grant of a right of way had been overlooked.

Q7: The Commission proposes that a right to take action in a court or tribunal (e.g. the Lands Tribunal) should be created to address particular concerns affecting matters of title. For example, to order a developer to transfer the common areas to the management company, or to order the developer / management company to set up a

sinking fund? Do consultees agree? If so, which other matters might be addressed by this means?

16.35 The complexity of the problem may depend on whether the defect is in each of the leases and affects all the residents or is in one particular lease. In that case, the court/tribunal might be able to consider an application for defective documentation to be amended. If an amendment has to be made to all the leases in a development, it may be necessary to obtain the agreement / consent of a proportion of the other residents.

Q8: If the documentation (i.e. the lease) is defective, should there be a right for either party to the lease to apply to a court or tribunal for it to be amended? If so, should it have power to amend all the leases in the development on the application of one lessee / a specified proportion of the lessees?

16.36 The Lands Tribunal is an option as a forum for rectification of defects in documentation, but the Land Registry may be another possibility. Now that all title has to be registered in the Land Registry on purchase, the title to the majority of developments will be registered[134]. Accordingly the Land Registry may be more appropriate because of its expertise and familiarity with the subject matter.

[134] Compulsory Registration of Title Orders (Northern Ireland) 1995 – 2002: Compulsory Registration of Title Order (Northern Ireland) 1995 No. 412, Compulsory Registration of Title Order (Northern Ireland) 1999 No. 455, Compulsory Registration of Title Order (Northern Ireland) 2000 No. 312, Compulsory Registration of Title Order (Northern Ireland) 2001 No. 237, Compulsory Registration of Title Order (Northern Ireland) 2002 No. 400 and Compulsory Registration of Title (No. 2) Order (Northern Ireland) 2002 No. 401.

Q9: Is the Lands Tribunal or the Land Registry the appropriate forum for an application to amend the lease? Is there a distinction between matters omitted from the title which ought to be included and matters which require an order for positive action to be taken?

16.37 Alternatively, as with applications to make amendments to leases, (see Chapter 17) the Land Registry might be considered as the best forum for resolving all issues in relation to title. In either case, there may be an argument that any dispute or problem should be decided in one place so that it is clear to everyone where to take proceedings, whatever their nature.

Q10: Which forum do consultees consider is the most appropriate in which to take proceedings to enforce the covenants in a lease of an apartment or other property with shared facilities? Should it continue to be the small claims court or should jurisdiction be conferred on the Lands Tribunal of the Land Registry to make the necessary determination?

PURSUIT OF DEBTORS

16.38 As well as providing remedies for apartment owners, it must be remembered that some of the problems experienced on developments are caused by a minority of the owners or residents failing to engage properly in communal living. Some may be in financial difficulties and fall into arrears with payment of their service charge. When this occurs, the management company, or managing agent acting on its behalf, will normally have a policy for pursuing the debt. Proceedings may be taken in the small claims court to obtain judgment against the apartment owner. If the

amount due is not paid when the order is made, the management may proceed to enforce the judgment through the Enforcement of Judgments Office[135]. An order charging land can be made which is registered against the owner's title. This remains in place for 12 years and has to be discharged if the property is sold at any time within that period.[136] Alternatively an inhibition can be registered against the title in the Land Registry.

16.39 However, the debt can run into substantial amounts over time and this course of action does not necessarily result in the management receiving payment in full satisfaction of the amount due, particularly where the owner is in reduced financial circumstances. In these circumstances, there may be some support for the management company to have a right of action to acquire possession of a property (like a mortgagee's action) or an award or forfeiture of a lease (without relief from forfeiture being granted)[137] .

Q11: Do consultees consider that the management company should have a right of action under which they could be awarded possession of a property or forfeiture of a lease? If so, should this be through the courts or the Lands Tribunal?

STANDARDISATION OF DOCUMENTS

16.40 When the question has been raised as to whether it would be of benefit if, in the future, legal documentation such as leases of apartments, were in a standard form, there has been a mixed response. On the face of it there are advantages to

[135] Judgments Enforcement (Northern Ireland) Order 1981 No. 226 (N.I. 6)
[136] Judgments Enforcement (NI) Order No. 226 (N.I. 6), Article 45
[137] See Chapter 6 – Title to Apartments

standardisation, such as uniformity, consistency, and familiarity. However, there are also a number of disadvantages. Given the range of the nature of parties and the variation in the building developments, it is unlikely that agreement could be reached on a standard for the documents. A standard form would also be inflexible and may not provide sufficient scope for tailoring to individual circumstances if required.

Q12: Do consultees agree that it would be difficult to reach an agreement on a standard form of lease and that it would be more effective to encourage better drafting of documents? For example, this could be done by the introduction of a standard framework.

CENTRAL REGISTER OF INFORMATION

16.41 It is not only important that the right information is produced at certain stages of purchasing an apartment, but it would also be helpful if key information could be held centrally that is accessible to all. A central register of key documentation that is publicly available would be a good source of information for owners and potential purchasers. It could contain copies of relevant documentation such as the lease, house rules and a full development plan. This could be held at Land Registry, where a certain amount of documentation is already registered. It could be expanded further to include copies of documents relating to the owners' management company.

16.42 A central register would not only assist apartment owners who may not have received copies of such documentation in the conveyancing process, but it would also assist managing agents who take over a development from another agent, sometimes in

difficult circumstances, and find it difficult to obtain the relevant documentation from their predecessor.

Q13: Do consultees agree that it would be helpful to have a central register of key information about each development? If so, what would be the key documentation that would need to be recorded? Is the Land Registry the best venue to hold such a register?

CHAPTER 17 – OPTIONS TO ADDRESS MANAGEMENT PROBLEMS

INTRODUCTION

17.1 As well as the introduction of legislation there are other options that can be considered to address the range of problems that are experienced by those owning and living in apartments. Some of the problems stem from a lack of knowledge about the roles and responsibilities of the various parties involved in the developments – the developers, management companies, and the owners of the apartments - and their interaction with one another. Other problems arise from the activities of those parties or their failure to discharge their responsibilities properly. There are different approaches to coming up with solutions; either the apartment owners can be empowered to address the issues and facilitate improve control for themselves, or managers / stewards can be charged with acting on their behalf[138].

REGULATION OF MANAGING AGENTS

17.2 At present, no party or body is responsible for oversight of the functioning of residential developments with management companies. There appear to be significant disparities in terms of the levels of service which managing agents provide to

[138] Douglas Robertson and Katharine Rosenberry (Joseph Rowntree Foundation) '*Home Ownership with Responsibility – Practical Governance Remedies for Britain's flat owners*' (2001).

the property owners. Since this is an area which is the source of many of the grievances, it is clear that it might benefit from some form of statutory regulation. However, it is also important to bear in mind that the policy of successive governments has been a commitment to reducing the level of regulation. Excessive regulation is considered to have a negative impact on business and it may place disproportionate burdens upon those who are regulated.

17.3 Against this background, a proposal for the introduction of a new regulatory body may not progress beyond the drawing board. Nevertheless, if a regulatory body was thought to be an effective means of supervising the operation of residential property developments this should be considered as a possible option.

Q14: Do consultees support a proposal for the regulation of managing agents?

17.4 A regulator might be an independent specialised organisation with a remit to include the following:

- A general monitoring and supervision responsibility for developers, management companies and managing agents involved in residential developments;

- The provision of information and advice to apartment owners about the operation of a management company and the role of the managing agents;

- Investigation of complaints made by anyone interested in the management of apartments or other residential property where there is a management company and advising what course of action to take as a result. The regulatory body would not be responsible for dispute resolution between the groups but would facilitate

resolution through referral to arbitration or mediation services;

- Producing codes of practice, encouraging standardised terms of agreement, promoting best practice, including e.g. forward work planning, annual budgets, avoiding conflicts of interest;

- playing a central role in ensuring that appropriate information and other appropriate consumer advice is given to purchasers of apartments;

17.5 In relation to the issues of the service charge and sinking fund which have been the source of a substantial proportion of the complaints made, a regulatory body might:

- Monitor service charge regimes and ensure that a separate designated bank account is maintained for each management company;

- Investigate the provision in existing developments for reserve / sinking funds or other provision to meet long-term capital expenditure;

- Investigating block insurance policies in existing developments; ensuring that the policies are held in the name of the management company and that the premiums charged are reasonable;

- Advise on initiating appropriate action to remedy problems coming to light;

Q15: Do consultees agree with the suggestions as to the remit of a regulator? Are there any other matters that might be within the remit of the regulator?

17.6 The decision as to what form the regulatory body would take is obviously a matter for government, as is the means of funding of any such body. Careful thought would have to be given to conferring appropriate powers on the regulator. It would benefit from being given wide investigative powers including the power to inspect documentation and records of developers, management companies and managing agents.

17.7 As an alternative, consideration might be given to conferring additional powers for regulation of the property management sector on an existing body. To be effective, the regulatory body would require a wide remit and co-ordinating role, which probably extends beyond the current role of existing bodies. However, one of the existing bodies, for example, the Royal Institution of Chartered Surveyors (RICS) or the Housing Rights Service, may be more qualified than anyone in terms of expertise and experience in dealing with the area. There is a question as to whether the remit of an existing body should be widened.

Self-regulation

17.8 As an alternative to full regulation, it may be an option to consider the possibility of self-regulation. In general terms, self-regulation can provide a solution that is both more efficient and cost-effective. Under self-regulation, an industry is permitted to create and adopt its own code of conduct which it can administer and enforce. It can take the form of codes of conduct, customer charters, voluntary agreements or rules. These may be negotiated by the industry body with wider interests such as government or consumer organisations.

17.9 However, when considering the option of self-regulation in the particular context of management

companies this may not be the first choice solution. There is a low level of confidence in some management companies and the introduction of self-regulation may not generate a sufficient improvement in that state of affairs to realistically justify proposing that self-regulation might alleviate the management problems experienced by apartment owners.

17.10 In England and Wales, despite the fact that there are a number of organisations that are promoting greater regulation of property professionals to ensure better protection for consumers, the government does not seem to favour it[139]. Against this background, the Association of Residential Managing Agents (ARMA) for example is continuing to promote higher standards of leasehold management by providing advice, training and guidance to its member firms of managing agents. It is also currently working on its own proposals for enhanced self-regulation to further improve standards in the industry.

Q16: If government does not support the introduction of independent regulation, should self-regulation be permitted by an appropriate body or organisation? If so, which body or organisation might be suitable?

Licensing

17.11 Generally, regulation aims to control an activity or industry whereas licensing is giving official permission for an activity in advance which would otherwise be illegal. With licensing the onus of responsibility shifts to the applicant to ensure compliance before engaging in the activity; whereas with regulation the regulatory body has the responsibility of ensuring compliance once the services are being supplied. Licensing could be considered as an option as part of a regulatory

[139] See Chapter 12 – Neighbouring Jurisdictions.

regime or it could stand alone as an alternative to regulation. In that respect licensing may be a more limited and narrower option than regulation, but it is nevertheless worth considering.

Q17: Should the option of licensing managing agents be considered as an alternative to independent regulation or self-regulation?

17.12 To outline in principle how a licensing system for managing agents might operate, the following might be feasible:

- a voluntary licensing period before it becomes compulsory;
- a new agent must be licensed before commencing any activity;
- existing agents could be given a specified time period within which it would be mandatory to obtain a licence (e.g. 6/12 months);

17.13 Examples of the conditions for obtaining a licence might be:

- an agent must first be a member of another body such as RICS, ARLA, ARMA etc;
- an agent must demonstrate appropriate arrangements for holding client money;
- an agent must have an appropriate complaints procedure.

Q18: Are consultees in agreement with the principles for licensing managing agents? Can consultees suggest any other matters that might be conditions of the licence to operate?

17.14 The funding of a licensing regime would also have to be considered, whether as part of a new regulatory system or otherwise. A licensing fee could cover the cost of administration of the scheme, although there is a risk that this cost would be passed on to the property owners.

17.15 For comparison purposes, it is of interest to look at other similar activities which are licensed[140]. Currently the Department for Social Development (DSD) is proposing that a licensing system be introduced for Houses in Multiple Occupation (HMOs)[141]. There is already a registration scheme in place but it is not working effectively, so a fundamental review is under way. DSD envisage that the licensing system will be mandatory and that a licence will last for five years. Certain conditions must be met before a licence is granted and a licence may be revoked on breach of a condition.

17.16 DSD is also introducing a landlord registration scheme which it will administer[142]. There may be merit in considering extending this or using it as a model for registration of managing agents.

17.17 In Scotland, statutory licensing of managing agents has recently been introduced by the Property Factors (Scotland) Act 2011[143]. Previously there had been a move to introduce voluntary accreditation for managing agents but this did not proceed. The 2011 Act establishes a compulsory register for property managing agents (factors), a code of conduct and a

[140] Other examples of licensing are for taxis and fast food outlets.

[141] Department of Social Development, Consultation on Fundamental Review of the Regulation of Houses in Multiple Occupation in Northern Ireland (June 2012).

[142] Draft Landlord Registration Scheme Regulations (Northern Ireland) 2012 made under Article 72(3) of the Private Tenancies (Northern Ireland) Order 2006 No. 1459 (N.I. 10)

[143] It came into force on 1 October 2012.

new statutory dispute resolution mechanism called the Homeowner Housing Panel. A property factor who offers property management services while unregistered is guilty of an offence.

17.18 The Scottish government has also introduced a statutory Code of Conduct for registered property factors under the 2011 Act. It sets out minimum standards of practice with which all registered property factors are required to comply.

17.19 In the Republic of Ireland the recently established National Property Services Regulatory Authority is responsible for the regulation on property managing agents. It maintains a public register of licensees, including managing agents, which took effect from 6 July 2012. The authority also ensures that all client monies, including service charges and sinking funds are held by licensed agents in clients' accounts. Rigorous conditions are set for applicants for licences. These include proof of professional indemnity insurance as well as certification that proper financial control are in place for the protection of clients' money.

17.20 The National Property Services Regulatory Authority has produced a Code of Practice for property service providers which is currently voluntary, although there is power to make it legally binding.

17.21 There are a range of bodies and organisations in Northern Ireland which might be considered potentially suitable as a licensing authority for managing agents. For example, the local councils, Northern Ireland Housing Executive, Royal Institution of Chartered Surveyors (RICS), or the National Association of Estate Agents (NAEA). On the other hand, it might be preferable to establish a new body for this purpose.

Q19: Which body or organisation do consultees consider might be the most appropriate to operate a licensing system for managing agents? How might this be funded?

Statutory agency

17.22 Instead of creating a regulator or a licensing system, a more radical option would be to consider establishing a new statutory body or agency to deal with all management matters. Ideally, such a body would oversee the running of the management and administration of all developments. Given that there are so many management problems this may be considered the most effective solution. However, this would be unlikely to work on a voluntary basis and it is unlikely that sufficient numbers would opt into it by agreement. It is possible that it could be considered as a means of last resort where residents were unable to agree.

17.23 In Scotland a statutory scheme was run by Edinburgh City Council in an effort to ensure that the historic housing stock was well maintained[144]. The scheme operated on a notice basis and where the owner failed to carry out specified works, the Council stepped in to do so. In emergency situations, the Council carried out the work without giving notice. The Council claimed the costs back from the owner with an additional administration fee of 15%.

17.24 However the scheme was not successful. By November 2010 there was a backlog of an estimated £1.4 billion of repairs to Edinburgh's tenements, with 3,000 notices being served in that year. The scheme also faced allegations of bribery, overcharging and unnecessary and poor quality work. In August 2012,

[144] Under the City of Edinburgh District Council Order Confirmation Act 1991 c.xix.

The Council proposed an overhaul of the scheme to encourage residents to manage their own repairs, with the Council intervening only as a last resort.

Q20: Although creating a statutory body or empowering an existing body or agency to deal with all management issues may seem like an ideal solution, the Commission suggests that experience shows it is unlikely to work in practice. Do consultees agree?

DISPUTE RESOLUTION MECHANISMS

Rescue provisions

17.25 In the case where the management of a particular development is not running properly it may be of benefit to consider creating a right to take an action to a court or tribunal for a remedial order. This might arise for example where other avenues had been exhausted and the dispute could not otherwise be resolved. Various problems could be addressed by this means, particularly where there was a complex litany of complaints. Any initiative should aim to improve the efficiency of the management arrangements.

17.26 Consideration should be give to ensuring that any mechanisms are available to the owners, the management companies and the managing agents. Examples of some of the issues that a remedial order might address are: amending defective conveyancing documentation, apportionment of financial charges, amendment of covenants, ordering co-operation, appointing a professional administrator or obtaining a secured loan for major repairs to the fabric of the building.

17.27 Non-payment of service charge is sometimes indicative of a wider range of problems. Owners may refuse to pay the service charge as a means of protesting about other work not having been done. Any mechanism for dealing with disputes should be able to address all the issues as a package so that the problem is effectively resolved.

Q21: Do consultees support the idea for a remedial order grounded on one or more causes of action as an effective rescue plan where management arrangements are not working? If so, what would be the most appropriate forum? For example, the small claims court or the Lands Tribunal?

17.28 Instead of considering a remedial order to address a multiplicity of issues, it may be preferable to consider each potential cause of action on its own merits. In this context it is important to differentiate between matters of title and matters of management. It should be possible to classify problems relating to issues such as service charges or sinking funds as either matters of title or management depending on whether the problem arises through a deficiency in the lease or in the operation of the management.

Service charges and sinking funds

17.29 Many of the problems experienced by apartment owners concern service charges and sinking funds which are by their nature management matters. On the other hand it is recognised that questions such as provision for the establishment of a sinking fund which may involve amendment of the lease, are more a matter of title. This section is more concerned with management issues such as whether the service charge is reasonable, whether it is being kept in a designated account, whether it is being put to a suitable use and similar issues in respect of the

sinking fund. It is possible that these may be matters for determination by the regulating or licensing body.

17.30 Alternatively power could be conferred on the same body as for issues concerning matters of title, to examine a wider range of problems as a rescue package. For example, the Lands Tribunal or the small claims court. Arguably, when considering service charges and sinking funds, the means of addressing the problems should be seen, not in isolation but in the context of seeking a forum for addressing all the issues in relation to management. It would not be helpful if disputes relating to service charges and sinking funds were dealt with in one way, but other management problems, such as service contracts, were treated differently.

Q22: Should problems relating to service charges and sinking funds specifically be considered in the same forum as other management matters? Or in the same forum as the title matters, such as enforcement of covenants? Which forum would this be? Are they a matter for the licensing or regulatory body?

Planned maintenance

17.31 Many of the current complaints centre on a concern about long term maintenance of a building and its potential for decline into a state of unacceptable disrepair. To address this, first there must be a sinking fund or maintenance fund in place to provide the finance for the work. Secondly, a planned maintenance programme should be agreed. Some of the problems experienced by owners could be avoided if these proposals were adopted. This may be an issue that can be addressed by the regulator or licensing authority. It may also be a matter that could

be raised in the same forum as more general issues relating to service charges and sinking funds.

ALTERNATIVE DISPUTE RESOLUTION

17.32 There are alternative ways of dealing with disputes in general other than going to a court or tribunal[145]. Leaving aside issues in relation to defective documentation and enforcement of covenants, it may be that disputes which are more concerned with management matters may be better addressed by another means. Where there is a dispute, it may not always be appropriate to take a formal court action and in some circumstances a less structured approach may provide a more suitable alternative. In property management disputes, it may be advisable to try to resolve the issue informally at first, through a meeting or telephone call. If that fails, then it may be helpful to put the matter in writing to the other party. The next step is to try to negotiate an agreement. In many types of cases the courts will encourage the parties to consider alternative means of resolving their disputes before taking court action because court action can be slow, expensive, stressful and unsatisfactory.

17.33 Methods of alternative dispute resolution include conciliation, mediation, neutral evaluation, adjudication, arbitration as well as the use of ombudsmen schemes and other regulatory bodies. These alternative methods are not intended to replace the courts but the advantages of choosing one of these options is that they are normally cheaper and provide a means of reaching a conclusion more quickly. They are also more informal, conciliatory, confidential, flexible and consensual in their approach

[145] See NI Ombudsman, Law Centre (Northern Ireland) and Queen's University Belfast, *Alternatives to Court in Northern Ireland* (2011).

to the dispute. However, the disadvantages of using alternative methods should also be recognised. For example, the outcome may not be legally binding or it may not be possible to obtain compensation. If the problem is to be addressed by alternative dispute resolution, both parties must agree and be willing to do so.

17.34 Potential alternative means of resolving property management disputes are:

Mediation: mediation is a carefully managed process, often involving a meeting, through which a mediator identifies the issues, works out the options, and helps the parties to reach agreement on a mutually acceptable outcome;

Arbitration: arbitration involves an independent arbitrator making a decision which is binding on the parties after receiving their submissions either orally or in writing;

Independent expert determination: the parties can agree that an independent expert will look at the case and reach a decision;

Adjudication: this is similar to arbitration and best suited to a quick resolution of single issue problems;

Ombudsman schemes*:* an ombudsman provides an independent and impartial review and determination of complaints about an organisation. Under the scheme, the way in which a decision was made is investigated and whether it results in an injustice which amounts to maladministration.

The Property Ombudsman: The Property Ombudsman provides a free and independent scheme to resolve disputes regarding leasehold management arising between scheme members (registered firms of

letting agents or property management agents) and consumers. The Ombudsman also issues codes of practice which make general provision as to good practice in the management of property. Although this service is useful in terms of the provision of information, the promotion of best practice and the resolution of disputes, it may be perceived as not having enough powers to be properly effective.

Ombudsman Services - property: is another ombudsman scheme to resolve complaints about chartered surveying firms, surveyors, estate agents, residential managing agents and other property professionals from consumers.

17.35 Of all the alternative means of dispute resolution options, it seems that mediation and arbitration are likely to be the methods most suited to property management disputes. It may be possible to consider introducing a provision that every agreement between a managing company and a managing agent is deemed to contain an agreement to submit the matter for mediation or arbitration in the event of a dispute. To avoid the costs of creating new procedures any disputes relating to property management services could be referred under existing procedures of an established body, such as the Law Society of Northern Ireland or the Royal Institution of Chartered Surveyors.

Q23: Do consultees agree that alternative means of dispute resolution should be encouraged for resolving management issues? In particular, do consultees agree that greater use should be made of mediation and arbitration?

PRACTICAL RESCUE

17.36 There are many examples of developments where the management arrangements have run into difficulties for a variety of reasons and very little maintenance is undertaken, other than the most basic tasks. In these situations the residents are understandably most unhappy and unable to find a means of addressing the problems. In the most serious cases, the developer may be in receivership or liquidation, the management company may have been struck off and there may be no managing agents actively providing management services to the development. The owners of these properties are the ones who most need an urgent solution.

17.37 Similar issues may arise where the development is unfinished (see Chapter 19) but the problem is being considered in the present context where the lack of finish is not the main concern. The aim here is to look for a practical way to improve the living conditions of residents and address the management problems. The impact that the difficulties are presently having on the residents should not be underestimated and this should be given serious attention as a matter of priority, whatever other solutions are considered.

17.38 This situation is urgent and the residents who are currently feeling frustrated and powerless should not have to wait for a new legislative or regulatory framework to provide them with a means to take action or to make a formal complaint. As a starting point it may be useful to undertake a survey of the developments where the management arrangements are not working and have broken down. One possibility as a next step would be to allow managing agents to tender for a contract to take on a problem development.

Q24: Do consultees consider that allowing managing agents to tender for the contract to take on a problem development would be a good practical solution?

17.39 If no-one could be found to manage the development, as an alternative, the key stakeholders having a role in the development could be brought together. The aim would be to create a co-ordinated approach and encourage a collaborative working environment in which the parties could work out the best means of alleviating the problems. The parties might include the developer, lender, the property owners, the managing agent and possibly professional advisers such as surveyors, accountants or solicitors.

17.40 The parties could draw up a plan for dealing with the development and bring about an effective and pragmatic solution. The plan would include an assessment of the development and an outline strategy of action for the work that needs to be done. It would also have to consider funding proposals. In the event of a failure by the parties to prepare and implement a resolution plan, other remedial action would have to be considered.

Q25: If no-one will take on management of a problem development would a co-ordinated approach involving the parties in the development drawing up an action plan and putting it into effect be an alternative solution? How could this be funded and provided with the appropriate level of administrative support?

17.41 An opportunity could be given to the local councils to become involved, either as an alternative or by default where informal arrangements had been unsuccessful. A local council might be considered as more suited to the role of identifying and working out a strategy to resolve critical issues. Either way, the provision of

funding and the secretariat support should be considered in detail.

Q26: As an alternative, or in default, should the local council be brought in to devise an action plan and put it into effect? If so, how would it be funded?

CHAPTER 18 – IMPROVING CONSUMER AWARENESS

INTRODUCTION

18.1 The source of some of the problems experienced by apartment owners and others living on developments with an element of shared ownership is the lack of awareness about the workings of the ownership and management structures from the outset. There is far too much confusion over what is involved in owning and living in an apartment. It is clear that this should be addressed and that a proactive approach should be taken to ensuring that more information is made available both to purchasers and residents.

INCREASING UNDERSTANDING

18.2 Often it seems that members of the public are seduced by the marketing of the development into thinking that with the purchase of a new apartment they will be buying into a more glamorous lifestyle. The advantages of convenience and affordability are very appealing. Prospective owners are not advised or informed about the element of interdependence involved and do not appreciate the level of responsibility that it imposes on all the residents of the development. There is a need for greater clarity about the roles of each party and a degree of understanding that it is advisable to take an interest in management issues which arise in apartment developments.

INFORMATION

18.3 One of the reasons the misunderstandings are so widespread is the shortage of reliable detailed information available to prospective purchasers at the outset. To address the issues of purchasers not being sufficiently aware of their responsibilities it may be helpful to increase the information available to them.

18.4 Working out precisely what information should be provided at different stages, what form and content it should have and who should provide it are matters which a regulator or licensing authority could investigate. In the meantime best practice could specify the nature and content of the information.

To be provided by the developer or agent

House rules of the development:

18.5 Each developer could provide a leaflet with information providing details of the management arrangements for the development. This would include the internal complaints procedure.

Protocol of information:

18.6 There could be a requirement at the marketing stage of the development for specified information to be disclosed to purchasers before they make any commitment to buy an apartment.

18.7 The information might include:

- a brief summary of the structure including the name of the managing company and the managing agents;

- an estimate of the dates for completion of the phases of the development;

- estimates of the amount of the service charge and a list of the items it is to cover;

18.8 Perhaps this information could be furnished in a standard template by way of completion of a checklist or replies to a standard pro-forma questionnaire.

Q27: Do consultees agree that when a new property is marketed the developer or estate agent should provide information about the management arrangements for the development? If so, how should this be prescribed? Could it be done by building on the Consumer Code for Builders? Or should it be by the regulator or licensing authority? In the meantime, should best practice encourage the provision of House Rules and Protocols of Information?

To be provided by the solicitor

18.9 Solicitors should ensure that their clients are given all the relevant information and that their rights and obligations are properly explained to them. The Law Society of Northern Ireland has published two leaflets: 'Buying and Living in an Apartment' and 'Buying and Living in a Property with Common Spaces' which can usefully be provided to clients to explain the particular issues involved when living in an apartment.

18.10 Under the Home Charter Scheme[146] a solicitor acting for a developer of a new build property is required to provide specified information and documentation to the purchaser's solicitor. However, it might be of benefit if there was also a requirement for a purchaser's solicitor to provide the purchaser with details about the apartment. Although this might duplicate the information provided by the agent, it

[146] A quality assurance scheme operated by the Law Society of Northern Ireland with which it is compulsory for all solicitors to comply.

would be another opportunity to ensure that the purchaser was properly informed and understood the implications of buying an apartment.

18.11 Such information might include an explanation of:

- the management structure of the building and the development and how it works in practice;
- the way an apartment owner participates in the management;
- the rights and obligations in the lease;
- the service charge and the way in which it is used, including a list of the items it is to cover;
- the sinking fund and the way in which it is used, including a list of the items it is to cover;
- internal complaints procedures;
- other mechanisms and procedures for resolving disputes between the parties.

18.12 The purchaser should also be given:

- A map or plan of the development and / or the apartment block showing the common areas;
- A map or plan of the apartment;

18.13 Like the information to be provided by the estate agent, perhaps this information could also be furnished in a standard template by way of completion of a checklist or replies to a pro-forma questionnaire.

Q28: Do consultees agree that the Law Society of Northern Ireland should include in its Home

Charter Scheme the provision of specified information to purchasers of apartments about the structures of ownership and the arrangements for management of the development? This should extend to cases where a purchaser is buying any property with elements of shared ownership including open space.

IMPROVING COMMUNICATION

18.14 It is important to introduce and encourage more effective ways of communication between all the parties involved in a development. One example is a dedicated website where apartment owners can log into a forum and contact other owners.[147] Information relating to the development could be available on the website, such as the constitution of the management company, the lease, the insurance cover, minutes of the AGM and other meetings, details of invoices for the service charge, copies of the annual accounts and any other relevant information. It could also give notice of impending works, ongoing maintenance and planned repairs.

18.15 A matter for further consideration is how to encourage apartment owners to become more interested in and more involved in the running of their management company. It might assist both communication and engagement in management issues if residents could be encouraged to be more aware of the social responsibility role involved in living in high density property.

Q29: Do consultees have any suggestions for improving communication between apartment owners, for encouraging greater participation in

[147] The Commission is aware of one managing agent who already offers this facility.

the management company or for encouraging better understanding of community living?

Q30: Do consultees have any suggestions to address the particular problems of buy to let landlords who do not live in their properties, and are mainly concerned about obtaining an income from the occupying tenant?

CHAPTER 19 – UNFINISHED DEVELOPMENTS

INTRODUCTION

19.1 Many of the most serious difficulties experienced by apartment owners arise when the developer becomes insolvent before the development is completed, leaving some of the work undone. Where a receiver or mortgagee (generally a bank) has taken possession of the site, the position of the residents can be very problematic because they have no power to take any action. In the worst cases, this leads to the creation of ghost estates. If the infrastructure is not completed residents may find they are living in a development where the roads, drainage, sewers and street lighting are unfinished.

19.2 It is clear that there are no easy answers where the developers face financial difficulties. The residents who purchased apartments in unfinished developments may not be in a very strong position financially themselves. They may have purchased an apartment at a higher price than it is currently worth so that they are in negative equity and they may find that they are unable to sell at all. The problems may be alleviated if the market picks up and property values increase again, but in the meantime, the owners face the challenge of keeping the property well maintained and in good repair.

19.3 There may be similar features in developments which are for most intents and purposes finished, but where some of the apartments remain unsold. This can result in situation where the residents who have taken up

occupation are paying disproportionately high service charges and funding the maintenance of the whole development.

REPUBLIC OF IRELAND

19.4 For comparison purposes it is interesting to look at Republic of Ireland where there have been very serious issues with unfinished developments[148]. The Irish government has viewed this as a matter of national concern and has taken action to address it as follows:

- A national survey was undertaken to obtain evidence of the problems;
- An Advisory Group was set up to ensure effective management and resolution of unfinished housing developments;
- Effective co-ordination mechanisms were established between various agencies and bodies to create a more strategic approach;
- Site resolution plans were developed to address the problems on the ground and obtain significant improvements in living conditions for the residents;
- Immediate action was taken in improving public safety.

19.5 This approach has already yielded results and the problems are being progressively addressed. It may be of benefit to consider taking similar action in this jurisdiction.

[148] See Chapter 12 – Comparison with Neighbouring Jurisdictions.

Q31: Do consultees consider that it would be of benefit to undertake a survey of unfinished developments, address the deficiencies in the infrastructure as a matter of urgency and put in place site resolution plans for each unfinished development? If so, how would this be organised and how would it be funded?

UNADOPTED ROADS

19.6 There has been some debate about the problems caused by incomplete infrastructure and the Northern Ireland Assembly is conducting an Inquiry into Unadopted Roads to see if it can come up with any solutions. The Department for Regional Development is working with the parties involved to come up with appropriate solutions in each particular situation. This Consultation Paper is concentrating more widely on all the issues involved in unfinished developments but the Commission will welcome any proposals that emerge to address this particularly problematic issue.

19.7 In the past developers agreed some very large bonded areas with Roads Service. However, the downturn in the construction industry has been unprecedented and housing developments are taking longer to complete. There have been significant increases in costs and there are many examples of unfinished roads. In these circumstances, Roads Service has been very helpful in splitting the bonds into roads that have been completed where houses are built and those for future completion.

19.8 As with incomplete developments, in specific situations where the roads are unfinished, it would be helpful if the financial and risk issues were addressed and the various agencies properly resourced to work in partnership to rectify the position. A protocol is an

obvious suggestion and although it may be a valuable tool, it may not be sufficient to ensure that effective outcomes are achieved.

BONDS

19.9 The concept of bonding is familiar in the context of the provision of a surety for the construction of roads and sewers in the building of a new development.[149] Essentially a bond is provided to guarantee that funding is secure to underpin performance of an agreement between the developer and the relevant statutory body for completion of the agreed works. The guarantee is provided by a financial institution or other body[150] for such amount as is estimated to cover the cost of the work. If the developer fails to complete the work, the statutory body has power to enforce the bond, carry out the works and recover the costs from the surety.

19.10 This may be a facility that could be considered for other aspects of the building process. It might prevent some of the problems arising if there were funds available for the uncompleted works to be finished. However, it has to be recognised that the financial institutions or other bodies looking at the risks of providing sureties, would need to be confident that there was a realistic prospect of work to be bonded being completed as agreed.

Q32: What are the views of consultees in relation to the bonding of construction work on developments?

[149] See Chapter 4 – the Role of the Developer.
[150] For example, the National House-Building Council (NHBC).

PROVISION OF FUNDING TO HOUSING ASSOCIATIONS

19.11 In May 2007 it was announced that the Department of Social Development (DSD) funding would be available to allow housing associations to buy 'off the shelf' developments from private developers[151]. Since then housing associations have obtained funding to buy properties from developers for the purposes of social housing. The proposal was not universally welcomed in the beginning because those who had purchased properties in the developments were concerned about the effect on the value of their homes and the impact of their new neighbours.

19.12 In practice the experience has turned out to be much more positive than may have been anticipated and there are examples of the new arrangements being very successful. By working closely with the local residents' association, the social housing can be fully integrated with the local community and provide a mode housing solution. Such a scheme can provide an effective solution as long as all the parties co-operate and work together in partnership[152].

19.13 By making funds available to enable housing associations to purchase unfinished developments, effective solutions can be found in some situations. However, it may be more problematic where the development is not suitable for social housing. It is unlikely in current market conditions that another developer would find it commercially attractive to assume all the risk and take on an unfinished

[151] By Margaret Ritchie MLA, who was then the Minister of Social Development.

[152] Curzon development in Belfast, in which Clanmil Housing Association purchased some of the apartments, is an example of a successful scheme which has met a housing need and also benefitted the local community.

development, so other possibilities should be considered.

OTHER INNOVATIVE SOLUTIONS

19.14 DSD is continuing to explore alternative innovative models for funding new social housing, such as entering into long term leases with private sector developers or changing legislation to allow housing association grants to be paid to a wider range of bodies, including housing associations registered in Great Britain or the private sector.[153]

19.15 DSD also has a strategy to encourage the development of a healthy private rented sector, capable of responding more effectively to the housing need in Northern Ireland.

Q33: Do consultees have any suggestions as to how private landlords or other bodies could be encouraged to invest in apartments or other properties in incomplete developments to alleviate some of the current problems?

19.16 The Commission is interested in finding out if the banks could be encouraged to take a more active role in realising the assets and divesting themselves of property of which they are in possession as mortgagee.

Q34: Can consultees suggest any ways in which the banks could be encouraged to divest themselves of property of which they are in possession as mortgagee. Could the banks take any role in management while they are in possession?

[153] Department for Social Development, Consultation on Northern Ireland Housing Strategy 2012 – 2017 (October 2012).

PREVENTION OF PROBLEMS

19.17 In general, the Commission has given priority to considering finding solutions for existing problems to assist the owners of apartments and other properties who are currently experiencing difficulties. For that reason, the Commission has concentrated more on achieving effectiveness under the present structures rather than introducing new concepts or a new legal framework. However, some attention must also be given to putting measures in place to ensure that the same problems will not arise again in the future when new developments are undertaken.

19.18 Some of the solutions that have been already been considered, such as legislative options for reform (Chapter 16) will be of benefit mainly for new developments which will be established at a future date. In addition to such measures, the position of future apartment owners should be improved if a regulation or licensing system is introduced (Chapter 17). The greater availability of information and increasing consumer awareness (Chapter 18) should also mean that any prospective purchaser will be better informed before making the decision to buy a property with elements of shared ownership. The implementation of new administrative processes might be considered as well.

Planning

19.19 At present, although a developer is required to obtain planning permission for the development and is generally under an obligation to commence building work within a period of five years from the date of the grant of the planning permission, there is no corresponding requirement to finish the work within a specified period or at all. In some circumstances, a failure to complete the building work can present

problems for the residents who purchase properties before work on the whole development is finished.

19.20 To prevent some of the problems with non-completion and unfinished works it may be helpful if there was a condition attached to the planning permission for the developer to ensure that both the apartment / individual property and the development are completed within a specified time. As a matter of good practice solicitors should ask the developer's solicitor to confirm, on completion of the purchase of each apartment / individual property that the building work has been substantially completed in accordance with the planning permission.

19.21 An option going forward may be to consider whether there should be a requirement for each apartment / individual property / block of apartments / development to be inspected by planning officials on completion and for confirmation or approval to be issued verifying that the building work accords with the conditions of the planning permission. If the work was not complete there could be an enforcement process.

19.22 A similar requirement is already in place currently in relation to building control approval where a certificate of completion is issued after an inspection on completion.

Q35: Should a requirement be introduced for the Planning Service to inspect property on completion and certify that the building work accords with the conditions of the planning permission?

19.23 Another frequently occurring problem which might be addressed by the imposition of a planning condition is the failure by the developer to transfer the structure of the building and the common parts to the management company. If planning permission was

issued for a development subject to a requirement that the transfer of title was effected, a failure to do so could be enforced as a breach of planning consent.

Q36: In appropriate cases, should a planning condition be introduced for transfer of title to the management company so that a failure to do so would be a breach of planning consent?

CHAPTER 20 – QUESTIONS

INTRODUCTION

These are basically broad questions on issues of principle. The detail will be explored at a later stage.

CHAPTER 16 – OPTIONS FOR THE LEGAL FRAMEWORK

Statutory title

Q1: The Commission is not inclined to propose the introduction by legislation of a new statutory form of strata title for apartments. Do consultees agree?

Company law

Q2: The Commission is inclined to the view that for residential property management companies the introduction by legislation of a simpler more suitable form of company should be considered. Do consultees agree? If so, what provision should be made for the conversion of existing management companies to the new format?

Q3: If the proposal for a new form of company is not supported, the Commission favours the introduction of provisions to improve and facilitate the administration of management companies. Do consultees agree?

A statutory management scheme

Q4: Do consultees consider that it would be helpful to introduce a statutory default management scheme for blocks of apartments or other residential developments?

Specific management issues

Q5: Instead of a full statutory default management scheme, it may be an option to consider legislation to address specific matters of concern. For example, this might provide for the transfer of common parts or the provision of a sinking fund. The Commission is not opposed to this in principle but is conscious of the drafting difficulties involved. It is inclined to the view that means other possibilities should be examined. Do consultees agree?

Q6: Do consultees think there is merit in considering a provision for a small percentage (e.g. 1%) of the proceeds to be paid into the sinking fund on the sale of an apartment, such amount to vary according to the length of the ownership?

Creation of a right of action

Q7: The Commission proposes that a right to take action in a court or tribunal (e.g. the Lands Tribunal) should be created to address particular concerns affecting matters of title. For example, to order a developer to transfer the common areas to the management company, or to order the developer / management company to set up a sinking fund? Do consultees agree? If so, which other matters might be addressed by this means?

Q8: If the documentation (i.e. the lease) is defective, should there be a right for either party to the lease to apply to a court or tribunal for it to be amended? If so, should it have power to amend all the leases in the development on the application of one lessee / a specified proportion of the lessees?

Q9: Is the Lands Tribunal or the Land Registry the appropriate forum for an application to amend the lease? Is there a distinction between matters omitted from the title which ought to be included and matters which require an order for positive action to be taken?

Q10: Which forum do consultees consider is the most appropriate in which to take proceedings to enforce the covenants in a lease of an apartment or other property with shared facilities? Should it continue to be the small claims court or should jurisdiction be conferred on the Lands Tribunal of the Land Registry to make the necessary determination?

Pursuit of debtors

Q11: Do consultees consider that the management company should have a right of action under which they could be awarded possession of a property or forfeiture of a lease? If so, should this be through the courts or the Lands Tribunal?

Standardisation of documents

Q12: Do consultees agree that it would be difficult to reach an agreement on a standard form of lease and that it would be more effective to encourage better drafting of documents? For example, this could be done by the introduction of a standard framework.

Central register of information

Q13: Do consultees agree that it would be helpful to have a central register of key information about each development? If so, what would be the key documentation that would need to be recorded? Is the Land Registry the best venue to hold such a register?

CHAPTER 17 – OPTIONS TO ADDRESS MANAGEMENT PROBLEMS

Regulation of managing agents

Q14: Do consultees support a proposal for the regulation of managing agents?

Q15: Do consultees agree with the suggestions as to the remit of a regulator? Are there any other matters that might be within the remit of the regulator?

Self-regulation

Q16: If government does not support the introduction of independent regulation, should self-regulation be permitted by an appropriate body or organisation? If so, which body or organisation might be suitable?

Licensing

Q17: Should the option of licensing managing agents be considered as an alternative to independent regulation or self-regulation?

Q18: Are consultees in agreement with the principles for licensing managing agents? Can consultees suggest any other matters that might be conditions of the licence to operate?

Q19: Which body or organisation do consultees consider might be the most appropriate to operate a licensing system for managing agents? How might this be funded?

Statutory agency

Q20: Although creating a statutory body or empowering an existing body or agency to deal with all management issues may seem like an ideal solution, the Commission suggests that experience shows it is unlikely to work in practice. Do consultees agree?

Rescue provision

Q21: Do consultees support the idea for a remedial order grounded on one or more causes of action as an effective rescue plan where management arrangements are not

working? If so, what would be the most appropriate forum? For example, the small claims court or the Lands Tribunal?

Service charges and sinking funds

Q22: Should problems relating to service charges and sinking funds specifically be considered in the same forum as other management matters? Or in the same forum as the title matters, such as enforcement of covenants? Which forum would this be? Are they a matter for the licensing or regulatory body?

Alternative Dispute Resolution

Q23: Do consultees agree that alternative means of dispute resolution should be encouraged for resolving management issues? In particular, do consultees agree that greater use should be made of mediation and arbitration?

Practical Rescue

Q24: Do consultees consider that allowing managing agents to tender for the contract to take on a problem development would be a good practical solution?

Q25: If no-one will take on management of a problem development would a co-ordinated approach involving the parties in the development drawing up an action plan and putting it into effect be an alternative solution? How could this be funded and provided with the appropriate level of administrative support?

Q26: As an alternative, or in default, should the local council be brought in to devise an action plan and put it into effect? If so, how would it be funded?

CHAPTER 18 – IMPROVING CONSUMER AWARENESS

To be provided by the developer or agent

Q27: Do consultees agree that when a new property is marketed the developer or estate agent should provide information about the management arrangements for the development? If so, how should this be prescribed? Could it be done by building on the Consumer Code for Builders? Or should it be by the regulator or licensing authority? In the meantime, should best practice encourage the provision of House Rules and Protocols of Information?

To be provided by the solicitor

Q28: Do consultees agree that the Law Society of Northern Ireland should include in its Home Charter Scheme the provision of specified information to purchasers of apartments about the structures of ownership and the arrangements for management of the development? This should extend to cases where a purchaser is buying any property with elements of shared ownership including open space.

Improving communication

Q29: Do consultees have any suggestions for improving communication between apartment owners, for encouraging greater participation in the management company or for encouraging better understanding of community living?

Q30: Do consultees have any suggestions to address the particular problems of buy to let landlords who do not live in their properties, and are mainly concerned about obtaining an income from the occupying tenant?

CHAPTER 19 – UNFINISHED DEVELOPMENTS

Republic of Ireland

Q31: Do consultees consider that it would be of benefit to undertake a survey of unfinished developments, address the deficiencies in the infrastructure as a matter of urgency and put in place site resolution plans for each unfinished development? If so, how would this be organised and how would it be funded?

Bonds

Q32: What are the views of consultees in relation to the bonding of construction work on developments?

Other innovative solutions

Q33: Do consultees have any suggestions as to how private landlords or other bodies could be encouraged to invest in apartments or other properties in incomplete developments to alleviate some of the current problems?

Q34: Can consultees suggest any ways in which the banks could be encouraged to divest themselves of property of which they are in possession as mortgagee. Could the banks take any role in management while they are in possession?

Planning

Q35: Should a requirement be introduced for the Planning Service to inspect property on completion and certify that the building work accords with the conditions of the planning permission?

Q36: In appropriate cases, should a planning condition be introduced for transfer of title to the management company so that a failure to do so would be a breach of planning consent?

ANNEX – CONSULTATION ON EQUALITY SCREENING

Section 75 of the Northern Ireland Act 1998 requires public authorities (in this instance, the Northern Ireland Law Commission) to ensure that they carry out their functions having due regard to the need to promote equality of opportunity between:

- Persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- Between men and women generally;
- Between persons with a disability and persons without; and
- Between persons with dependants and persons without.

Without prejudice to the obligations set out above, the Commission is also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

An initial screening of the provisional views contained in this Consultation Paper has been carried out by the Commission. Consultees are invited to comment on the conclusions drawn from this initial screening.

PART 1. POLICY SCOPING

Information about the policy

Name of the policy
The title of this policy is ‘Apartments’.

Is this an existing, revised or new policy?
This policy is seeking to revise and improve existing policy.

What is it trying to achieve? (intended aims/outcomes)
The project aims to address by the most appropriate means, the problems experienced in practice relating to the ownership and management of apartments. When the Commission consulted on its First Programme of Law Reform, it received numerous responses regarding problems in the apartment sector.

The objectives are:

- To examine the law under which apartments are owned;
- To examine the structures and framework under which apartments are managed;
- To assess the strengths and weaknesses of the current systems;
- To gather evidence of the problems arising in practice;
- To consult key stakeholders including owners of units, owners' management companies, managing agents, developers, the Law Society of Northern Ireland, MLAs and others;
- To use the analysis of responses received to inform policy development;
- To consider whether legislative reform is appropriate;
- To consider whether the establishment of a form of regulation or licensing for managing agents is a possible solution;
- To consider amending company law to provide for a special form of company specifically to manage residential property;
- To consider mechanisms to enable existing company structures to be converted to a more appropriate format;
- To consider appropriate dispute resolution mechanisms to address existing problems;
- To consider the better provision of information for purchasers of apartments;

- To consider means of improving communication between the parties on a development;
- To consider the best means of addressing problems on unfinished developments; and
- To develop proposals which are tailored to the particular context of Northern Ireland and which address the problems arising in this jurisdiction.

Are there any Section 75 categories which might be expected to benefit from the intended policy? If so, explain how.
It is envisaged that this policy will create a positive impact generally for all those involved in the apartment sector. No specific benefits have been identified for any of the section 75 categories.

Who initiated or wrote the policy?
The Northern Ireland Law Commission is responsible for devising the policy.

Who owns and who implements the policy?
The Northern Ireland Law Commission will make recommendations to government, who will decide whether to adopt the recommendations and duly implement them.

Implementation factors

Are there any factors which could contribute to/detract from the intended aim/outcome of the policy/decision?
Financial – Government budget and cost cutting requirements

Legislative – Timetable and legislative process, prioritisation

Other – Resource constraints

Main stakeholders affected

Who are the internal and external stakeholders (actual or potential) that the policy will impact on?
There are a number of stakeholders who are potentially affected by the policy for example, solicitors, property professionals e.g. surveyors, estate agents, lenders, the Law Society of Northern Ireland, Land and Property services, regulatory bodies, owners' management companies and apartment owners themselves.

Other policies with a bearing on this policy
The Consultation Paper on Land Law (NILC 2 (2009), Supplementary Consultation Paper on Land Law (NILC 3 (2010) and Report on Land Law (NILC 8 (2010) previously published by the Northern Ireland Law Commission have relevance on this policy, which seeks to complement those proposed policy recommendations.

Other policy areas of relevance include planning, roads, company law, consumer law and property law.

Available evidence
There is very limited statistical information available in respect of apartment developments generally. The Northern Ireland Law Commission has considered statistical data and other evidence from the Northern Ireland Statistics and Research Agency, Lands Tribunal, Land and Property Services, Northern Ireland Housing Executive, Housing Rights Service and Companies House. All sources of information are referenced throughout the main text of the Consultation Paper.

Of the statistics available, there is a focus on the number of apartments being built etc with limited evidence on those who occupy them.

Apartments currently account for around 9% of the total housing stock (NIHE, *Northern Ireland Housing Market Review 2012)*. The 2011 Census does show a trend towards smaller household sizes meaning that the number of households is increasing more rapidly than the number of

people. The number of households has increased by 12%, whereas the population growth of 8%. This is particularly significant in the context of apartments, as apartment living is a suitable means for accommodating smaller households. The population is projected to increase by 6% between 2010 and 2020 which will put increased pressure on the housing supply market (NIHE, *Northern Ireland Housing Market Review 2012)*.

What evidence/information (both qualitative and quantitative) have you gathered to inform this policy? Specify details for each of the Section 75 categories.

Section 75 category	Details of evidence/information
Religious belief	There is no available evidence which provides a breakdown of apartment ownership based on religious belief
Political opinion	There is no available evidence which provides a breakdown of apartment ownership based on political opinion
Racial group	There is no available evidence which provides a breakdown of apartment ownership based on racial group
Age	There is some evidence to suggest that persons aged 17 – 24 and those over 75 may be over represented with regard to apartment ownership / occupations, when compared to those in other age groups. (NIHE, *Northern Ireland Housing Market: Review and Perspectives 2011 – 2014).*
Marital status	There is no available evidence which provides a breakdown of apartment ownership based on marital status.

Sexual orientation	There is no available evidence which provides a breakdown of apartment ownership based on sexual orientation.
Men and women generally	There is no available evidence which provides a breakdown of apartment ownership based on gender.
Disability	There is no available evidence which provides a breakdown of apartment ownership based on disability.
Dependants	There is some evidence to suggest that those without dependants are more likely to own / occupy an apartment. Statistics from NIHE (*Northern Ireland Housing Market: Review and Perspectives 2011 – 2015)* show that apartments are occupied by higher proportions of lone adults (19%) and lone pensioners (16%) than other types of housing. Typically apartments have only 1 or 2 bedrooms, therefore it is likely that this type of housing will be more suited to those without dependants than those in larger family units.

Needs, experiences and priorities

Taking into account the information referred to above, what are the different needs, experiences and priorities of each of the following categories, in relation to the particular policy/decision? Specify details for each of the Section 75 categories.

Section 75 category	Details of needs/experiences/priorities
Religious belief	There is no evidence that people of differing religious beliefs have any particular needs, experiences and priorities in relation to this policy.

Political opinion	There is no evidence that people of differing political opinions have any particular needs, experiences and priorities in relation to this policy.
Racial group	There is no evidence that people of differing racial groups have any particular needs, experiences and priorities in relation to this policy.
Age	As there is some evidence which suggests that apartment living has a higher take up for those over the age of 75 there is a need to ensure that the policy takes account of their needs. For example the policy seeks to address some of the problems by ensuring that owners have greater awareness of and access to information. Consideration must therefore be given to the most appropriate means to disseminate that information, and that there should be a variety of methods available i.e. not just solely based on technological methods.
Marital status	There is no evidence that people of differing marital status have any particular needs, experiences and priorities in relation to this policy.
Sexual orientation	There is no evidence that people of differing sexual orientation have any particular needs, experiences and priorities in relation to this policy.
Men and women generally	There is no evidence that people of different genders have any particular needs, experiences and priorities in relation to this policy.
Disability	There is no evidence that people who are living with a disability have any particular needs, experiences and priorities in relation to this policy.
Dependants	There is no evidence that people who may or may not have dependants have any

	particular needs, experiences and priorities in relation to this policy.

PART 2. SCREENING QUESTIONS

1. What is the likely impact on equality of opportunity for those affected by this policy, for each of the Section 75 categories?

Section 75 category	Details of policy impact	Level of impact? minor/major/none
Religious belief	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different religious beliefs.	None
Political opinion	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different political opinion.	None
Racial group	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different racial groups.	None
Age	The Northern Ireland Law Commission does not consider that the policy has an impact on people of differing ages.	None
Marital status	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different marital status.	None
Sexual	The Northern Ireland Law	None

orientation	Commission does not consider that the policy has an impact on people of different sexual orientation.	
Men and women generally	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different genders.	None
Disability	The Northern Ireland Law Commission does not consider that the policy has an impact on people of living with disabilities.	None
Dependants	The Northern Ireland Law Commission does not consider that the policy has an impact on people who have or do not have dependants.	None

2. Are there opportunities to better promote equality of opportunity for people within the section 75 equality categories?

Section 75 category	If **Yes**, provide details	If **No**, provide reasons
Religious belief		The Northern Ireland Law Commission does not consider that this policy provides opportunities to promote equality of opportunity for people of different religious beliefs.
Political opinion		The Northern Ireland Law Commission does not consider that this policy provides opportunities to promote equality

		of opportunity for people of different political opinions.
Racial group		The Northern Ireland Law Commission does not consider that this policy provides opportunities to promote equality of opportunity for people of different racial groups.
Age		The Northern Ireland Law Commission does not consider that this policy provides opportunities to promote equality of opportunity for people of different ages.
Marital status		The Northern Ireland Law Commission does not consider that this policy provides opportunities to promote equality of opportunity for people of different marital status.
Sexual orientation		The Northern Ireland Law Commission does not consider that this policy provides opportunities to promote equality of opportunity for people of different sexual orientation.
Men and women generally		The Northern Ireland Law Commission does not consider that this policy provides opportunities to promote equality of opportunity for people of different genders.
Disability		The Northern Ireland Law Commission does not consider that this policy provides opportunities to promote equality of opportunity for people living with a disability.
Dependants		The Northern Ireland Law

		Commission does not consider that this policy provides opportunities to promote equality of opportunity for people who have or do not have dependants.

3. To what extent is the policy likely to impact on good relations between people of different religious belief, political opinion or racial group?

Good relations category	Details of policy impact	Level of impact minor/major/none
Religious belief	The Northern Ireland Law Commission does not consider that this policy is likely to impact on good relations between people of different religious beliefs.	None
Political opinion	The Northern Ireland Law Commission does not consider that this policy is likely to impact on good relations between people of different political opinions.	None
Racial group	The Northern Ireland Law Commission does not consider that this policy is likely to impact on good relations between people of different racial groups.	None

4. Are there opportunities to better promote good relations between people of different religious belief, political opinion or racial group?

Good relations category	If **Yes**, provide details	If **No**, provide reasons
Religious belief		No, the subject matter of this policy does not provide an opportunity to promote good relations between people of different religious beliefs.
Political opinion		No, the subject matter of this policy does not provide an opportunity to promote good relations between people of different political opinions.
Racial group		No, the subject matter of this policy does not provide an opportunity to promote good relations between people of different racial groups.

Additional considerations

Multiple identity

Generally speaking, people can fall into more than one section 75 category. Taking this into consideration, are there any potential impacts of the policy/decision on people with multiple identities?
(*For example; disabled minority ethnic people; disabled women; young Protestant men; and young lesbians, gay and bisexual people).*

There are no impacts on people with multiple identities.

Provide details of data on the impact of the policy on people with multiple identities. Specify relevant section 75 categories concerned.

Not applicable.

PART 3. SCREENING DECISION

If the decision is not to conduct an equality impact assessment, please provide details of the reasons.

The Northern Ireland Law Commission has decided that it is not necessary to conduct an Equality Impact Assessment because it is not envisaged that the policy will have negative impacts on any section 75 categories. The nature of this policy is that it is intended to have a positive impact generally for all those involved in the apartments sector, by addressing the problems in practice which have arisen. This in turn will benefit all section 75 groups in a uniform fashion, irrespective of their section 75 categorisation. The views of consultees are welcome in this regard.

If the decision is not to conduct an equality impact assessment the public authority should consider if the policy should be mitigated or an alternative policy be introduced.

Not applicable – no negative impacts have been identified.

If the decision is to subject the policy to an equality impact assessment, please provide details of the reasons.

Not applicable.

Mitigation

Can the policy/decision be amended or changed or an alternative policy introduced to better promote equality of opportunity and/or good relations?

The subject matter does not easily lend itself to the promotion of equality of opportunity and / or good relations. However, the Northern Ireland Law Commission is consulting on a number of options to reform this area of law, and will take such factors into account when determining the final recommendations.

Timetabling and prioritising

Factors to be considered in timetabling and prioritising policies for equality impact assessment

Not applicable.

PART 4. MONITORING

The Northern Ireland Law Commission is not responsible for monitoring the effect of this policy as its role is limited to making recommendations for law reform. Should the Department with policy responsibility for this subject matter decide to implement the policy, it will be responsible for monitoring its effects in practice.

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