

# Report

## Apartments



# **REPORT**

## **APARTMENTS**

**NILC 17 (2013)**

Laid before the Northern Ireland Assembly by the Department of Justice under Section 52 of the Justice (Northern Ireland) Act 2002 (as amended by paragraph 10 of Schedule 13 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010)

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### **REMIT OF THE NORTHERN IRELAND LAW COMMISSION**

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# CONTENTS

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	<b>Page</b>
<b>TABLE OF LEGISLATION</b>	<b>x</b>
<b>CHAPTER 1. INTRODUCTION</b>	<b>1</b>
1.1 Background to the project	1
1.4 Issues for consideration	1
1.10 Scope of the project	3
1.14 Stakeholder engagement	4
1.21 Recommendations	5
1.25 Summary	6
<b>CHAPTER 2. RECOMMENDATIONS</b>	<b>8</b>
2.1 Title to Apartments	8
2.3 Management companies	8
2.7 A statutory management scheme	9
2.13 Title issues – creation of a right of action	11
2.24 Legal Documentation and Register	13
2.28 Regulation and licensing of managing agents	14
2.42 Dispute resolution mechanisms	17
2.50 Problem Developments	19
2.56 Improving consumer awareness	20
2.65 Unfinished developments	23
<b>CHAPTER 3. THE DEVELOPMENT OF APARTMENTS</b>	<b>27</b>
3.1 Background	27
3.2 The development of apartments	27
3.5 Statistics	28
3.10 The market	30
3.13 Characteristics of an apartment	31
3.16 Statutory definition	31
3.17 Physical characteristics	31
3.19 interdependence	32
<b>RECOMMENDATIONS TO IMPROVE THE PROVISION OF INFORMATION AND ADVICE</b>	

<b>CHAPTER 4.</b>	<b>IMPROVING CONSUMER AWARENESS</b>	<b>34</b>
4.1	Introduction	34
4.4	Increasing understanding	34
4.6	Information	35
4.8	Information to be provided by the developer or estate agent	35
4.13	Question 27	36
4.14	Responses to Question 27	36
4.20	Recommendation 27	38
4.21	Information to be provided by the solicitor	39
4.26	Question 28	40
4.27	Responses to Question 28	40
4.31	Recommendation 28	41
4.32	Improving Communication	41
4.33	Question 29	42
4.34	Responses to Question 29	42
4.39	Recommendation 29	44
4.41	Question 30	44
4.42	Responses to Question 30	45
4.46	Recommendation 30	46
4.47	Other comments	46
4.50	Provision of an advice service	47
4.57	Additional recommendation	51

## **RECOMMENDATIONS TO ADDRESS LEGAL PROBLEMS**

<b>CHAPTER 5.</b>	<b>TITLE TO APARTMENTS</b>	<b>52</b>
5.1	Introduction	52
5.2	Form of title	52
5.9	The role of the lease	54
5.12	Title of developer	55
5.14	Title of management company	55
5.18	Contents of the lease	56
5.20	Description of the apartment	57
5.22	Easements	58
5.23	Exceptions and reservations	58
5.24	Covenants	58
5.28	Service charges	59
5.32	Ground rents	60
5.34	Enforcement of covenants	61

5.38	Registration of title	62
5.41	Houses in multiple occupation	63
5.46	The context for reform	64
5.47	Statutory title	64
5.50	Question 1	65
5.51	Responses to Question 1	65
5.52	Recommendation 1	66
<b>CHAPTER 6. MANAGEMENT COMPANIES</b>		<b>67</b>
6.1	Introduction	67
6.3	Management companies	67
6.4	The Companies Act 2006	68
6.5	Company documentation	68
6.6	Company procedures	68
6.7	Proposal for a more suitable form of company	69
6.13	Republic of Ireland	70
6.14	Question 2	70
6.15	Responses to Question 2	71
6.20	Recommendation 2	72
6.24	Provisions to facilitate administration of companies	73
6.25	Question 3	73
6.26	Responses to Question 3	73
6.30	Recommendation 3	74
<b>CHAPTER 7. A STATUTORY MANAGEMENT SCHEME</b>		<b>75</b>
7.1	Introduction	75
7.3	Question 4	75
7.5	Response to Question 4	76
7.6	Recommendation 4	76
7.15	Question 5	79
7.16	Responses to Question 5	80
7.21	Recommendation 5	81
7.22	Question 6	81
7.23	Responses to Question 6	81
7.25	Recommendation 6	82
<b>CHAPTER 8. TITLE ISSUES – CREATION OF A RIGHT OF ACTION</b>		<b>83</b>
8.1	Introduction	83
8.2	Question 7	83
8.4	Responses to Question 7	83



8.6	Recommendation 7	84
8.10	Question 8	85
8.11	Responses to Question 8	85
8.12	Recommendation 8	86
8.13	Question 9	86
8.15	Responses to Question 9	86
8.16	Recommendation 9	86
8.17	Question 10	87
8.18	Responses to Question 10	87
8.19	Recommendation 10	87
8.20	Question 11	88
8.21	Responses to Question 11	88
8.22	Recommendation 11	88

## **CHAPTER 9. LEGAL DOCUMENTATION AND REGISTER 89**

9.1	Introduction	89
9.2	Standard documentation	89
9.3	Question 12	89
9.4	Response to Question 12	90
9.10	Recommendation 12	91
9.12	Central register of information	91
9.14	Question 13	92
9.15	Responses to question 13	92
9.20	Recommendation 13	93

## **RECOMMENDATIONS TO ADDRESS MANAGEMENT PROBLEMS**

## **CHAPTER 10. REGULATION AND LICENSING OF MANAGING AGENTS 95**

10.1	Introduction	95
10.2	Regulation of managing agents	95
10.4	Question 14	96
10.5	Responses to Question 14	96
10.8	Recommendation 14	96
10.9	The remit of a regulator	97
10.13	Question 15	98
10.14	Response to Question 15	98
10.21	Recommendation 15	100
10.22	Self-regulation	100
10.25	Question 16	101

10.26	Response to Question 16	101
10.29	Recommendation 16	104
10.30	Licensing of managing agents	104
10.33	Question 17	105
10.34	Response to Question 17	105
10.37	Recommendation 17	106
10.38	Licensing standards	106
10.44	Question 18	108
10.45	Responses to Question 18	108
10.47	Recommendation 18	108
10.48	The licensing authority	109
10.49	Question 19	109
10.50	Responses to Question 19	109
10.51	Recommendation 19	109
10.52	A statutory agency dealing with management	110
10.56	Question 20	111
10.57	Responses to Question 20	111
10.60	Recommendation 20	111
<b>CHAPTER 11. DISPUTE RESOLUTION MECHANISMS</b>		<b>112</b>
11.1	Introduction	112
11.2	Rescue provisions	112
11.3	Question 21	112
11.4	Responses to Question 21	113
11.5	Recommendation 21	113
11.8	Separate causes of action in management matters	114
11.9	Service charges and sinking funds	114
11.11	Question 22	115
11.12	Responses to Question 22	115
11.15	Recommendation 22	116
11.17	Planned maintenance	116
11.18	Alternative dispute resolution	117
11.22	Question 23	119
11.23	Responses to Question 23	119
11.28	Recommendation 23	120
11.29	Provision of an advice service	120
11.34	Additional recommendation	124
<b>CHAPTER 12. PROBLEM DEVELOPMENTS</b>		<b>125</b>
12.1	Introduction	125
12.3	Tendering for management	125
12.4	Question 24	126

12.5	Response to Question 24	126
12.6	Recommendation 24	126
12.7	An action plan	126
12.9	Question 25	127
12.10	Responses to Question 25	127
12.12	Recommendation 25	128
12.13	Question 26	128
12.15	Responses to Question 26	128
12.16	Recommendation 26	129
<b>CHAPTER 13.</b>	<b>UNFINISHED DEVELOPMENTS</b>	<b>130</b>
13.1	Introduction	130
13.4	Republic of Ireland	130
13.5	Question 31	131
13.6	Responses to Question 31	131
13.8	Recommendation 31	132
13.10	Unadopted roads	132
13.13	Bonds	133
13.15	Question 32	133
13.16	Response to Question 32	133
13.20	Recommendation 32	134
13.21	Provision of funding to Housing Association	135
13.23	Other innovative solutions	135
13.24	Question 33	136
13.25	Responses to Question 33	136
13.29	Recommendation 33	137
13.30	The Banks	137
13.31	Question 34	137
13.32	Responses to Question 34	137
13.39	Recommendation 34	139
13.40	Compliance with planning permission	139
13.44	Question 35	140
13.45	Responses to Question 35	140
13.48	Recommendation 35	141
13.51	A planning condition for transfer of title	141
13.52	Question 36	142
13.53	Responses to Question 36	142
13.56	Recommendation 36	143
<b>APPENDIX A.</b>	<b>SECTION 75 OF THE NORTHERN IRELAND ACT 1998 EQUALITY SCREENING</b>	<b>144</b>
<b>APPENDIX B.</b>	<b>ACKNOWLEDGEMENTS</b>	<b>156</b>

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## TABLE OF LEGISLATION

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### NORTHERN IRELAND

Statute of Frauds (Ireland) 1695 c.12  
The Landlord and Tenant Law Amendment Act (Ireland) 1860 c.154  
Real Property Act 1845 c.106  
Renewable Leasehold Conversion Act 1849 c.105  
Conveyancing Act 1881 c.41  
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Registration of Deeds Act (Northern Ireland) 1970 c.25  
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Property (Northern Ireland) Order 1978 No. 459 (N.I. 4)  
Building Regulations (Northern Ireland) Order 1979 No. 1709 (N.I. 16)  
Private Streets (Northern Ireland) Order 1980 No. 1086 (N.I.12)  
Housing (Northern Ireland) Order 1981 No. 156 (N.I. 3)  
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Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 No. 1452 (N.I. 7)

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Energy Performance of Buildings (Certificates and Inspections) Regulations (Northern Ireland) 2008 No. 170  
The Fire Safety Regulations (Northern Ireland) 2010 No. 325  
Planning Act (Northern Ireland) 2011 c.25  
Land Registration (Amendment) Rules (Northern Ireland) 2011 (No. 141)

## **ENGLAND AND WALES**

Law of Property Act 1925 c.20  
The Leasehold Reform Act 1967 c.88  
Housing Act 1974 c.44  
Housing Act 1980 c.51  
The Landlord and Tenant Act 1985 c.70  
Landlord and Tenant Act 1987 c.31  
Leasehold Reform, Housing and Urban Development Act 1993 c.28  
Housing Act 1996 c.52  
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## **SCOTLAND**

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## **UK WIDE LEGISLATION**

Estate Agents Act 1979 c.38

Property Misdescription Act 1991 c.29

Estate Agents (Provision of Information) Regulations 1991 No.859

Estate Agents (Undesirable Practices) (No 2) Order 1991 No. 1032

Human Rights Act 1998 c.42

Companies Act 2006 c.46

Consumers, Estate Agents & Redress Act 2007 c.17

Consumer Protection from Unfair Trading Regulation 2008 No.1277

The Companies (Model Articles) Regulations 2008 No. 3329

## **OTHER JURISDICTIONS**

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Strata Titles Act (New South Wales) 1973 (NSW)

Strata Schemes (Freehold Development) Act 1973 Act 68 of 1973 (NSW)

Victoria Subdivision Act 1988 No. 53 of 1988 (Vic)

Community Land Development Act 1989 Act 201 of 1989 (NSW)

Community Land Management Act 1989 Act 202 of 1989 (NSW)

Strata Schemes (Leasehold Development Act) 1996 No. 219 of 1996 (NSW)

Strata Schemes Management Act 1996 Act 138 of 1996 (NSW)

Owners Corporation Act 2006 No. 69 of 2006 (Vic)

Uniform Condominium Act 1980 (USA)

Uniform Common Interest Ownership (Uniform) Act (1994)

The 2009 Florida Statutes Title XL, c.718 (USA)

The Condominium Act 1998 S.O 1998, c. 19 (Ont)

## **INTERNATIONAL LEGAL INSTRUMENTS**

Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms

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## **CHAPTER 1. INTRODUCTION**

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### **BACKGROUND TO THE PROJECT**

- 1.1 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. Since 2007, when the property market reached its height, the economic climate has become less favourable and the construction sector has declined. This has created 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.
- 1.2 The Apartments project 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 project was originally constituted under the title of Multi-Unit Developments but was reconfigured and restructured in July 2012 to focus specifically on apartments and other properties with elements of shared ownership such as open spaces. The Consultation Paper on Apartments<sup>1</sup> was published in November 2012. This Report and the Consultation Paper which preceded it represent the work that has been done on the project since the end of July 2012.
- 1.3 The Commission has considered the position primarily in the context of private home ownership and has not examined those issues which arise between a landlord and a tenant in the letting of property. The Commission is conscious that private homeowners feel there is a deficit of services and remedies available to them when they encounter difficulties or have a dispute; whereas there is a perception that there is a greater range of support for tenants, whether in social or private housing.

### **ISSUES FOR CONSIDERATION**

- 1.4 Until relatively recently there has been limited experience of living in an apartment. People in Northern Ireland are not culturally familiar with the concept of living in apartments nor are they accustomed to shared

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<sup>1</sup> NILC 15(2012)

ownership of any kind, being more used to traditional forms of housing with largely separate facilities. It is likely that the number of people living in apartments and other properties with elements of shared ownership will increase further in the future as a result of planning policy which encourages high densities and the provision of affordable housing.

- 1.5 Some home owners were attracted to the concept of living in an apartment by the convenience and affordability of the accommodation but failed to appreciate the obligations and responsibilities which accompanied it. Others have found the increasing maintenance and repair costs have come at a time when they may be in negative equity and the value of the property is not rising. There are also owners who have made the transition from social housing by buying property at a discount from the NI Housing Executive after having lived in and rented it for several years, who have found the expense and responsibility of ownership particularly challenging.
- 1.6 The legal framework under which apartment developments operate is complex and it may be difficult for apartment owners to comprehend both the structures and the documentation. In all cases, the individual ownership of the property has to be able to accommodate collective responsibility for its ongoing governance. 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 cooperation between the parties and there have to be proper channels of communication between them.
- 1.7 A characteristic of the sector is the fact that ownership of an apartment can often be relatively short-term. Consequently some of the residents do not see the benefit of taking an active role in discussions or meetings relating to management issues. There is also an issue in that many apartments are tenanted. This divides the ownership and the occupation of the apartment so that each has an interest of a different nature. In addition it is evident that where there is a high turnover of owners and / or tenants, it can impact further on the effective operation of management arrangements.
- 1.8 The physical characteristics of blocks of apartments and other forms of multiowned high density property have some common characteristics



and are quite different from those of freestanding 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.

- 1.9 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. 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.

## **SCOPE OF THE PROJECT**

- 1.10 The central focus of this project has been to concentrate on the law and practice relating to apartments. Although the primary focus is on apartments, the considerations which apply to other types of residential property with elements of shared ownership, such as townhouses and property on developments with common areas or open spaces are similar, regardless of the nature of the housing provided.
- 1.11 The Commission is very aware of the pressing immediate problems of existing owners of apartments and those in other developments where there are elements of shared ownership or open spaces. In looking at possible solutions to the existing problems, the Commission has examined the issues which affect apartments themselves as well as the structure of buildings and common areas in the development, both internal and external.
- 1.12 As a matter of priority, the Commission has focused on the need to offer solutions for people currently living in apartments and other developments who are experiencing difficulties with the management of their development. In undertaking this work the Commission has reviewed the structures and framework under which apartments are owned and managed. The same principles that apply to apartments

also apply to other properties with elements of shared ownership and open spaces.

- 1.13 The Commission has sought 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, but has not undertaken a detailed academic analysis. It recognises that the subject of apartments is one which is of wide appeal. It is also conscious that this review raises matters of concern to many members of the public and sectors of the community at large.

## **STAKEHOLDER ENGAGEMENT**

- 1.14 Consultation with stakeholders and other interested parties has formed an important part of the project. The Commission has ensured that it has engaged and consulted extensively with as wide a range of stakeholders as possible throughout the project. In doing so it has taken into account the roles and views of all parties involved in residential housing developments – the developers, management companies, managing agents, apartment owners and residents.
- 1.15 Subsequently meetings and preliminary discussions have been held with representatives across a range of stakeholders including developers, managing agents, solicitors, chartered surveyors and housing associations. The Commission also met with the Minister for Finance and Personnel to report on the progress of the project and with Kieran McCarthy MLA, who has a particular interest in Apartments.
- 1.16 During the consultation period which ran from 15 November 2012 until 25 January 2013 the Commission contacted interested stakeholders to encourage them to participate in the consultation. Individuals and organisations who had drawn specific issues to the attention of the Commission during the earlier stages of the project were invited to engage with the Commission to express their views on the proposals made in the Consultation Paper. By request the project team appeared before the Committee for Finance and Personnel at the NI Assembly Committee on 13 March 2013.
- 1.17 Meetings were held with representatives from a number of organisations including Belfast Building Control, Association of Apartment Owners of Northern Ireland (AANI), Brackenwood Property and Estate Management, CSM Estate Agents, Charterhouse Property Management Limited, Property One, Law Society of Northern Ireland,

Royal Institution of Chartered Surveyors, Housing Rights Service, the Northern Ireland Ombudsman, the Northern Ireland Housing Executive and Land and Property Services. The Commission held a seminar on the proposals in conjunction with the Law Society at Law Society House.

- 1.18 The Commission has also engaged with representatives of professional organisations in England and Wales, Scotland and the Republic of Ireland to find out about the effectiveness of the measures that have been introduced in neighbouring jurisdictions and the lessons that can be learnt from their experiences.
- 1.19 The Commission wishes to acknowledge those who have assisted in the project to date, as well as those who have participated in discussions both formally and informally. The Commission welcomes these contributions which have been of great assistance to it in its deliberations. The Commission also wishes to acknowledge the assistance and guidance provided by the Departmental Solicitors' Office throughout the course of this project. A list of all those who have assisted us in the course of the project can be found in Appendix B.
- 1.20 The Commission is grateful to all those who responded to the questions raised in the Consultation Paper for their views and comments. The responses provided were generally very supportive of the proposals made by the Commission and indicate that the Commission was on the right track in the proposals that it made. In many cases, the responses were almost unanimous or were overwhelmingly in favour of the proposals. Many of the additional comments made also indicated that the respondents, whatever their own role or perspective, shared the same views on matters of principle.

## **RECOMMENDATIONS**

- 1.21 In formulating its recommendations, the Commission has been open minded and has recognised that there may be a range of options which can offer effective solutions to the problems currently experienced by those living in and owning apartments. The Commission has taken the views of consultees and stakeholders into account in reaching its conclusions and formulating its recommendations. It has put forward a comprehensive range of solutions concentrating on the most effective means and the most suitable mechanisms for addressing existing problems as well as trying to ensure that the same issues do not arise in the future.

- 1.22 The Commission has concluded that the answers may lie not only in the introduction of legislation to address some of the specific issues but also that there are more practical or flexible ways of implementing a number of the recommendations. The Commission is making recommendations that it anticipates will be of broad appeal, while recognising the need to be conscious of issues of cost, funding, transparency and accessibility. It is clear from the reaction of consultees that some of the suggested solutions would be very popular with stakeholders and the Commission hopes that those which are relatively straightforward will be taken forward as soon as it is practicable to do so.
- 1.23 This Report does not contain draft legislation, but the Commission is confident that the recommendations outlined in it can offer effective solutions to the problems currently experienced by those who own and live in apartments or other properties with elements of shared ownership. The Commission recognises that funding of any new services is an issue so it has aimed to be pragmatic and realistic in its approach. Some of the measures which it recommends are likely to be low-cost, accessible and have the potential to be introduced quite quickly.
- 1.24 The Commission believes that it should be possible to achieve the objective of alleviating the current problems and improving the position of home owners by implementing the proposals which have the support of a wide range of stakeholders. Although the Commission has formulated the proposals and is now making its recommendations, its involvement in the work ends at this point and the final decision as to the direction in which they will be taken forward is a matter for the Department of Finance and Personnel. Clearly it is in everyone's interests that lessons are learned from the experience of the past and that effective measures are introduced taken to address the issues.

## **SUMMARY**

- 1.25 In summary the Commission recommends that consideration be given to the introduction of the following:
- provision of more information to prospective purchasers by the developer / estate agent when a new apartment or property with a management company is marketed;
  - provision of more information to purchasers by their solicitor;

- development of a website to improve communication between apartment owners, encourage greater participation in the management company and better understanding of community living;
- provision of an advisory service for homeowners;
- development of a standard framework for leases of properties with elements of shared ownership;
- establishment of a central register of information;
- creation of a new form of company structure for management companies or alternatively, provisions to facilitate the administration of management companies;
- designing a statutory default management scheme for apartment blocks and other properties with elements of shared ownership;
- access for homeowners to an affordable and straightforward dispute resolution service;
- establishing a new purpose build tribunal, panel or commissioner to deal with management issues;
- creation of a right of action (either in the Lands Tribunal or a new forum) to address matters of title such as transfer of the common areas to the management company or amendment of the leases in a development;
- encouraging the use of alternative means of dispute resolution;
- regulation of managing agents;
- licensing of managing agents;
- issuing effective rescue plans and remedial orders on problem developments and in serious cases where management arrangements are not working;
- enabling managing agents to tender for the contract to take on the management of problem developments;
- undertaking a survey of unfinished developments;
- a requirement for the Planning Service to inspect property on completion and certify that it accords with the conditions for the planning permission;
- alternatively linking compliance with planning permission to the certification system currently operated by building control.

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## CHAPTER 2. RECOMMENDATIONS

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### RECOMMENDATIONS TO ADDRESS LEGAL PROBLEMS

#### CHAPTER 5: TITLE TO APARTMENTS

**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?**

2.1 **Responses:** The overwhelming majority of consultees agreed with the preliminary view of the Commission not to recommend the introduction of a statutory form of strata title.

2.2 **Recommendation 1:** Whilst recognising that a new form of strata title may be attractive in principle, the Commission has reached the conclusion that the interests of present owners of apartments would not be best served by pursuing the aim of a new form of title. It considers that other remedies may be more effective which could be introduced more quickly. Accordingly the Commission does not recommend that a new form of statutory title should be introduced.

#### CHAPTER 6: MANAGEMENT COMPANIES

**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?**

2.3 **Responses:** The overwhelming majority of consultees agreed that the introduction by legislation of a simpler more suitable form of company should be considered.

2.4 **Recommendation 2:** The preliminary inclination of the Commission was to introduce a new simpler form of company for management companies and it recognises that in principle this proposal was very attractive to consultees. However, on reflecting further and taking a

more pragmatic view, it has concluded on balance that a new form of company may not be an effective solution for residential property management companies in the shorter term. In preference it considers that it would be of greater benefit to consider provisions to facilitate the administration of companies (see below Question 3).

**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?**

2.5 **Response:** If a new specialised form of company is not feasible, consultees would support the proposal for the introduction of provisions to improve and facilitate the administration of management companies.

2.6 **Recommendation 3:** The Commission is persuaded of the merits of administrative reform of management companies as a more viable alternative to the introduction of a simpler form of company. In the light of the level of support from the consultees for this proposal, the Commission recommends that consideration be given to modifying and adapting the administrative requirements for management companies. This could be taken forward through Companies House. The Commission further recommends that more information and guidance about the requirements be made widely available to such companies, their members and officers.

## **CHAPTER 7: 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?**

2.7 **Response:** Almost all the consultees agreed that it would be helpful to introduce a statutory default management scheme for blocks of apartments and other properties with elements of shared ownership. This is a very important issue and careful consideration needs to be given as to legislative options.

2.8 **Recommendation 4:** The Commission realises that the proposal for a statutory management scheme is attractive to consultees and appreciates that it may be considered effective in addition to the other measures it is recommending. On balance, the Commission is persuaded by the strongly expressed views of the overwhelming

majority of consultees that it should recommend a comprehensive statutory management scheme for apartments and other residential developments with elements of shared ownership, such as open spaces. However, it would sound a note of caution in recommending the introduction of legislation. Careful consideration should be given to the issues that would be addressed in the legislation and in the detail of the provisions. The statutory management legislation should not encroach on the matters that are dealt with elsewhere i.e. company law and the administration aspects of management companies, regulation or licensing of managing agents, and dispute resolution mechanisms (See Recommendations 2 - 3, 14 -19, 21 - 23).

**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?**

2.9 **Response:** Although supportive of this in principle, the consultees responding to this question considered it very much a second choice, preferring a full statutory management scheme.

2.10 **Recommendation 5:** The Commission recognises that a legislative scheme which only addresses specific points would not be as popular as a full statutory management scheme. Accordingly, it recommends this option should only be pursued if government decides not to proceed with a statutory management scheme under Recommendation 4. If this came about, government should give further consideration to the issues that it wished to address in the legislation, such as a requirement to establish a sinking fund.

**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?**

2.11 **Response:** Consultees did not support the proposal for a compulsory contribution to the sinking fund to be made on sale of an apartment.



- 2.12 **Recommendation 6:** The Commission does not recommend that there should be any requirement for a percentage of the sale proceeds of an apartment to be paid into a sinking fund.

## **CHAPTER 8: TITLE ISSUES - 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?**

- 2.13 **Response:** Consultees were unanimous in agreeing that a right of action should be created to address particular concerns affecting matters of title. Given the potential expense involved, the provision of a low-cost tribunal was considered the most suitable approach.

- 2.14 **Recommendation 7:** The Commission recommends that consideration should be given to conferring appropriate jurisdiction on the Lands Tribunal and creating a right of action to address issues relating to matters of title affecting residential property with elements of shared ownership. Although it has previously drawn a distinction between matters of title and management matters, the Commission recognises that an alternative solution would be to establish a new low-cost accessible body to deal with both title and management matters. Accordingly, the Commission also recommends that government gives further consideration to the option of inclusion of title in the same forum as management as opposed to having a separate process for title disputes.

**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?**

- 2.15 **Response:** Consultees were also unanimous in agreeing that it would be very helpful to have a right to apply to a court or tribunal for the lease to be amended. A few additional comments were made about the powers of amendment but there was no consensus on the proportion of lessees required to apply.

2.16 **Recommendation 8:** Following Recommendation 7 the Commission further recommends that the power to address title matters should include a power to amend all the leases in the development. There was no consensus on the appropriate proportion of lessees that would be required for the amendment to be imposed on all the residents so the Commission is not expressing any view on this point.

**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?**

2.17 **Response:** Almost all of the consultees responding to this question favoured the Lands Tribunal over the Land Registry.

2.18 **Recommendation 9:** Accordingly, the Commission recommends that consideration be given to conferring appropriate jurisdiction on the Lands Tribunal to make an order to amend leases of properties in residential developments with elements of shared ownership. However, if in the alternative a new body is established to deal with both title and management matters (see Recommendation 7), that body should be given the appropriate jurisdiction.

**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 or the Land Registry to make the necessary determination?**

2.19 **Response:** The great majority of consultees also considered that proceedings to enforce the covenants in a lease should be taken in the Lands Tribunal in preference to the small claims courts as is the position at present.

2.20 **Recommendation 10:** The Commission recommended above (Recommendation 9) that consideration be given to conferring appropriate jurisdiction on the Lands Tribunal to make an order to amend leases of properties in residential developments with elements of shared ownership. However, if in the alternative a new body is established to deal with both management and title matters (see

Recommendation 7), that body would be given the appropriate jurisdiction.

2.21 The enforcement of covenants is also a matter of title so the Commission recommends that the appropriate forum to address this issue should be considered in the context of matters affecting title. As it has already recommended that jurisdiction should be conferred on the Lands Tribunal it would be consistent to do so again. However, if government considers that a new body should be established, the Commission recommends that the new body should also deal with enforcement of covenants.

**Q11: Do consultees consider that the management company should have a right of action under which it could be awarded possession of a property or forfeiture of a lease? If so, should this be through the courts or the Lands Tribunal?**

2.22 **Response:** The majority of consultees did not support the idea of enabling a management company to be awarded possession of a property or forfeiture of a lease for non-payment of the service charge by an apartment owner.

2.23 **Recommendation 11:** In view of the lack of support for this proposal the Commission is not recommending that a management company should have a right of action under which it could be awarded possession of a property or the lease should be forfeited.

## **CHAPTER 9: LEGAL DOCUMENTATION AND REGISTER**

**Q12: Do consultees agree that it would be difficult to reach 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.**

2.24 **Response:** Almost all of the consultees agreed with the preliminary view of the Commission and recognised the difficulties of complete standardisation of leases because of the individual characteristics of each development.

2.25 **Recommendation 12:** Although the Commission does not support the introduction of a standard lease for residential properties with elements of shared ownership it has taken into account the comments made by consultees in favour of a standard framework and the use of

precedents to ensure that the necessary rights and obligations are properly clarified in each case. It appreciates the points made with regard to specific issues, such as service charges and sinking funds, and considers that it would be of benefit for certain core provisions to be incorporated in every appropriate case.

### **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?**

2.26 **Response:** Consultees were almost unanimous in expressing support for this proposal.

2.27 **Recommendation 13:** The Commission is reinforced in its preliminary view by the response of the consultees and recommends that a register of information should be established relating to developments with a management company. Consideration should be given to the register being established in the Land Registry. However, it is clear that further thought needs to be given as to how the register would be funded and administered.

## **RECOMMENDATIONS TO ADDRESS MANAGEMENT PROBLEMS**

### **CHAPTER 10: REGULATION AND LICENSING OF MANAGING AGENTS**

**Q14: Do consultees support a proposal for the regulation of managing agents?**

2.28 **Response:** Consultees were almost unanimous in their support for regulation.

2.29 **Recommendation 14:** This is one of the most important issues in the consultation and proved to be a very popular proposal. In the light of the strong support from consultees the Commission recommends that regulation of managing agents should be introduced.

**Q15: Do consultees agree with the suggestions of the Commission as to the remit of a regulator? Are there any other matters that might be within the remit of the regulator?**

2.30 **Response:** Consultees broadly agreed with the possible remit and powers of a regulator as set out in the Consultation Paper (paragraph 17.4).

2.31 **Recommendation 15:** Having looked at the models in neighbouring jurisdictions, the Commission recommends that serious consideration should be given to developing a framework similar to that which operates in Scotland under the Property Factors (Scotland) Act 2011. The new legislation should similarly provide for the establishment of a register of managing agents, require managing agents to be registered, provide for a code of conduct and create a homeowner housing panel as a suitable dispute resolution mechanism.

### **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?**

2.32 **Response:** Some consultees accepted that self-regulation might be considered in default of a statutory scheme, but there was little enthusiasm for it. The RICS submitted a detailed scheme of proposals for self-regulation.

2.33 **Recommendation 16:** The Commission is recommending the introduction of legislation to regulate managing agents and the views of consultees also strongly support full regulation in preference to self-regulation. However, if government is not inclined to proceed with full regulation, the Commission recommends that consideration should be given to the proposals of the RICS for self-regulation.

### **Licensing of managing agents**

**Q17: Should the option of licensing managing agents be considered as an alternative to independent regulation or self-regulation?**

2.34 **Response:** Most consultees expressed support for licensing, some as an alternative if regulation was not to be introduced and some in addition to regulation.

2.35 **Recommendation 17:** Although licensing is a more limited solution than regulation the Commission recommends that a licensing scheme should be established either as part of a scheme of regulation or if regulation is not to be introduced.

**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?**

2.36 **Response:** Consultees agreed with the proposals for licensing set out in the Consultation Paper (paragraphs 17.12 -17.13).

2.37 **Recommendation 18:** Accordingly the Commission recommends that if a licensing scheme is to be established, it should be based on the minimum standards proposed in the Consultation Paper. Consideration should be given to establishing a licensing regime similar to that which operates in Scotland under the Property Factors (Scotland) Act 2011.

**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?**

2.38 **Response:** Consultees made a range of suggestions for the licensing body, including each of those suggested in the Consultation Paper (paragraph 17.21).

2.39 **Recommendation 19:** In view of the complexity of the issues in identifying the most suitable body and the variety of views expressed by the consultees, the Commission is not making any recommendation in relation to this issue. If a licensing scheme is introduced, the funding and administration of it will be a matter for government.

### **A statutory agency dealing with management**

**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?**

2.40 **Response:** Consultees agreed with the preliminary view of the Commission that empowering a statutory body to deal with all management issues may seem like an ideal solution, but is unlikely to work in practice.

- 2.41 **Recommendation 20:** The Commission considers that creating a statutory agency to deal with all management issues is not a solution that should be considered in the short term. It would require the establishment of a large publicly funded organisation with substantial funding which the Commission does not regard as an appropriate or effective proposal in the current economic climate.

## CHAPTER 11: DISPUTE RESOLUTION MECHANISMS

### 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?**

- 2.42 **Response:** Consultees supported the idea of a remedial order grounded on one or more causes of action as an effective rescue plan where management arrangements are not working. The majority suggested that the Lands Tribunal was the most suitable forum.
- 2.43 **Recommendation 21:** In the Consultation Paper the Commission distinguished between the legal framework and remedies for matters of title on the one hand (Chapter 16) and management problems on the other hand (Chapter 17). The proposal for a remedial order was suggested as a means of resolving management issues. A recommendation has been made above for creation of a right of action for title matters (Recommendation 7).
- 2.44 Having reflected further on this issue, the Commission recommends that consideration be given to the proposal for rescue plans to be undertaken on particular developments where management arrangements have broken down. It further recommends that there should be a right of action to obtain a remedial order to enforce the rescue plan.
- 2.45 The Lands Tribunal may currently be the most appropriate forum. However, if government decides to take forward the recommendation to establish a scheme for the regulation of managing agents, similar to

that which operates in Scotland under the Property Factors Act 2011<sup>2</sup>, it may include a dispute resolution mechanism (similar to the homeowner housing panel in Scotland). The Commission supports this course of action and recommends that further consideration be given to the creation of a relatively informal process for adjudication of disputes relating to management matters which would include the making of remedial orders. This might take the form of a panel, tribunal or commissioner to deal with management issues.

### **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?**

2.46 **Response:** The consultees made a range of comments in response to this question and it was not possible to discern any consistent view from their remarks.

2.47 **Recommendation 22:** The Commission considers that the distinction between matters of title and matters of management is a valid one. It recognises that the Lands Tribunal is the preferred forum to address title issues but that it is not necessarily best suited for management disputes. As with Recommendation 21 above, the Commission having taken into account the benefits of recourse to an affordable and accessible process, has reached the conclusion that there may be a role for a new purpose built panel, tribunal or commissioner to deal with management issues. This could be pursued by means similar to the homeowner housing panel in Scotland, established under the Property Factors (Scotland) Act 2011, along with regulation of managing agents. The new scheme could operate in conjunction with the other remedies considered in Question 23.

### **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?**

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<sup>2</sup> See Recommendation 15 which relates to the regulation of managing agents and recommends the establishment of a register of managing agents, a code of conduct and a homeowner housing panel as a dispute resolution service.



- 2.48 **Response:** The consultees were unanimously in favour of the proposal to encourage the use of alternative means of dispute resolution.
- 2.49 **Recommendation 23:** It appears to the Commission that mediation and arbitration are likely to be the methods most suited to property management disputes. The Commission recommends that both management companies and managing agents should have complaints procedures providing for disputes to be submitted for mediation or arbitration. The schemes highlighted by the Law Society and the RICS should be more widely publicised.

## **CHAPTER 12: PROBLEM DEVELOPMENTS**

**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?**

2.50 **Response:** The majority of consultees were in favour of the proposal for tendering to be permitted on the basis that it may offer a practical solution, although some queried the likelihood of a managing agent having the resources to wish to take on a problem development.

2.51 **Recommendation 24:** The Commission has considered this matter carefully. It has concluded that enabling managing agents to tender for the management contract of problem developments may be of assistance to some residents who are currently experiencing serious problems with poorly functioning management arrangements. There would have to be some supervision or regulation to ensure that only managing agents operating in accordance with recognised standards can tender for the contract. Accordingly the Commission recommends that further consideration should be given as to how this might be facilitated. It may be an issue that could be considered if regulation or licensing of managing agents is implemented (see Recommendations 14 - 19).

**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?**

2.52 **Response:** Although a few consultees were in favour of an action plan, many consultees recognised the practical difficulties of the various parties involved taking a co-ordinated approach to adopting an action plan and in general the responses to this question were mixed. A range of suggestions was made for funding and administering action plans including the Housing Council, home owners, the developer, the lender, various government departments (DSD, DRD, DOE, DETI) or the councils.

2.53 **Recommendation 25:** The Commission has taken into account all the comments made by the consultees in response to this question. There is little discernable support overall for a co-ordinated action plan and there would be issues with raising the necessary funds to address the problems. Although the Commission considers that it is important to offer some solutions for residents of problem developments it concludes that promoting the provision of a co-ordinated action plan may not be practical in the current climate.

**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?**

2.54 **Response:** Opinions were divided amongst the consultees responding to this question, although many recognised that the main issue is funding.

2.55 **Recommendation 26:** The Commission considers that it is very important to offer some solutions for residents of problem developments. However, it recognises that consultees do not consider that it is realistic to suggest that the responsibility to devise and put action plans into effect should be imposed on local councils. The Commission therefore recommends that government should take the lead role in taking a co-ordinated approach to drawing up action plans and finding the funding to ensure that action plans can be implemented.

## **CHAPTER 4: IMPROVING CONSUMER AWARENESS**

### **Information to be provided by the developer or estate 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?**

- 2.56 **Response:** All the consultees who responded were in favour of the provision of more information about management arrangements when the property is marketed.
- 2.57 **Recommendation 27:** The Commission believes that the better provision of information at the point when the property is marketed would greatly improve the awareness and understanding of consumers. In order to ensure that information is made available for all properties, whether newly constructed or pre-owned, the Commission recommends that detailed requirements for the provision of information be included both in the Consumer Code for Builders and in the code of conduct which will form part of the scheme for the regulation of managing agents. In the meantime, best practice should be encouraged though the provision of house rules and protocols of information for each management company.

#### **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.**
- 2.58 **Response:** Again, all the consultees who responded agreed with this proposal and the Law Society itself supported the Commission's view in adding that the Home Charter Scheme is an ideal vehicle for stipulating the nature and extent of such information to be provided. The Law Society also agreed with the Commission that this should extend to cases where any property with an element of shared ownership is involved.
- 2.59 **Recommendation 28:** The Commission is greatly encouraged by the level of support for this proposal and has no hesitation in recommending that through its Home Charter Scheme the Law Society should stipulate the nature and extent of information to be provided by

solicitors on the purchase of an apartment or other property with elements of shared ownership.

### **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?**

2.60 **Response:** It was widely recognised that improving communication is one of the keys to more sustainable community living and a variety of suggestions were made by the consultees in response to this question. For example: a management company website, social gatherings, regular online updates, site bulletin boards, monthly management meetings, facebook private group, mandatory AGM and others.

2.61 **Recommendation 29:** The Commission recommends that the offer of NI Co-Ownership Housing Association Limited to assist in the development of a generic website (subject to funding being made available) should be pursued. The Commission further recommends that other best practice guidance to improve communication should form part of the code of conduct for managing agents to be administered and enforced by the new regulator.

**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?**

2.62 **Responses:** Various suggestions were made by the consultees in response to this question. For example: an insurance levy for landlords, vetting of tenants by management committee, penalties for owners not attending meetings, provisions to compel a landlord to satisfy management requirements, register of landlords, licensing of landlords, increased awareness and communication.

2.63 **Recommendation 30:** Having taken into account the suggestions made by the consultees the Commission is inclined to the view that suitable provisions could be taken forward and developed through the Landlord Registration Scheme established by the Department of Social Development.

## **Provision of an advisory service**

- 2.64 **Additional Recommendation:** The Commission recommends that an advice service should be established for residential leaseholders to which those owning and living in apartments and other properties with elements of shared ownership could have access. It recognises that the provision of any service would require resources to be made available and a competitive tendering process.

## **CHAPTER 13: UNFINISHED DEVELOPMENTS**

**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?**

- 2.65 **Response:** The consultees were unanimous in expressing their agreement to this proposal in principle. A range of suggestions were made as to how it might be done.

- 2.66 **Recommendation 31:** The Commission recommends that further consideration should be given to undertaking a survey of unfinished developments in order to provide site resolution plans where necessary. The suggestions for organising and funding it should be explored.

- 2.67 The Commission notes that Article 37 of the Planning (Northern Ireland) Order 1991 (1991 No. 1220 (N.I.11)) provides for the Department of Environment to make a completion order where it is of the opinion that the development will not be completed within a reasonable period. The Commission recommends that consideration be given to using this provision where appropriate and to include as part of the completion order a requirement that inspection would take place at the end of a specified period to check that the development had been completed.

## **Bonds**

**Q32: What are the views of consultees in relation to the bonding of construction work on developments?**

2.68 **Response:** Those who responded were supportive in principle for full bonding of construction works but recognised the impracticalities of the suggestion largely because the cost of providing such a bond would be prohibitive.

2.69 **Recommendation 32:** Unless a collective and co-ordinated approach could be taken to bonding on a cross departmental basis, the Commission does not see that it is realistic to recommend that this proposal should be pursued any further.

## **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?**

2.70 **Response:** The consultees responding to this question put forward a range of suggestions to encourage investment in incomplete developments.

2.71 **Recommendation 33:** The Commission recommends that the Department should give further consideration to the suggestions and comments made by consultees in encouraging investment in properties on unfinished developments.

## **The Banks**

**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?**

2.72 **Response:** Again the consultees made a variety of suggestions.

2.73 **Recommendation 34:** The Commission recommends that the Department should give further consideration to the suggestions and comments made by consultees in encouraging the banks to divest themselves of property of which they are in possession as mortgagee.

## **Compliance with planning permission**

**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?**

2.74 **Response:** The consultees were strongly in favour of the proposal to introduce a requirement for the Planning Service to inspect property on completion and certify that the building work accords with the conditions of the planning permission.

2.75 **Recommendation 35:** The Commission notes that Article 37 of the Planning (Northern Ireland) Order 1991 (1991 No. 1220 (N.I.11)) provides for the Department of Environment to make a completion order where it is of the opinion that the development will not be completed within a reasonable period. The Commission recommends that consideration be given to using this provision where appropriate and to include as part of the completion order a requirement that inspection would take place at the end of a specified period to check that the development had been completed.

2.76 Alternatively, the Commission recommends that certification of completion and compliance with planning permission should be taken forward in conjunction with the certification system currently administered through building control inspection. This could be put in place when responsibility for planning matters is transferred to the local councils.

## **A planning condition for transfer of title**

**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?**

2.77 **Response:** Consultees also strongly supported the proposal to impose a planning condition requiring transfer of title to the management company so that a failure to do so would be a breach of planning consent.

2.78 **Recommendation 36:** Whilst recognising that this proposal is superficially attractive the Commission is aware that it is not a straightforward matter. The Commission recommends that careful consideration should be given to a further analysis of the point at which

it would be beneficial for the transfer of title to take place, bearing in mind the drafting difficulties and the need for the provision to be enforceable to be fully effective.



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## **CHAPTER 3. THE DEVELOPMENT OF APARTMENTS**

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### **BACKGROUND**

- 3.1 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 a 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**

- 3.2 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.
- 3.3 Until relatively recently there has been limited experience in Northern Ireland of living in an apartment. 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.

- 3.4 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 the same 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. There is evidence that the process of understanding in the commercial world has been assisted by the nature of the commercial investors and business organisations which are already very familiar with operating multi-unit buildings. It is also clear, in the case of commercial premises, that maintained premises in good condition and repair are more likely to attract customers and increase turnover.

## STATISTICS

- 3.5 Although apartment developments are a comparatively new phenomenon, they now make up a substantial proportion of the housing stock in Northern Ireland. Throughout the 1980s and 1990s, the number of apartments increased, with apartments comprising approximately 9% of all new dwellings constructed in this period.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> The most recent figures show that this percentage is falling and for the period 2010/11 20% of all new housing starts were apartments<sup>6</sup>.

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<sup>3</sup> Northern Ireland Housing Executive, 'Northern Ireland House Condition Survey 2006', p. 32. This figure may also include social housing.

<sup>4</sup> 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.

<sup>5</sup> Northern Ireland Housing Executive, 'Northern Ireland Housing Market: Review and Perspectives 2011-2014', p. 69.

<sup>6</sup> Northern Ireland Housing Executive, 'Northern Ireland Housing Market: Review and Perspectives 2011-2015'.

- 3.6 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<sup>7</sup>. Construction levels continued to fall, in subsequent years albeit not as dramatically. Figures for the first six months of 2011/12 show that approximately 2,600 new private homes were started in that period, a 32% reduction compared with the first six months of 2010/11<sup>8</sup>. In view of the changed economic climate and the resulting fall in property prices, a number of developers have become insolvent and, in consequence, some apartment developments have not been completed or their completion has been delayed. This has caused additional problems for the apartment owners involved.
- 3.7 The 2011 House Condition Survey Preliminary findings published by the Northern Ireland Housing Executive found that there are 66,480 flats / apartments out of a total housing stock of 760,000 dwellings (8.74% of the total housing stock), of which 15,330 are owner occupied and 13,850 are privately rented. In terms of age profile, persons aged 17-24 (21%) and over 75 (14%) are 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 and two person households, regardless of age.
- 3.8 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.
- 3.9 Turning to the statistics for the number of developments and management companies, the Commission found that 1,117 companies are registered with Companies House within the category of 'residential management companies'.<sup>9</sup> It would seem that the vast majority of these are management companies for apartment developments and are likely to consist of at least five units. In addition to these, there will

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<sup>7</sup> Northern Ireland Housing Executive, 'Northern Ireland Housing Market: Review and Perspectives 2012-2015'.

<sup>8</sup> Northern Ireland Housing Executive, 'Northern Ireland Housing Market: Review and Perspectives 2011-2015'.

<sup>9</sup> 1097 of which are registered using the 98000 SIC code (Residential Property Management) and 22 registered using the old 2003 SIC code 9800 (figures obtained in January 2013).

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.

## **THE MARKET**

- 3.10 Many apartment developments are in city or town centres forming part of the urban environment. 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<sup>10</sup>.
- 3.11 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. It is also apparent that 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.
- 3.12 One outcome resulting from the decline in property values and the wider economic difficulties is that some 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.

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<sup>10</sup> Northern Ireland Housing Executive, 'Northern Ireland Housing Market: Review and Perspectives 2011-2015'.

## **CHARACTERISTICS OF AN APARTMENT**

- 3.13 The particular physical and legal features of an apartment are quite different from other forms of residential accommodation. It is useful to examine them from a technical perspective to set the context for an analysis of the issues relevant to apartment living.
- 3.14 In physical terms, 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.
- 3.15 '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.

## **STATUTORY DEFINITION**

- 3.16 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**

- 3.17 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.

- 3.18 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**

- 3.19 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.
- 3.20 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.

- 3.21 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. Apartment owners also frequently 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.
- 3.22 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.
- 3.23 It is apparent that the owners of apartments and other properties with elements of shared ownership encounter difficulties in understanding the complexities of both the legal framework under which the developments are established and the management arrangements. The current structures and procedures are considered in the chapters which follow together with possible solutions to the existing problems.

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## **CHAPTER 4. IMPROVING CONSUMER AWARENESS**

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### **INTRODUCTION**

- 4.1 In Chapter 18 of the Consultation Paper the Commission drew attention to the fact that 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. Many of the responses from consultees have confirmed the Commission's view that 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.
- 4.2 This is such an important issue and is of such concern to stakeholders that the Commission has brought it to the top of its list of recommendations for improving the present position. For this reason Improving Consumer Awareness appears in this Report ahead of the recommendations to deal with the legal and management problems. The Commission sees that simple measures could be introduced here which would make a real difference to home owners. More information could be provided to purchasers and more explanation given to them about the nature of the property that they are buying before they start living in the property and find that they have unforeseen liabilities.
- 4.3 The proposals made by the Commission in the Consultation Paper for improving consumer awareness were very popular with consultees and received high levels of support. The organisations which potentially may be able to provide the support services and additional information were also very enthusiastic about the proposals. Clearly it would be of benefit to everyone if effective measures which should be relatively straightforward to implement are taken forward as soon as possible.

### **INCREASING UNDERSTANDING**

- 4.4 As the Commission explained in the Consultation Paper (paragraphs 18.2 – 18.3), it often seems that apartment owners 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. They are not advised or informed about the element of interdependence involved in buying an apartment 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.

- 4.5 One individual consultee who had owned and lived in a flat in London for 34 years, in responding in general terms to the Consultation Paper, agreed with the observation that residents of apartments here in Northern Ireland are less accustomed to dealing with shared responsibility for dwellings and common land.

## **INFORMATION**

- 4.6 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.
- 4.7 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.

## **INFORMATION TO BE PROVIDED BY THE DEVELOPER OR ESTATE AGENT**

- 4.8 The Commission suggested in paragraphs 18.5 to 18.8 of the Consultation Paper that it would be helpful if the following information could be provided:

### *House rules of the development:*

- 4.9 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:*

- 4.10 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.
- 4.11 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;
- 4.12 It was suggested that 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.

**QUESTION 27**

- 4.13 Question 27 asked if 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? Should it be by the regulator or licensing authority? Could it be done by building on the Consumer Code for Builders<sup>11</sup>? In the meantime, should best practice encourage the provision of House Rules and Protocols of Information?

**RESPONSES TO QUESTION 27**

- 4.14 This question elicited a good response from the consultees, many of whom provided detailed additional comments in reply. All of those who commented agreed that lack of information and understanding is a problem and were in favour of ensuring that more information is available from the outset. Several supported the proposals made by

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<sup>11</sup> Currently the Consumer Code for Home Builders (Third Edition, April 2013) does stipulate that certain information must be provided to purchasers at various stages, including “the nature and estimated cost of any management services the Home Buyer must pay for” (paragraph 2.6).

the Commission to encourage the provision of House Rules and Protocols of Information. In addition, it was suggested that there should be a statutory obligation on the developer to provide information. This should include an estimate of service charge costs, the identity of the managing agent and the kinds of obligation which the owners will have. Some apartment owners would like to have information rating developments and managing agents.

- 4.15 One consultee mentioned that if there was a requirement to ensure that all vendors / developers are required to give information about any management company involved with the property and the service charge payable it would not be sufficient that it is contained in the Consumer Code for Builders. It was suggested that the requirements might be enforced in the same way as the Energy Performance Certificate information under a recast European Directive.
- 4.16 Many comments were made agreeing that the more information that is available to prospective buyers the better. There was also support for the regulator or licensing authority to prescribe the information as suggested by the Commission (paragraph 18.6 -18.7) in the Consultation Paper. It was evident from the remarks made by the apartment owners in responding to this question that they felt they had been given insufficient information when they purchased their properties to give them a proper understanding of the ownership and management arrangements.
- 4.17 In contrast, the remarks made by the managing agents, whilst fully supportive of the proposals to provide detailed information, revealed a different perspective. The managing agents pointed out that providing information and paperwork to the purchasers does not mean that it will be read by them. They had experience of apartment owners who did not listen to what their solicitors told them and claimed ignorance of their responsibilities. The managing agents also highlighted the fact that some apartment owners do not wish to get involved in the management and show no interest in the building itself. A suggestion was made that an Introductory / Welcome pack should be issued to potential and actual purchasers by estate agents. One managing agent thought the position would be improved if the purchasers were to sign an acceptance form confirming that they have received the information and have understood it. This document would be included as part of the legal sale documents.
- 4.18 The Law Society responded to this question confirming that it shares the view that when a new property is marketed it is essential that the

developer and estate agent should provide full information about the management arrangements for the development. Given that the majority of new build properties of this type are constructed by builders registered with the National House Building Council or similar organisation and such home builders are automatically signed up to the Consumer Code, the Law Society considered that this may be a speedy way of achieving the provision of such information in new build properties. However, it pointed out that this will not address the provision of such information in the sale of pre-owned properties. If it is felt that the information should be provided initially at “point of sale” some form of obligation will have to be imposed by other means – the regulator or licensing authority.

- 4.19 The Royal Institution of Chartered Surveyors (RICS) also supported the Commission’s proposal. It highlighted that as a professional organisation it has the potential to raise consumer awareness about ownership structures and management arrangements for apartments. It expressed the view that the precise detail of the requirements should be an early issue for consideration by the proposed new regulator, informed by the existing Consumer Code for Builders. It agreed that there is also a need to ensure consistency with the Law Society’s Home Charter Scheme.

## **RECOMMENDATION 27**

- 4.20 The Commission believes that the better provision of information at the point when the property is marketed would greatly improve the awareness and understanding of consumers. This view was unanimously supported by the consultees. In order to ensure that information is made available for all properties, whether newly constructed or pre-owned, the Commission recommends that detailed requirements for the provision of information be included both in the Consumer Code for Builders and in the code of conduct which will form part of the scheme for the regulation of managing agents. In the meantime, best practice should be encouraged through the provision of house rules and protocols of information for each management company.

## INFORMATION TO BE PROVIDED BY THE SOLICITOR

4.21 The Commission took the preliminary view, as set out in the Consultation Paper (paragraphs 18.9 – 18.13) that 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.

4.22 Under the Home Charter Scheme<sup>12</sup> 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 would be another opportunity to ensure that the purchaser was properly informed and understood the implications of buying an apartment.

4.23 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.

4.24 The purchaser should also be given:

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<sup>12</sup> A quality assurance scheme operated by the Law Society of Northern Ireland with which it is compulsory for all solicitors to comply.

- A map or plan of the development and / or the apartment block showing the common areas;
  - A map or plan of the apartment;
- 4.25 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.

## **QUESTION 28**

- 4.26 Question 28 asked consultees if they agreed 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? It further asked consultees if they agreed that this should extend to cases where a purchaser is buying any property with elements of shared ownership including open space.

## **RESPONSES TO QUESTION 28**

- 4.27 This proposal was very popular with consultees and received a high level of support. With one exception, the consultees who answered the question were unanimous in expressing their agreement that the Law Society should include in its Home Charter Scheme the provision of specific information for purchasers of apartments. Some consultees made additional comments to emphasise that it was equally necessary for all purchasers of properties with elements of shared ownership to have information about the structures of ownership and the framework for management arrangements. The confirmation ought to be provided to successive owners and not only to the purchasers of newly constructed properties. It was recognised that this proposal has the potential to raise consumer awareness about ownership structures and management arrangements for apartments.
- 4.28 One consultee believed that “natural selection” has started to weed out the bad managing agents and that steps taken to date in furthering the education of owners have been effective (This is a reference to the publication of leaflets by the Law Society in relation to “Buying and Living in an Apartment” and “Buying and Living in a Property with Common Spaces” which solicitors now provide to purchasers). The

consultee expressed the opinion that education of shareholders through best practice would negate the need to directly regulate the managing agents, which could prove extremely difficult.

- 4.29 The respondent who dissented from the general agreement that there is a need for more information considered that a detailed breakdown of services is not required because the individual service providers can change and the level of services provided will vary considerably from one development to the next. That respondent explained that experience seems to show it is impractical to guarantee that the buying public can be fully educated to have sufficient savvy of what they are entering into when purchasing an apartment. He said that making the provision of information compulsory will generate more paper / waste. He also thought that a dedicated website may be helpful but not much more than that.
- 4.30 The Law Society itself agreed that the Home Charter Scheme is an ideal vehicle for stipulating the nature and extent of such information to be provided. This should also extend to cases where any property with an element of shared ownership is involved. It drew attention to the existing leaflets. It considered that there should be consistency with the proposed information requirements imposed on developers and estate agents detailed above (see Question 27 above).

## **RECOMMENDATION 28**

- 4.31 The Commission is greatly encouraged by the level of support for this proposal and has no hesitation in recommending that through its Home Charter Scheme the Law Society should stipulate the nature and extent of information to be provided by solicitors on the purchase of an apartment or other property with elements of shared ownership.

## **IMPROVING COMMUNICATION**

- 4.32 In the Consultation Paper (paragraphs 18.14 – 18.15) the Commission emphasised the importance of introducing and encouraging more effective ways of communication between all the parties involved in a development. It gave as an example a dedicated website where apartment owners can log into a forum and contact other owners.<sup>13</sup> Information relating to the development could be available on the

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<sup>13</sup> The Commission is aware of one managing agent who already offers this facility.

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. Another way in which communication could be improved might be to encourage residents to be more aware of the social responsibility role involved in living in high density property.

## **QUESTION 29**

4.33 Question 29 asked consultees if they have any suggestions for improving communication between apartment owners or for encouraging better understanding of community living.

## **RESPONSES TO QUESTION 29**

4.34 The consultees who responded to this question recognised the importance of good communication and made a variety of suggestions for improvement. Comments were made describing common situations where property owners do not realise that they themselves have an obligation to communicate with their own neighbours as well as the managing agents. In some developments there are one or two people (usually retired) who are the conduits in spreading information. Proposals included setting up a management company website, regular online updates, setting up a facebook private group to collate information, the provision of bulletin boards, holding quarterly social events, having regular management meetings. It was also suggested that there might be a case for induction into the ownership of apartments or other property with elements of shared ownership.

4.35 One group of apartment owners advised that they had initially communicated by means of a newsletter which was delivered to all homes along with a letter of concern relation to the management company. Following the feedback received they identified a need for a forum to communicate, held a public meeting and set up a facebook group to successfully communicate with residents on various issues. They now have a useful contact list, photographic evidence of non-completion of works, copies of letters sent and of responses received. There is no cost associated with the set up of the facebook group and it is managed by residents on a voluntary basis. They suggested that



sites such as this can complement more formal websites operated by the developer or managing agent.

- 4.36 Although a dedicated website is one way forward, one respondent pointed out that people who are not IT literate should not be excluded. There is potential for cyber-bullying, defamatory comments being made or festering neighbour disputes on personal grounds. The same respondent identified the need for re-introduction of a mandatory AGM for management companies and the provision of consumer friendly information.
- 4.37 One consultee suggested that the provision of information about the management arrangements for the development could be progressed through the Consumer Code for Builders. However care needs to be taken that a purchaser is not subjected to information overload.
- 4.38 The NI Co-Ownership Housing Association shares the view that one of the keys to the successful implementation and sustainability of apartments and other properties with elements of shared ownership is the greater participation and understanding of community living. It considers that this is an area, subject to funding, to which it could contribute as follows:

a) A dedicated website could be created which could give guidance to owners and occupiers in apartment properties and properties with open spaces. There is certain guidance issued by different bodies giving comments on different aspects of apartment living but there is no one portal from which to access the information. It would be useful if there was one website which gave a general indication of the roles and responsibilities of the key players involved in the issue. One dedicated website could give generic guidance on the commencement of the development and guidance regarding the sustainability of the management company etc. For instance, the guidance issued by the Law Society, Companies House and any other body could be linked to from the site. Examples of this used in other jurisdictions include the New South Wales Fair Trading website on strata titles. Co-Ownership Housing could play its part in developing this, with appropriate funding. The website referred to in this paragraph would be a generic website as distinct from a website in relation to each individual management company in Northern Ireland.

(b) There is a role to be played in the education of homeowners in apartment living and living in properties with common spaces. Co-Ownership Housing as the regional body for shared ownership considers that it would be useful if there were courses which were available for homeowners in general in relation to the purchase process and the sustainability of homeownership. Of particular relevance would be a course for apartment owners and owners in developments with common spaces, especially apartment owners who are the directors of the management company. This would enhance skills in the sector and would enable owners to be better equipped to lead and manage the management company. Such courses are available in other jurisdictions. We would suggest that, given the nature of the issues involved in apartments etc, there should be government funding in relation to such courses to enhance the development of skills in the sector. Co-Ownership Housing could facilitate and run such courses.

## **RECOMMENDATION 29**

- 4.39 It was widely recognised in the responses of the consultees that improving communication is one of the keys to more sustainable community living which reinforces the view of the Commission that this should be encouraged. The various suggestions made such as management company websites, facebook private groups, social gatherings, regular online updates, site bulletin boards, monthly management meetings and mandatory AGMs, should be considered.
- 4.40 The Commission recommends that the offer of NI Co-Ownership Housing Association Limited to assist in the development of a generic website (subject to funding being made available) should be pursued. The Commission further recommends that other best practice guidance to improve communication should form part of the code of conduct for managing agents to be administered and enforced by the new regulator.

## **QUESTION 30**

- 4.41 Question 30 asked if 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.

## RESPONSES TO QUESTION 30

- 4.42 The consultees who responded to this question made various suggestions. One consultee highlighted that the housing need in Northern Ireland is well documented and therefore the availability of lettable units should not be discouraged. The DSD tenancy deposit scheme and ancillary proposals suggest movement in the direction of accountability and regulation of the buy-to-let market. Moreover sustainable communities comprise not only owner / occupied properties, but also those that are tenanted.
- 4.43 Another consultee considered that there needs to be a greater appreciation of the implications of owning an apartment or property in a development with common areas. It may be that when the new landlord registration scheme is operational that guidance could be provided to landlords as to the importance of considering the issues regarding community living. It was suggested that there should be a central register with details of the landlords and their tenants. Suggestions were also made to encourage landlords to become more involved – for example by the publication of a newsletter, Chairperson’s detailed annual report, and arranging quarterly social meetings.
- 4.44 Other views were expressed with ideas which would impose greater financial obligations on landlords because of the increased risks of damage to the building with tenants on short term lets – these included higher service charges, levies on the insurance premium, and a provision fee for damage to communal areas. It was also proposed that in a management company the votes could be weighted so that owner occupiers have a greater weight of vote than those owners who let out their property.
- 4.45 Several comments indicated that more effort should be made to make tenants aware of their obligations when living in properties with communal elements; including the vetting of tenants by a management committee in advance, the provision of house rules to the tenant, and the possibility of requiring the tenant to pay the service charge to the management company where the landlord is in financial difficulty. One respondent considered that tenants should assist in making their landlords play an active part in running the development. Perhaps owners should be obliged to provide management information to the tenant on an annual basis; should be responsible for breaches of the house rules by the tenant; should pay a penalty for failing to attend meetings; should be informed by other residents about the problems

caused by their tenants, and should be compelled by the management company to recognise their responsibilities.

### **RECOMMENDATION 30**

4.46 Having taken into account the suggestions made by the consultees the Commission is inclined to the view that suitable provisions relating to landlords could be taken forward and developed through the Landlord Registration Scheme established by the Department of Social Development.

### **OTHER COMMENTS**

4.47 One consultee who submitted a response to the Commission but did not respond to the specific questions raised in the Consultation Paper, expressed a view that the most pressing need is to educate the shareholders / apartment owners and potential buyers as to the way in which a management company operates.

4.48 The same consultee considered that education of shareholders in best practice will negate the need to directly regulate the managing agents, which could prove extremely difficult. This education must extend to the rights and responsibilities of shareholders. They must be aware of their right collectively to set the service charge, change suppliers and generally be in control of their own development. They must also be aware of their responsibility to pay their service charge on time and without deduction. Too many disaffected shareholders see withholding service charges as a legitimate tool to get the management company and managing agent to deal with their particular issue. They must be made aware that the way to address issues is by raising them at a meeting of the company and gaining support from their fellow shareholders.

4.49 Another consultee made detailed proposals on a solution to the problem of lack of transparency in management of apartment blocks. The consultee suggested that an organisation such as "The Apartment Association for Northern Ireland" funded initially by government and then by a service charge levy of say £20 per unit per year would operate a form of regulation. The costs for advice would be minimal and in most cases free in that the running of the association is sponsored via service charge. The Association would provide an education / communication web site, mediation services in the event of

disputes, news updates and an interactive forum for owners throughout the province, ratings on developments and ratings in managing agents, advice on charges and so on. That consultee took the view that the ongoing education and subsequent empowerment of apartment owners is the long term solution to the problem

## **PROVISION OF AN ADVICE SERVICE**

- 4.50 In the Consultation Paper (paragraph 13.11) the Commission noted that apartment owners and occupiers feel that it is very difficult to obtain redress for any grievances or to find a solution to alleviate the problems that they are experiencing. A recurring theme emerging from engagement with stakeholders was that there are no organisations in Northern Ireland which can offer support or advice on the issues connected with ownership and management of apartments.
- 4.51 The Northern Ireland Executive is committed to ensuring that all citizens have access to a level of advice which meets their needs. Given the demonstrated level of need which exists, an appropriate and practical recommendation would therefore be for government to address this current gap in provision. The Commission has had discussions with Leasehold Advisory Service (LEASE) in London about the service that it provides. LEASE is a Non Departmental Public Body (NDPB) funded by Government to provide free advice on the law affecting residential leasehold property in England.
- 4.52 The Commission takes the view that it would be of great benefit to private home owners if a similar service could be provided in Northern Ireland. It recognises that funding is an important issue and also that there may be procurement processes which have to be observed. It contacted the General Consumer Council and Citizens Advice Bureau (CAB) about the most appropriate means to address the problems currently faced by those owning and living in apartments and other properties with elements of shared ownership. Both organisations commented that the provision of an advice service to homeowners was outside their current remit and CAB explained that it was more likely to be contacted by tenants than owner occupiers about property related problems.
- 4.53 The Commission approached the NI Housing Executive (NIHE) for its views because it currently has approximately 5,800 leaseholders who own former NIHE flats and maisonettes which require management services. NIHE made the general comment that whilst the Commission

is focusing primarily on private developments a number of the issues addressed are applicable to owner occupiers in mixed-tenure apartments and flats, particularly the issues relating to consumer awareness. Based on conversations with its leaseholders, NIHE agreed with the Commission that it would be of benefit if there was an advice service established where leaseholders would have access to expert advice. Its experience showed that people who had purchased flats had almost no knowledge of what was involved in it, even something as basic as having to pay service charges and ground rent.

- 4.54 NIHE also confirmed that there seems to be a lack of knowledge amongst leaseholders as to what the service charge actually covers. A key problem that it encounters is on resale of former NIHE flats where service charges are outstanding which have not been addressed and the leaseholders can experience significant planned repair scheme costs. In the former NIHE properties the leaseholders can be pepper potted throughout the estate and do not have the support of other lessees that would be typical within private apartment blocks and developments. NIHE recognises that there is a requirement for an advice service in Northern Ireland like LEASE and that the main issue is providing the resources and skills required to administer such a service.
- 4.55 The Commission also contacted the Housing Rights Service (HRS) about the possibility in principle of providing an advice service and received a very positive response. HRS agrees with the Commission that funding should be provided for a service which can offer free, independent and impartial advice and support on the law affecting residential leaseholders in Northern Ireland. It suggests that a service should be provided that would complement rather than duplicate or displace existing services. It would not deal with conveyancing issues or other legal proceedings typically provided by private solicitors or surveyors.
- 4.56 HRS subsequently submitted a paper to the Commission which outlines the proposed objectives for an advice service and identifies the key elements which a comprehensive service should offer. Whilst the service could offer a level of help to all stakeholders, its primary focus would be on helping the residential leaseholders and other tenants living in apartments to make well informed decisions and to effectively resolve any problems which they encounter.

**The Housing Rights Service proposal:**

<b>Service Objectives</b>	<b>Key Elements</b>
<p><b>To promote awareness of rights and responsibilities of all relevant parties involved in the use of residential apartments in NI.</b></p>	<p><b>Provision of range of basic information</b> for use by potential and existing purchasers and other stakeholders. The information would be provided on line and included on identified relevant websites such as <a href="http://www.nidirect.gov.uk">www.nidirect.gov.uk</a></p>
<p><b>To:</b></p> <ul style="list-style-type: none"> <li>• <b>Assist occupiers to make informed choices and to ensure they are not disadvantaged through lack of knowledge of their rights / responsibilities:</b></li> <li>• <b>Actively support occupiers, where required, to resolve their difficulty in an efficient and effective manner.</b></li> </ul>	<p><b>Provision of initial advice</b> by specialist legal adviser. This advice would aim to help people understand the information provided and how it relates to their own circumstances. It would be accessed via: <i>a dedicated telephone helpline; email; virtual adviser facility and face to face by appointment if required.</i></p> <p><b>Provision of practical assistance</b> to help people act on the information which has been provided when they are unable to help themselves. This would include: <i>assistance in the identification of the problem(s); clarification of the options available; and consideration of their preferred course of action for resolution.</i></p> <p><b>Provision of advocacy / representation OR Access to mediation services.</b> For more complex problems additional support may be required to help resolve the issue.</p> <p>The options available are likely to include negotiation; advocacy / formal representation or legal action to challenge decisions or actions of the other party. For some disputes a less expensive, and often</p>

	<p>more effective, alternative may also be mediation – this type of service should therefore also be available.</p> <p>There may already be a number of existing specialist providers who can offer such services to assist in resolution of the problem or issue (<i>e.g if legal casework is required this service is already likely to be available via practising solicitors</i>). It would not necessarily be appropriate therefore for the new service to offer additional support in all cases.</p> <p>Criteria should be agreed to help determine the most appropriate progression route. Factors to be considered may include: nature of the issue; financial means of client; suitability of the issue for mediation and client preference.</p> <p>Whilst not continuing to be engaged in all cases the service should however:</p> <ul style="list-style-type: none"> <li>• Maintain a list of leasehold practitioners / professional advisers;</li> <li>• Provide basic guidance on how to select and appoint a professional adviser;</li> <li>• Offer the client assistance with instructing professional advisers / other specialists if necessary.</li> </ul>
<p><b>To:</b></p> <ul style="list-style-type: none"> <li>• <b>Develop the capacity of other agencies and advice providers to offer advice and support on leasehold law relating to apartments in NI;</b></li> <li>• <b>Promote good practice by all parties through the provision of a range of support services.</b></li> </ul>	<p><b>Provision of a range of support services</b> designed for professional practitioners &amp; other stakeholders e.g. managing agents, surveyors, solicitors and other advice providers.</p> <p>Focusing on the law relevant to residential leasehold these services would include:</p> <p><b><i>Development of legal information</i></b> on</p>



	<p>residential leasehold for inclusion in existing on line resources used by frontline advice providers e.g. Housing Law in Practice in NI (HLPNI).</p> <p><b><i>Development of range of more detailed information resources / guides</i></b> for leasehold practitioners.</p> <p><b><i>Development &amp; delivery of practitioner training</i></b> ranging from short seminars to formal accredited training courses. To promote accessibility the option for provision of on-line training should be explored.</p>
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#### **ADDITIONAL RECOMMENDATION**

4.57 The Commission recommends that an advice service should be established for residential leaseholders to which those owning and living in apartments and other properties with elements of shared ownership could have access. It recognises that the provision of any service would require resources to be made available and a competitive tendering process.

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## CHAPTER 5. TITLE TO APARTMENTS

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### INTRODUCTION

5.1 Although the legal framework which governs residential housing and apartment developments in Northern Ireland was originally designed for traditional forms of housing, land law and conveyancing practice have evolved to meet the requirements demanded of them as changing structures of ownership emerge. In relation to blocks of apartments, the system operates in such a 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. Similarly, the owner of a house in a development sharing open space in that development will have individual ownership of the house and a separate interest in the open space.

### FORM OF TITLE

5.2 Land law and conveyancing law in Northern Ireland is very complex and arcane. Although reform has been on the agenda since the 1960s<sup>14</sup>, and several piecemeal provisions have been introduced to address specific issues<sup>15</sup>, no major reform has taken place and the recommendations made for substantial modernisation have not yet been implemented<sup>16</sup>. However, there has been a policy move towards a general simplification of titles and a shift in favour of 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 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<sup>17</sup>.

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<sup>14</sup> 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), NI Law Commission Report on Land Law (NILC 8 (2010)).

<sup>15</sup> Leasehold (Enlargement and Extension) Act (NI) 1971, Property (NI) Order 1978, Registration (Land and Deeds)(NI) Order 1992, Property (NI) Order 1997, Ground Rents Act (NI) 2001, Compulsory Registration of Title (NI) Orders 1995-2002, Law Reform (Miscellaneous Provisions) (NI) Order 2005.

<sup>16</sup> Final Report of the Land Law Working Group (1990), NI Law Commission Report on Land Law (NILC 8 (2010)).

<sup>17</sup> Property (Northern Ireland) Order 1997 (No. 1179 (N.I.8)), article 30(1)<sup>17</sup>.

- 5.3 The grant of a long lease of a flat is one of the exceptions to the general prohibition on new long leases<sup>18</sup>. 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<sup>19</sup>.
- 5.4 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 generally accepted as being suitable for this particular purpose and is a useful means of creating a framework of rights and obligations 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.
- 5.5 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 (Ir) 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.
- 5.6 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.

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<sup>18</sup> Property (Northern Ireland) Order 1997 (No. 1179 (N.I.8)), (article 30 (5) (e)).

<sup>19</sup> Of course, 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 (Deasy's Act).

- 5.7 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<sup>20</sup>. 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.
- 5.8 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 throughout the development, with variations for individual characteristics, such as use of access.

## **THE ROLE OF THE LEASE**

- 5.9 In looking at the existing legal framework, some explanation is needed as to the application of leasehold principles 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 physical characteristics of apartments and the existence of shared common areas and facilities.
- 5.10 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 common for the benefit of all owners. It is this element of interdependence which distinguishes apartments from houses since it requires decision-making on maintenance to be taken on a collective basis. Consequently, the arrangements for apartment management set

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<sup>20</sup> Property (NI) Order 1997, 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).

out in the lease inevitably contain a scheme of rights and responsibilities, as well as processes for collective decision-making.

- 5.11 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, 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**

- 5.12 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.
- 5.13 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**

- 5.14 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.

- 5.15 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.
- 5.16 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.
- 5.17 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 should appoint a company secretary and director(s), have annual accounts prepared, organise annual general meetings (though no longer compulsory) and make the necessary returns to Companies House.

## **CONTENTS OF THE LEASE**

- 5.18 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.
- 5.19 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 the obligation to pay the service charge
- stipulate the covenants of the lessor including a covenant to provide the services subject to the lessee paying the service charge;
- make related provision on matters such as procedure, enforcement and dispute resolution.

## **DESCRIPTION OF THE APARTMENT**

5.20 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.

5.21 The lease should 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 such work by way of the service charge which is payable by all the apartment owners in the block.

## **EASEMENTS**

5.22 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**

5.23 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**

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

5.25 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.

#### 5.26 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.

#### 5.27 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;

### **SERVICE CHARGES**

5.28 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.

5.29 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.

5.30 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.

5.31 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.

## **GROUND RENTS**

5.32 A ground rent arises when property is held under leasehold title. It is essentially a regular 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 when the properties were built the developers saw the opportunity to create a significant income. Although there is normally a right to collect a ground rent in a lease, it may not always be collected. In some cases ground rents can provide a valuable income 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.

5.33 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 management

company assumes the position of the freeholder. In this instance if the ground rents are paid, the owners are essentially paying the rent to themselves.

## **ENFORCEMENT OF COVENANTS**

- 5.34 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). 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 because the arrangements depend on this piece of the jigsaw being in place.
- 5.35 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.
- 5.36 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 in law. However, as with forfeiture, it is unlikely that the lease would actually be voided as other considerations such as proportionality would be taken into account.
- 5.37 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<sup>21</sup>. 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 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.

## REGISTRATION OF TITLE

- 5.38 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 made it compulsory for a purchaser of property to register the title in the Land Registry if it has not previously been registered.<sup>22</sup> Accordingly, the lease to any new apartment must be registered and it is very likely that the lease to an existing apartment will already be registered.
- 5.39 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.
- 5.40 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<sup>23</sup>.

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<sup>21</sup> Covenants should be enforceable if a building or estate scheme is set up. See *Elliston v Reacher* [1908] 2CH 374.

<sup>22</sup> See Land Registration Act (NI) 1970 section 25 (1) and Schedule 2, Part 1, Entry 2. Compulsory registration was rolled out on 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.

<sup>23</sup> See Land Registration (Amendment) Rules (Northern Ireland) 2011 (No. 141).

## HOUSES IN MULTIPLE OCCUPATION

- 5.41 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.
- 5.42 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 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.
- 5.43 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.<sup>24</sup> The owner or the person managing the property would be responsible for registering the property.
- 5.44 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.
- 5.45 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 lighting system (if any) and all fire extinguishers and fire blankets have been serviced and maintained.

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<sup>24</sup> Article 75 of the Housing (Northern Ireland) Order 1992 No. 1725 (N.I. 15).

## THE CONTEXT FOR REFORM

5.46 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 which is also able to accommodate collective responsibility for the whole building and the areas commonly owned.

## STATUTORY TITLE

5.47 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 that would provide a statutory framework for the ownership and management of residential property with an element of shared services and facilities. In Northern Ireland the possibility of introducing standard statutory provisions was first considered in 1971 and has subsequently been revisited. However, the proposals and recommendations made by previous Reports have not been implemented and the legal position is the same now as it was when the debate began<sup>25</sup>. As time has passed, the prevailing view as to the most appropriate solution to the problems has changed.

5.48 The Commission recognises the merits of a statutory scheme and the earlier views in favour of reform. It accepts that a form of statutory title may be a good solution in an environment where apartments are just beginning to be developed and few have yet been constructed. In such circumstances it could be argued that a new scheme might facilitate development as well as providing a significantly improved framework for the ownership and management of apartments. However, many years have elapsed since the issue was first considered and the apartments sector of the property market has changed beyond all recognition in that time. Apartment blocks and developments with elements of shared ownership are commonplace and now represent a significant proportion of all accommodation. It should also be

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<sup>25</sup> See the Consultation Paper on Apartments (NILC 15 (2012)) Chapter 11 for a more detailed consideration of law reform proposals in Northern Ireland from 1971 to date.

recognised that such housing developments are well established under existing legal structures using a leasehold framework.

- 5.49 Evidence from England and Wales suggests that the introduction of a statutory form of title by the Commonhold and Leasehold Reform Act 2002 has not been a success<sup>26</sup>. Very few new developments have been established under a statutory commonhold framework and existing developments have not converted from leasehold to commonhold title. It seems that the problems of the leasehold system may not be sufficient to warrant a complete departure from it and there are few incentives to induce apartment owners to convert into the new system. There may be other reasons as well for the low take up rates but it is disappointing, bearing in mind the amount of work that went into it over many years to provide a workable scheme.

## **QUESTION 1**

- 5.50 After considering the merits of a statutory scheme of title and looking at other models the Commission formed the preliminary view that in the present context, where the apartments sector of the property market is already well developed, it would not be inclined to recommend the introduction of a statutory form of strata title for apartments. Question 1 of the Consultation Paper asked if consultees agreed with that view.

## **RESPONSES TO QUESTION 1**

- 5.51 The overwhelming majority of respondents agreed with the inclination of the Commission not to recommend the introduction of a statutory form of strata title. Several consultees made the point that the long leasehold structure for apartments functions well in Northern Ireland, particularly if all the parties play their part. It was considered that the introduction of a completely new form of strata title could introduce a further complex, perhaps unwieldy and potentially expensive layer to administer.

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<sup>26</sup> See Consultation Paper on Apartments, paragraphs 12.9 – 12.12. A Parliamentary Question stated that as of June 2009 there were 12 commonhold residential developments comprising of 97 units in England and one commonhold developments, consisting of 30 units in Wales i.e. 13 developments and 127 units in total in England & Wales. It has been difficult to obtain more up-to-date statistics.

## **RECOMMENDATION 1**

- 5.52 Whilst aware that a new form of title may be the ultimate ideal, the Commission recognises that it has not been a success in England, and other neighbouring jurisdictions have chosen not to go down that path either. The Commission is also conscious of the fact that one of the primary objectives of the present project was to provide solutions to the problems experienced by current owners of apartments and other properties with elements of shared ownership. The interests of those people would not be served by recommending a new form of statutory title for future developments. It would take too long for such legislation to be developed and it is not realistic to anticipate that existing owners would voluntarily convert, unless given significant incentives to do so.
- 5.53 The Commission has reached the conclusion that the interests of the present owners of apartments would not be best served by pursuing the aim of a new form of title. It considers that other remedies may be more effective which could be introduced more quickly. Accordingly the Commission does not recommend that a new form of statutory title should be introduced. It does not see strata title as an effective means of addressing present problems and for the time being is not inclined to recommend that this option should be pursued.



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## **CHAPTER 6. MANAGEMENT COMPANIES**

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### **INTRODUCTION**

- 6.1 Company law is an area of law which is of primary relevance to the management of apartments<sup>27</sup>. Apartment owners are normally incorporated into a company for the purpose of managing the development as long as it is of a certain size, usually where there are four or more units in the block. 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.
- 6.2 The advantages of being organised into a company are that it provides a structured statutory model which can facilitate management arrangements in a democratic manner. It can elect directors, take major decisions by way of resolutions, present members with annual reports and accounts, hold an annual general meeting and generally provide an organised framework for the management of the development.

### **MANAGEMENT COMPANIES**

- 6.3 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. The advantage of a management company being a private limited company is that this structure shields its members from personal liability for the unsatisfied debts of the company. As a private limited company, the liability of the management company is limited to the capital originally invested, i.e. the nominal value of the shares.

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<sup>27</sup> There is more detailed information about the Company Law Framework as it affects Management Companies in Chapter 7 of the Consultation Paper on Apartments.

## **THE COMPANIES ACT 2006**

- 6.4 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.

## **COMPANY DOCUMENTATION**

- 6.5 The company law framework as a whole can be difficult for individual apartment owners to use. It is recognised that the management company’s legal documentation can be complicated and hard to understand. The standardisation of the documentation to comply with the statutory requirements can be unwieldy because the provisions are not specifically tailored to the requirements of a particular development. At an earlier stage of the project, some of the respondents to the questionnaire issued by the Commission identified the legal structure of the management company as a constraint on resolving problems. They observed 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.

## **COMPANY PROCEDURES**

- 6.6 Some aspects of company law could be viewed as unnecessary for residential management companies, given their limited role e.g. filing obligations. On the other hand, the fact that there is no longer a requirement to hold an annual general meeting is not helpful when such a meeting is generally considered to be of benefit to apartment owners as shareholders of management companies. In addition, some company law provisions are unduly cumbersome, such as when a management company is struck off. The penalties are designed to be punitive and restoration to the register is an expensive process. Reinstatement can also be relatively slow given the serious consequences of a company being struck off.

## **PROPOSAL FOR A MORE SUITABLE FORM OF COMPANY**

- 6.7 The framework of company law as it applies to management companies is set out in Chapter 7 of the Consultation Paper and some of the current problems relating to the structure of management companies are described in Chapter 14.
- 6.8 In Chapter 16 (paragraph 16.16) of the Consultation Paper it was noted that there does not appear to be strong opposition to the current arrangement whereby the management company, owned by the apartment owners, has responsibility for management of the development. That arrangement seems to be generally accepted and is not a source of complaint. However, it is recognised 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 about the benefits of taking an active part in its work.
- 6.9 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. In Northern Ireland management companies are usually private limited companies limited by shares. This means that the company has shareholders and the liability of the shareholders to creditors of the company is limited to the capital originally invested (the nominal value of the shares).
- 6.10 The possibility of considering the vehicle of a private limited company limited by guarantee as an alternative was mentioned in passing (paragraph 16.17 of the Consultation Paper). This form of company is already available and is sometimes used for non-profit making organisations, such as sports clubs, professional societies and charities. However, it must be appreciated that if used in practice for residential management companies, the fact that liability is limited might disadvantage the development if the apartment owners, through the management company, do not meet the liabilities incurred by the company (i.e. themselves).
- 6.11 The Consultation Paper identified the specific 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 (paragraph 16.20).

6.12 These 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.

## **REPUBLIC OF IRELAND**

6.13 The Commission notes that in the Republic of Ireland, company law has recently been subjected to a major review and a new Companies Bill has been drafted. Part B3 of the Bill provides for a new form of Designated Activity Company (“DAC”). A DAC is a private company limited by either shares or by guarantee with the capacity to do only those acts or things set out in its constitution (memorandum of association). It is a simpler structure of company with limited capacity and exemptions from compliance with some of the statutory requirements applicable to companies which trade and operate in a business environment in the normal way.

## **QUESTION 2**

6.14 Question 2 of the Consultation Paper asked if consultees agreed with the inclination of the Commission to the view that for residential property management companies the introduction by legislation of a

simpler more suitable form of company should be considered. If so, what provision should be made for the conversion of existing management companies to the new format?

## **RESPONSES TO QUESTION 2**

- 6.15 The consultees were almost unanimous in supporting the proposal for consideration of legislation to create a simpler form of company. One consultee commented agreeing that it may be appropriate for the law to take a more relaxed approach to the treatment of residential management companies, while retaining the existing security for the shareholders and members of the company. There was also some support for the view that it is not necessary to have a separate form of company but administrative provisions could be improved.
- 6.16 As against this, individual comments were also made to the effect that in properly functioning and well organised developments the present arrangements can work perfectly well. One consultee expressly said that management companies operate effectively and well under the current leasehold and company law framework if the company is administered transparently. He added that it also assists if the managing agent operates in conjunction with shareholders who understand the way the management company should work and their role within it.
- 6.17 One of the consultees was attracted by the idea of a private company limited by guarantee. Another consultee suggested that management companies should have a designated title such as “Multi-Unit Development Management Company,” for example, and non-profit trading status, easily recognised by Companies House and HMRC, understood by everyone as an apartment management company (similar to the model in the Republic of Ireland). Another agreed with the proposals of the Commission for a new form of company, specifically identifying simplified articles and memorandums (sic), the employment of directors and secretary with suitable qualifications and the requirement to hold an AGM.
- 6.18 A further consultee considered that management companies need help to ensure they are professionally run, adding that the AGM should have a standard agenda to include: Directors Report, Management Accounts vs Budget for a period of 12 months from the Managing Agent and a Certified Auditors Report on Annual Expenditure. It should also provide

details of how the Sinking Fund should be apportioned when shares are transferred to new members.

- 6.19 None of the consultees responded to the second part of the question or made any suggestions about provision for the conversion of existing management companies to a new format.

## **RECOMMENDATION 2**

- 6.20 The Commission recognises the difficulty in converting existing companies because such conversion cannot be made mandatory. As was pointed out by one of the consultees, the Commission also recognises that since the Companies Act 2006 applies across the UK, it may be difficult to disentangle or exempt existing Northern Irish management companies which wished to convert into a new type of company specific to Northern Ireland.
- 6.21 If legislation was retrospective, it is likely that arguments would be raised that the provisions were an interference with the rights of apartment owners to their possessions enshrined in Article 1 of Protocol 1 to the European Convention of Human Rights. The counter arguments are that such interference has a legitimate aim and is in the wider public interest. Any potential interference with possessions will be subject to a general proportionality test and a requirement to demonstrate that a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual interests<sup>28</sup>.
- 6.22 The Commission is committed to looking for solutions to assist current owners and to solve existing problems. If there was to be a wider review of company law, as in the Republic of Ireland, the Commission would propose that management companies could be reconsidered in that context. However, in the absence of a more general review, the Commission has due regard to the difficulty of drafting suitable legislation for management companies in isolation. It also takes into account the fact that any new provisions would only apply to management companies coming into operation after commencement of the legislation which would not result in any benefit for a number of years and would not improve the position of existing owners.

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<sup>28</sup> See the Commission's analysis of the arguments in Supplementary Consultation Paper on Land Law (NILC 3 (2010) paragraphs 3.58 – 3.75

- 6.23 The preliminary inclination of the Commission was to introduce a new simpler form of company for management companies and it acknowledges that in principle this proposal was very attractive to consultees. However, on reflecting further and taking a more pragmatic view, it has concluded on balance that a new form of company may not be an effective solution for residential property management companies in the shorter term. In preference it considers that it would be of greater benefit to consider provisions to facilitate the administration of companies (see below Question 3).

### **PROVISIONS TO FACILITATE ADMINISTRATION OF COMPANIES**

- 6.24 The Commission considers that it may be of benefit to consider provisions to improve particular aspects of the administration of management companies. 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).

### **QUESTION 3**

- 6.25 Question 3 of the Consultation Paper invited consultees to consider as an alternative to a new form of company, the introduction of provisions to improve and facilitate the administration of management companies.

### **RESPONSES TO QUESTION 3**

- 6.26 The responses to this proposal were overwhelmingly in favour of it. Only one consultee strongly disagreed in the belief that the only viable way forward is to form a new company and another respondent expressed a view preferring a new company bespoke.
- 6.27 At present Companies House identifies and registers residential property management companies in Northern Ireland under the 98000 SIC Code which replaced the 2003 SIC Code 9800. One consultee suggested that there could be increased guidance issues by Companies House for residential property management companies for

apartments and open spaces. The information could be placed on a new website dedicated to information and issues relating to such companies and should be specific to Northern Ireland.

- 6.28 One consultee was of the opinion that the most pressing need is to educate the shareholders / apartment owners and potential buyers of the way in which a management company operates. He considered that best practice guidelines drawn up for managing agents should include aspects such as separate bank accounts for each management company, separate insurance policies for each development, independent preparation of accounts, transparency regarding fees and any in-house contractors. His view was that effective education in these areas would reduce the need for much of the legislation being considered which, if too far-reaching could be unwieldy and difficult to enforce.
- 6.29 Other comments were made suggesting that management companies should be subject to less punitive penalties for failure to file accounts and that it should be easier to restore management companies to the Companies Register. There should be more guidance and publicity available so that the members and officers of management companies are more familiar with the requirements.

### **RECOMMENDATION 3**

- 6.30 The Commission is persuaded of the merits of administrative reform of management companies as a more viable alternative to the introduction of a simpler form of company. In the light of the level of support from the consultees for this proposal, the Commission recommends that consideration be given to modifying and adapting the administrative requirements for management companies. This could be taken forward through Companies House. The Commission further recommends that more information and guidance about the requirements be made widely available to such companies, their members and officers.



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## **CHAPTER 7. A STATUTORY MANAGEMENT SCHEME**

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### **INTRODUCTION**

- 7.1 The problems that arise in residential developments with blocks of apartments or open spaces under shared ownership are described in Chapter 13 of the Consultation Paper. There is clear evidence that many of the problems experienced by residents in residential 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 most important issue to consider in principle is whether to introduce a scheme of statutory provisions for the management of apartments and other residential property with elements of shared ownership or open spaces. This question is considered in Chapter 16 of the Consultation Paper (paragraphs 16.29 -16.30).
- 7.2 The concept of a legislative scheme is very attractive and has been seen as a solution in neighbouring jurisdictions, although it is too early to accurately assess the effectiveness of the respective pieces of legislation. The Multi-Unit Developments (Ir.) Act 2011 (No 2 of 2011) was enacted in the Republic of Ireland to address problems relating to the ownership and management of the common areas of multi-unit developments in that jurisdiction. Following the outline of that Act, The Apartment Developments' Management Reform Bill was introduced into the Northern Ireland Assembly in December 2010 by Kieran McCarthy MLA. It was a Private Member's Bill intended to address current inadequacies in the laws governing aspects of the ownership of multi-unit developments. 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 continues to attract interest.

### **QUESTION 4**

- 7.3 Question 4 of the Consultation Paper asked if consultees considered that it would be helpful to introduce a statutory default management scheme for blocks of apartments or other residential developments.

- 7.4 The proposal for a statutory management scheme put forward in the Consultation Paper was based on the premise that the scheme would operate in default of provisions in the title deeds. The statutory scheme would provide a suitable framework for management of the development in the absence of other provisions where the title deeds were silent.

#### **RESPONSES TO QUESTION 4**

- 7.5 A high proportion of the respondents answered this question and the responses were almost unanimous in favour of such a proposal. Although enthusiastically in favour of a statutory management scheme, very few of the consultees elaborated in their replies and there was little comment about the possible content of a statutory management scheme. One consultee was against a statutory management scheme, pointing out that one template cannot cover all the varying types of schemes and one size does not fit all. Some of the consultees supporting the proposal voiced a similar note of caution, stressing the need for careful consideration of the detail of the terms set out in any scheme. There was also a suggestion that there should be a provision for apartment owners to opt out of a statutory scheme at a later stage with a majority consensus if they chose to do so and to immediately put in place suitable alternative arrangements.

#### **RECOMMENDATION 4**

- 7.6 The issues of management, management companies and managing agents are at the centre of many of the problems experienced by the owners and residents of apartments and other properties with elements of shared ownership. The proposal for a statutory management scheme proved to be very popular because it was anticipated that it would introduce clarity and responsibility in relation to the obligations for the property. However, it is important to recognise that there may be other equally effective solutions to the current problems. Chapter 6 of this Report looks at company law as it affects the structure and operation of management companies. Chapter 10 considers the regulation or licensing of managing agents. If either regulation or licensing was introduced, standards would be set for managing properties and penalties would be imposed for non-compliance. The Commission has also identified that there is a need for recourse to an

affordable and accessible process for disputes which is addressed in Chapter 11 of the Report.

- 7.7 The Commission realises that the proposal for a statutory management scheme is attractive to consultees and appreciates that it may be considered effective in addition to the other measures it is recommending. On balance, the Commission is persuaded by the strongly expressed views of the overwhelming majority of consultees that it should recommend a comprehensive statutory management scheme for apartments and other residential developments with elements of shared ownership, such as open spaces. However, it would sound a note of caution in recommending the introduction of legislation. Careful consideration should be given to the issues that would be addressed in the legislation and in the detail of the provisions. The statutory management legislation should not encroach on the matters that are dealt with elsewhere i.e. company law and the administration aspects of management companies, regulation or licensing of managing agents, and dispute resolution mechanisms (See Recommendations 2 -3, 14 -19, 21-23).
- 7.8 The Commission recognises that legislation creating a statutory management scheme is likely to be prospective and not to operate retrospectively. This means that it would apply to new developments from the operative date of the legislation and not to developments in existence before that date. In passing, the Commission notes that schedule 1 of the Tenements (Scotland) Act 2004 (asp 11) provides that the Tenement Management Scheme applies to all tenements in Scotland, old and new. That Act provides a simple scheme setting out the basic requirements for management and maintenance of a tenement where the title deeds fail to provide appropriate rules. The Commission recommends that consideration should be given to whether a similar retrospective provision could be brought into force in this jurisdiction. It would greatly assist owners of existing apartments who are experiencing problems as a result of the omission of provisions for maintenance and management from the title deeds. However, care has to be taken that the introduction of a retrospective provision does not override or negate the intentions of the parties, contrary to an express contractual arrangement.
- 7.9 The Right to Manage provisions contained in Part 2 of the Commonhold and Leasehold Reform Act 2002 (c. 15) which applies in England and Wales are specifically tailored to leasehold property in that jurisdiction and are prospective. The provisions in the 2002 Act enable a right to manage company to be established and set out the

conditions in which it would operate. They provide the details for the administration of the company but do not specifically identify the matters of management. Leases in England are not as long and the reversionary interest is usually retained by the landlord. Unlike in Northern Ireland, it is not common practice there for management companies to be set up when the development is constructed or to be a party in the title documentation. The Commission does not consider that there is very much of substance in the right to manage provisions in the 2002 Act which are of relevance to this jurisdiction.

7.10 The Commission notes that the Multi-Unit Developments Act 2011 in the Republic of Ireland contains provisions to transfer the common areas to the management company. However, on making informal enquiries, the Commission has found uncertainty as to the enforceability of these provisions and has not been able to establish that the provisions are an effective solution to the problem of the developer failing to make the transfer. Consequently the Commission recommends that careful consideration be given as to whether the same approach should be followed in this jurisdiction. The difficulties of defining the common parts and the point at which the transfer should take place may, if not tightly drafted, render the meaning of the provision uncertain and unenforceable. (Defining the point of transfer is considered further in relation to Question 5 and Question 36).

7.11 Turning to the provisions that would be set out in a statutory management scheme, the Commission is reinforced in its preliminary view that such a scheme should only apply where the title deeds are silent and recommends that consideration should be given to the issues on which the legislation would concentrate.

7.12 The Commission recommends that a management company should be responsible for maintaining, repairing and renewing the:

- main structure of the building including the foundations, the roof, chimneys, external walls, internal load bearing walls, floor supports, joints, beams, gutters and rainwater pipes;
- water pipes, drains, cables, wires, television and satellite aerials (if any);
- stairways and lifts;
- entrance halls, landings and passageways;
- roadways, pathways, driveways, entrances, parking areas, bin areas;
- boundary walls, fences, hedges and gates;
- gardens, landscaped areas;

- site lighting.
- 7.13 The management company would be responsible for providing the following services:
- Maintenance of all internal common areas including hallways, corridors, landings, stairways and lifts;
  - Maintenance of all gas tanks, sewers, drains, pipes, conduits, wires and services serving the property;
  - Lighting in internal and exterior common areas;
  - Compliance with Fire Authority Regulations;
  - Refuse disposal and maintenance of bin storage area;
  - Managing agents fees and outlays;
  - Management and administration of the company;
  - All other necessary expenses incurred in and about the maintenance and proper management of the property;
  - Maintenance of all landscaped areas and open spaces;
  - Periodic redecoration and refurbishing of the external and common parts of the development;
  - Insurance of the units, the building and the development as appropriate.
- 7.14 In addition to providing the services, the management company would also set up a sinking fund to be held against future liabilities and contingencies. The service charge and sinking fund would be funded by the unit owners paying a proportionate amount of the total cost to the management company as requested on account by instalments or as agreed. There would be an obligation to hold the service charge and the sinking fund contributions in separate designated accounts in the name of the management company.

## **QUESTION 5**

- 7.15 Question 5 of the Consultation Paper asked whether, instead of a full statutory default management scheme, it would be an option to consider legislation to address specific matters of concern. For example, provision for the transfer of the common parts of a development or provision for a sinking fund. The Commission indicated that it was not opposed to this in principle but was conscious of the drafting difficulties involved. For this reason it was inclined to examine other possibilities and asked if consultees agreed.

## RESPONSES TO QUESTION 5

- 7.16 A smaller number of consultees responded to this question. Those who did so were almost unanimous in supporting it but several qualified their approval by indicating that this was a second choice and they would prefer a full statutory default management scheme. One respondent drew attention to the drawbacks of a partial scheme and pointed out that, in a general sense, this can create problems. Another queried the merit of deciding which specific matters should be addressed.
- 7.17 Additional comments were made in favour of a statutory provision for the transfer of the ownership of the common parts of the development by the developer to the management company. One respondent noted any proposal to introduce a provision to compel a transfer of the developer's title would have to take account of any secured lender's interest in the development.
- 7.18 Several respondents echoed the concerns of the Commission (set out at paragraph 16.29 of the Consultation Paper) about the difficulty of deciding at which point the transfer should take place, such as 6 months from the sale of the first or the last apartment. The Commission recognised the challenges of defining "completion" and "development" to ensure clarity and consistency, which the respondents also acknowledged.
- 7.19 One respondent suggested that in drafting the point at which the development has to be transferred to the management company, it is appropriate that such a transfer is without prejudice to any rights that any of the apartment owners or the management company itself may have against the developer in respect of works that had been agreed by the developer to be undertaken prior to the vesting of the title in the management company. To overcome some of the difficulties it was suggested that it may be preferable that there is a statutory vesting of the title in the management company at a defined point.
- 7.20 A number of respondents also made comments supporting a statutory requirement for the establishment of a sinking fund. One respondent thought that a sinking fund should be set up when the building is say two years old (from the date the first unit is sold) and that the developer should contribute for any of the units that are unsold at that stage. Another respondent firmly recommended that all units in a building pay

full service charge based on a budget prepared by a professional managing agent once the first apartment becomes occupied.

## **RECOMMENDATION 5**

7.21 The Commission recognises that a legislative scheme which only addresses specific points would not be as popular as a full statutory management scheme. Accordingly, it recommends this option should only be pursued if government decides not to proceed with a statutory management scheme under Recommendation 4. If this came about, government should give further consideration to the issues that it wishes to address in the legislation, such as a requirement to establish a sinking fund.

## **QUESTION 6**

7.22 Question 6 asked if consultees thought there was 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.

## **RESPONSES TO QUESTION 6**

7.23 Almost all of the consultees who responded to this question were against the idea of a compulsory payment into the sinking fund on the sale of an apartment. However, several of those commented that they would support the gradual building up of a sinking fund. Only one respondent put a figure on a suggested recommended minimum contribution to a sinking fund - £150 per annum per unit. Others acknowledged that the appropriate contribution would be variable according to the age and characteristics of the development.

7.24 One respondent thought that the proposal merits some consideration but that devising a formula for the calculation of the charge would add to the complexity of purchasing an apartment. In addition, the consultee pointed out that consideration would have to be given as to how payment could be secured and if by a charge against the apartment, the ranking of this charge in relation to other charges.

## **RECOMMENDATION 6**

7.25 The Commission is in agreement with the majority of the consultees in relation to the proposal for compulsory contributions to the sinking fund on sale and consequently will not be recommending the introduction of a provision for a percentage of the sale proceeds of an apartment to be paid into a sinking fund.



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## **CHAPTER 8. TITLE ISSUES – CREATION OF A RIGHT OF ACTION**

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### **INTRODUCTION**

8.1 In Chapter 16 of the Consultation Paper (paras 16.32 – 16.37) the Commission explored the possibility of creation of a right of action to address matters of title. The Commission was initially inclined to consider that it might 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) as an alternative to attempting to prescribe for procedures in legislation. It suggested that this right would be available to 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).

### **QUESTION 7**

8.2 Question 7 explained that the Commission proposed 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. The question asked if consultees agreed and if so, which other matters might be addressed by this means?

8.3 A right of action would confer on an apartment owner 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.

### **RESPONSES TO QUESTION 7**

8.4 A substantial proportion of the respondents answered this question and those who did so were unanimously in favour of the creation of a right of action to address matters of title. Some additional comments were made, a number strongly expressing their approval. Several respondents made the point that the costs should be considered. Given

the potential expense involved and the difficulty of raising funds among the community of apartment owners, the provision of a low-cost tribunal would be the most suitable approach. Another suggested that all matters of dispute between lessor and lessee should be dealt with in the same place.

- 8.5 Only one respondent considered that the Lands Tribunal was the appropriate forum. Another respondent referred to section 16 of the Property Factors Act 2011 in Scotland which recommends the creation of a Home Owners Housing panel for dispute resolution and another suggested that a new Lease Tribunal should be created to deal with the issues. A further consultee emphasised that the courts must support the ability of the management company to collect service charges where the company is operating normally.

## **RECOMMENDATION 7**

- 8.6 The Commission drew a distinction in the Consultation Paper between the legal framework and remedies for matters of title on the one hand (Chapter 16) and management problems on the other hand (Chapter 17).
- 8.7 In the case of residential housing developments with elements of shared ownership there is evidence to support a requirement for a more extensive right of action to address matters of title and a need for a power to be conferred on a court or tribunal to order that amendments should be made to documents of title. Currently the Lands Tribunal is the forum for title issues and it would be an option to recommend that its jurisdiction should be extended.
- 8.8 However, there may also be another option and it may be more beneficial to consider matters of title in conjunction with others rather than in isolation. It has become clear to the Commission in the course of the project that there is an urgent need to have a dedicated forum in which to address management issues for residential properties with elements of shared ownership. In Chapter 11 of this Report, which addresses Dispute Resolution, a forum to address management issues is considered. A dispute resolution mechanism is also one of the features of regulation of managing agents which is considered in Chapter 10 of this Report. Recommendations 15 and 21-22 of this Report propose that further consideration be given to the creation of a relatively informal process for adjudication of disputes relating to management matters.

- 8.9 The Commission is conscious of the benefits of recourse to an affordable and accessible process for all the problems which arise, regardless of their nature. Although it has previously drawn a distinction between matters of title and management matters, the Commission recognises that one solution would be to establish a new body to deal with both title and management matters. Accordingly, the Commission recommends that government also gives consideration to the option of inclusion of title in the same forum as management as opposed to having a separate process for title disputes. One reason for doing so is that in some circumstances, for example where sinking funds are concerned, it may not be obvious whether the problem is a matter of title or of management.

## **QUESTION 8**

- 8.10 Question 8 asked consultees if the title documentation (i.e. the lease) was 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?

## **RESPONSES TO QUESTION 8**

- 8.11 As with the previous question, the respondents to Question 8 were unanimous in agreeing that there should be a right to apply to a court or tribunal for the lease to be amended and several made comments to the effect that it would be a very useful provision. One respondent thought that power should be available on the application of a specified portion of lessees only, as otherwise this might affect the extent to which mutuality of obligations are applied. Notice provisions should be included so that all unit holders are made aware of what is happening. It was also suggested that mortgage lenders and the NI Co-ownership Housing Association should have the same right. One respondent thought that an application by one lessee should be enough to amend all the leases in the development. Another respondent expressed a view in favour of the Lands Tribunal being the appropriate forum, but no other opinions were expressed in this regard.

## **RECOMMENDATION 8**

8.12 The Commission has recommended (Recommendation 7) that there should be a more extensive right of action to address matters of title. Either the jurisdiction conferred on the Lands Tribunal could be extended or a new body could be set up which potentially could deal with title and management matters. Turning to Question 8 and taking the views of consultees into account, the Commission further recommends that the power to address title matters should include a power to amend all the leases in the development. There was no consensus on the appropriate proportion of lessees that would be required for the amendment to be imposed on all the residents so the Commission is not expressing any view on this point.

## **QUESTION 9**

- 8.13 Question 9 asked whether consultees considered that the Lands Tribunal or the Land Registry is 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?
- 8.14 The Commission was inclined to the view that any dispute or problem would be decided in one place so that it is clear to everyone where to initiate proceedings, whatever their nature.

## **RESPONSES TO QUESTION 9**

8.15 The consultees who responded to the question were overwhelmingly in favour of the Lands Tribunal as the appropriate forum. It was seen as having a practical approach to the resolution of these types of dispute.

## **RECOMMENDATION 9**

8.16 Accordingly, the Commission recommends that consideration be given to conferring appropriate jurisdiction on the Lands Tribunal to make an order to amend leases of properties in residential developments with elements of shared ownership. However, if in the alternative a new body is established to deal with title matters (see Recommendation 7), that body would be given the appropriate jurisdiction.

## **QUESTION 10**

8.17 Question 10 asked consultees which forum they 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 or the Land Registry to make the necessary determination?

## **RESPONSES TO QUESTION 10**

8.18 Once again the greater majority of the consultees who responded to this question expressed views supporting the Lands Tribunal as the appropriate forum. However, a few consultees drew attention to the importance of keeping costs to a minimum for residents and to enable them to obtain successful redress. A significant minority of the respondents considered that the small claims court offers an effective service and provides a cheaper, quicker and more straightforward outcome.

## **RECOMMENDATION 10**

8.19 The Commission recommended above (Recommendation 9) that consideration be given to conferring appropriate jurisdiction on the Lands Tribunal to make an order to amend leases of properties in residential developments with elements of shared ownership. However, if in the alternative a new body is established to deal with title matters (see Recommendation 7), that body would be given the appropriate jurisdiction. The enforcement of covenants is a matter of title so the Commission recommends that the appropriate forum to address this issue should be considered in the context of matters affecting title. As it has already recommended that jurisdiction should be conferred on the Lands Tribunal it would be consistent to do so again. However, as an alternative, government may consider that a new body should be established in which case the Commission recommends that the new body should also deal with enforcement of covenants.

## **QUESTION 11**

8.20 Question 11 asked consultees if they 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?

## **RESPONSES TO QUESTION 11**

8.21 The great majority of consultees who responded to this question were against the idea for a management company to have such a right of action, although a significant minority supported it. Those who were in favour of it considered that the real threat of forfeiture or possession would act as a deterrent but those against felt that it was a disproportionate remedy and should remain a matter of simple debt pursued in the normal manner through the small claims court or the district judge's court as appropriate.

## **RECOMMENDATION 11**

8.22 In view of the lack of support for this proposal the Commission is not recommending that a management company should have a right of action under which it could be awarded possession of a property or the lease should be forfeited.

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## **CHAPTER 9. LEGAL DOCUMENTATION AND REGISTER**

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### **INTRODUCTION**

- 9.1 In Chapter 16 of the Consultation Paper the Commission considered a range of options for the legal framework of residential developments with apartments together with other properties which enjoy elements of shared ownership and open spaces. One of the proposals considered in the Consultation Paper was for legal documentation, such as leases of apartments, to be in a standard form.

### **STANDARD DOCUMENTATION**

- 9.2 The Commission noted that when it had raised the question in preliminary discussion with stakeholders as to whether it would be of benefit for legal documentation such as leases of apartments to be in a standard form, there had been a mixed response. On the face of it there are advantages to standardisation such as uniformity, consistency, and familiarity. However, there are also a number of disadvantages. Given the range of the nature of the parties and the variation in building developments, it is unlikely that agreement could be reached on a standard form for the documents. It was recognised that a standard form would also be inflexible and may not provide sufficient scope for tailoring to individual circumstances if required. It would have to be continuously kept under review and revised to enable changes to be made to its provisions.

### **QUESTION 12**

- 9.3 Question 12 asked consultees if they agreed that it would be difficult to reach 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.

## RESPONSES TO QUESTION 12

- 9.4 Almost all of the consultees responding to this question agreed with the preliminary view of the Commission and recognised the difficulties of complete standardisation of leases because of the individual characteristics of each development. However the respondents largely supported the proposal for a standard framework for the documentation to ensure that all the relevant issues are properly addressed. One of the respondents suggested that the Law Society, which has already undertaken significant work in establishing requirements under the Home Charter Scheme and providing leaflets for purchasers buying an apartment or property in developments with open spaces, could consider the development of a toolkit for owners and management companies.
- 9.5 Others considered that it should be possible to have a draft precedent lease setting out a clear structure and taking into account any statutory default management provisions. It was thought that some form of standard lease could be compiled given that solicitors' fees are already being aggressively undercut and threatened by other potential entrants into the legal services market. Each lease could contain some fundamentals whilst allowing for some flexibility to permit drafting covering different scenarios and future structures which are currently not in place.
- 9.6 One consultee suggested that a uniform lease and Memorandum and Articles document be brought in for all developments and management companies as far as possible, especially for service charge collection / company operation / occupant rules etc. and this should be done in consultation with shareholders and managing agents.
- 9.7 Others preferred the proposal to devise a standard form which would offer many benefits to developers, apartment owners and their professional advisers. A new framework would be very useful so that clauses were in the same order and it would be easy to find particular provisions. In addition, a standard style would be helpful. The point was also made that the language should be more suited to the average property owner.
- 9.8 One consultee, whilst not answering the question specifically, was in favour of a standardised lease to clarify the rights and responsibilities of the parties. The consultee made a number of detailed proposals relating to the service charge, buildings insurance, lift costs and sinking



fund, such costs to be confirmed by a life cycle report from an external building surveyor.

- 9.9 NI Housing Executive, which provided a response to the consultation in general terms, explained that it uses a standard lease agreement for properties where the tenants purchased flats or maisonettes from the Executive. The Executive has approximately 5,800 leaseholders in such properties from whom it collects an annual service charge. Due to the large number of properties and their common characteristics the Executive can impose a standard lease on the lessees. However other developers indicate that the particular features of their developments vary to a greater degree and while they may use some standard clauses, they prefer to retain a degree of flexibility to tailor the requirements of the lease to the specific properties.

## **RECOMMENDATION 12**

- 9.10 Although the Commission does not support the introduction of a standard lease for residential properties with elements of shared ownership, it has taken into account the comments made by consultees in favour of a standard framework and the use of precedents to ensure that the necessary rights and obligations are properly clarified in each case. It acknowledges the points made with regard to specific issues, such as service charges and sinking funds, and considers that it would be of benefit for certain core provisions to be incorporated in every appropriate case.
- 9.11 In conclusion, the Commission recommends better drafting of leases should be encouraged and that the Law Society should consider the provision of a structured framework for leases (as opposed to a standard lease).

## **CENTRAL REGISTER OF INFORMATION**

- 9.12 The Commission took the preliminary view that it is not only important that the right information is produced at certain stages of purchasing an apartment, but that it would also be helpful if key information could be held centrally that is accessible to all (see paragraph 16.41 of the Consultation Paper). 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 the Land Registry, where a certain amount of documentation is already registered. It could be extended further to include copies of documents relating to the management company.

- 9.13 The Commission considered that 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 who find it difficult to obtain the relevant documentation from their predecessor.

### **QUESTION 13**

- 9.14 Question 13 of the Consultation Paper asked if consultees agreed 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?

### **RESPONSES TO QUESTION 13**

- 9.15 The consultees who responded to this question were almost unanimous in their support for a central register. They agreed that a central register of key information about each development would be helpful; one consultee emphasising that this would only be necessary for developments in excess of 10 units as smaller developments tend to operate more smoothly and the residents in those cases are more familiar with the manner in which the management arrangements operate.
- 9.16 On the question of the information to be provided, several consultees identified documentation that would strictly relate to the title documentation or other legal requirements. One consultee mentioned that a register is essential to show clearly the terms of the lease, the management structure, the annual returns and the minutes of the annual general meeting. This comment would place company information in the same arena as details from the lease. Another respondent suggested that key information might be owners' names and addresses, lenders names if applicable, debtors and simplified lease information, i.e. do's and don'ts and covenants. Another suggested developer details, proposed management fees and the services covered in the service charge.

- 9.17 One respondent provided a detailed list which included information that it also suggested should be in a pack provided by the solicitor at the time of purchase. In summary this list covered all the title and management company documentation, management company and managing agents' details, as well as information relating to insurance, complaints, debt recovery, transport links, building control certificate with all building control inspection documents, energy performance certificate, and information relating to the regulation or licensing of the managing agent if such a scheme is introduced.
- 9.18 Several of the respondents, whilst recognising the theoretical benefits of a central register, drew attention to the practical difficulties of maintaining such a register, keeping it up to date and funding it, as well as data protection issues. One respondent commented that consideration should be given to an electronic solution that links information from several sources such as building control and environmental health, planning service and so on. Another respondent suggested that the host for the register should be chosen on the basis that it is best placed to ensure that the register contains accurate and up to date information that is readily available to all interested parties in a cost effective way.
- 9.19 Some of the respondents confirmed that they considered that the Land Registry was the most suitable venue for the register. However, it is clear that some of the documentation and information suggested by the consultees as being available on the register is not within the present jurisdiction of the Land Registry, such as the information relating to the management company. One respondent suggested that it may be easier to impose an obligation on developers and the directors of a management company to maintain an up to date register of appropriate documentation which is necessary in relation to the management company. Such information would have to be easily accessible for that suggestion to be workable.

### **RECOMMENDATION 13**

- 9.20 The Commission is reinforced in its preliminary view by the response of the consultees and will recommend that a register of information should be established in relation to developments in which there is a management company. It also believes that the Land Registry would be a suitable place to hold the register. However, it is clear that further thought needs to be given to the legislation to establish the register as

well as to how the register would be funded and administered. Management companies would have to be under an obligation to send in the information to keep the register up to date and to pay an annual fee for the administration. Enforcement mechanisms would also be necessary. If the register of information was held at the Land Registry, it would be in a separate register from the register of title, but it would be important that it was accessible to the public, as is the current position with the title registers. In addition to copies of the documents of title, the register might contain planning information, building control details, additional relevant information relating to the management company, the managing agent, the building, insurance and other information as prescribed.

- 9.21 One of the respondents to the Consultation Paper suggested that in apartment blocks there may be a place for a copy of the information to be displayed or left in a hallway or a reception area. However, it was recognised that this would not be possible in a development where the only shared facility was an open space. In any case the quantity of information might be too great to be displayed or left. It may be that some basic information should be available and displayed. For example, the name of the management company. This information could be displayed in a manner similar to the energy performance certificate which is hung in the hallway in public buildings.

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## CHAPTER 10. REGULATION AND LICENSING OF MANAGING AGENTS

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### INTRODUCTION

10.1 The possibility of regulation or licensing managing agents was considered in Chapter 17 of the Consultation Paper. At present, no party or body is responsible for oversight of the functioning of residential developments with management companies nor is there any regulation or licensing of managing agents. There appear to be significant disparities in terms of the levels of service which managing agents provide to the property owners.

### REGULATION OF MANAGING AGENTS

10.2 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 at Westminster 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<sup>29</sup>. Despite this policy, there has always been support for regulation in certain sectors and the Enterprise and Regulatory Reform Bill, introduced by Vince Cable MP, the Business Secretary, which proposes a certain level of regulation for letting agents, is currently going through Parliament<sup>30</sup>. Although since devolution this is now a matter within the competence of the NI Assembly, it is nevertheless relevant to be aware of the approach in Westminster towards regulation generally.

10.3 As was pointed out in the Consultation Paper, against this background, it has to be recognised that there may be opposition to the proposal for

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<sup>29</sup> See e.g. House of Commons Library Standard Note: SN/SP/6000 3 January 2013 – Private sector letting and managing agents (England): should they be regulated? However, there is recent evidence that the anti-regulatory approach may be changing.

<sup>30</sup> On 17 April 2013 the Government tabled an amendment to the Enterprise and Regulatory Reform Bill proposing that all persons engaged in lettings agency work and also persons who engage in property management work must be members of a Government approved or Government administered redress scheme (to be determined by secondary legislation). It is proposed that this regulation would only apply in England. See paragraph 10.32 for more detail.

the introduction of a new regulatory body and it may take some time to progress it. Bearing in mind the current environment, the Commission takes the view that if a regulatory body is thought to be an effective means of supervising the operation of residential property developments and managing agents, this should be given serious consideration.

#### **QUESTION 14**

10.4 Question 14 of the Consultation Paper asked if consultees supported a proposal for the regulation of managing agents.

#### **RESPONSES TO QUESTION 14**

10.5 The responses confirmed that this was a very popular proposal. A large proportion of the consultees responded to this question and they were almost unanimous in agreeing that there should be regulation. The point was made that at present no qualifications or experience are required and anyone can set themselves up as a managing agent. One consultee felt that some agents are in the business because they see it as lucrative and an opportunity to make money.

10.6 It is apparent that there is a concern about the variable performance of managing agents and it is important that a consistent standard is applied so that property owners can expect a recognised level of service. Comments were made confirming the view that a central regulatory body with appropriate powers to enforce standards would be an important step in encouraging higher standards. One respondent observed that it is important to ensure that managing agents undertake their work to agreed professional standards as outlined in relevant codes of practice thereby safeguarding the interest of their clients.

10.7 The government's lack of appetite for regulation was noted. It was recognised that the nature of any regulation would need to be explored and further developed. One consultee expressly preferred conferring a power to regulate on an existing suitable organisation, but critically independent body, such as the Housing Rights Service.

#### **RECOMMENDATION 14**

10.8 The question of regulation of managing agents is one of the most important issues in the consultation and proved to be a very popular

proposal. In the light of the strong support from consultees the Commission recommends that regulation of managing agents should be introduced.

## **THE REMIT OF A REGULATOR**

- 10.9 In the Consultation Paper (paragraphs 17.6 – 17.7) the Commission explained that the decision as to what form the regulatory body would take is obviously a matter for government, as is the means of funding any such body. Careful thought would have to be given to conferring appropriate powers on the regulator. The Commission considered that it would benefit from being given wide investigative powers including power to inspect documentation and records of developers, management companies and managing agents.
- 10.10 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. This raises the question as to whether the remit of an existing body should be widened. 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 this area. The RICS has experience of regulating its members, but the Housing Rights Service is more of an advisory body.
- 10.11 The possible remit and powers of an independent regulator were considered in the Consultation Paper (paragraph 17.4). The Commission proposed that 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 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.

10.12 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 the 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;
- Investigate 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.

## **QUESTION 15**

10.13 Question 15 of the Consultation Paper asked if consultees agreed with the suggestion as to the remit of the regulator. It also asked if there are any other matters that might be within the remit of the regulator.

## **RESPONSES TO QUESTION 15**

10.14 A range of comments were made by the consultees, many confirming that they supported the Commission's proposals for the remit of the regulator. To highlight the need for regulation, two respondents gave examples of the scope that managing agents have to obtain large commissions on insurance policies. If the insurance policy is in the name of the managing agent rather than the management company, it is impossible for an apartment owner to obtain any information about the policy or the premiums, which is a source of grievance for residents.



- 10.15 It was suggested that a regulator should have power to protect funds because this is very important, especially with a sinking fund. It is crucial that there is transparency regarding service charges and the sinking fund and that each management company has a separate designated bank account. Appropriate insurance which would protect against loss of funds would also be essential. One consultee made a further suggestion that there should be an obligation on a managing agent to obtain collateral warranties for individual owners where the managing agent instructs the work in its own name for the benefit of the owners.
- 10.16 The Commission proposed that there should be a dispute resolution service similar to the homeowner housing panel operating in Scotland under the Property Factors (Scotland) Act 2011 (see paragraph 17.17 of the Consultation Paper). It was noted that the 2011 Act also provides for the preparation of a code of conduct setting out minimum standards of practice for registered property factors (managing agents). Some of the consultees commented confirming that a code of practice for managing agents would be a positive development if it informed residents of what they may expect from their managing agents and in turn inform them of their own responsibilities as shareholders in the management company.
- 10.17 One consultee considered that there is a missing element in terms of enforcement activity to ensure compliance with professional standards. His response pointed out that the effectiveness of any new legislation on the registration and regulation of managing agents will be dependent on the establishment of an adequately resourced enforcement regime to ensure compliance with the statute, and to publicise its work. The consultee felt that it is important to publicise examples of non-compliance and the sanction resulting from such bad practice. Such a regime would be vital in creating a level playing field that influences and persuades managing agents to comply with the law, and in giving consumers confidence by actively demonstrating that their interests are being properly protected.
- 10.18 Another consultee suggested that, whilst not necessarily the remit of the regulator, consideration should be given to whether managing agents would benefit from being part of a professional body. This would help ensure managing agents have a consistent and professional approach. They would also be properly trained and obliged to comply with Continuous Professional Development requirements. A professional designation would be attractive because it typically helps individuals to progress with their career and improve earnings potential.

10.19 A different consultee made detailed proposals suggesting that an organisation such as "The Apartment Association for Northern Ireland" funded initially by government and then by a service charge levy of say £20 per unit per year would operate a form of regulation.

10.20 NI Housing Executive, making a general comment, suggested that there is potential for a future role for the new Regional Housing Authority and DSD to maintain a register and regulate management companies.

## **RECOMMENDATION 15**

10.21 The Commission reflected on the range of detailed comments made by the consultees on the potential scope of regulation. Having also looked at the models in neighbouring jurisdictions, the Commission is recommending that serious consideration should be given to developing a framework similar to that which operates in Scotland under the Property Factors (Scotland) Act 2011. As in the 2011 Act the new legislation should provide for the establishment of a register of managing agents, require managing agents to be registered, provide for a code of conduct and create a homeowner housing panel as a suitable dispute resolution mechanism.

## **SELF-REGULATION**

10.22 As an alternative to full regulation, the possibility of self-regulation was considered in the Consultation Paper (paragraphs 17.08 – 17.10). In general terms, self-regulation can provide a solution that is both more efficient and cost-effective than full independent regulation. Under self-regulation, an industry is permitted to create and adopt its own code of conduct which it can administer and enforce. That 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. The Consumer Code for Home Builders<sup>31</sup> is an example of self-regulation, which introduced "mandatory requirements that all homebuilders must meet in their marketing and selling of homes and their after-sales customer service"<sup>32</sup>. It is an industry-led code of conduct, applying to all

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<sup>31</sup> Third Edition, April 2013

<sup>32</sup> Consumer Code for Home Builders, Third Edition (April 2013), page 4, paragraph 1

homebuilders registered with the UK's main new home warranty providers. Under the scheme an independent resolution service is available where homebuyers believe the requirements of the Code have not been met.

10.23 When considering the option of self-regulation in the particular context of management companies the Commission appreciates that 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.

10.24 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 of consumers, the government does not seem to favour it<sup>33</sup>. Against this background, the Association of Residential Managing Agents (ARMA) is introducing its own scheme "ARMA-Q" for regulation of its members.

## **QUESTION 16**

10.25 Question 16 asked consultees if government does not support the introduction of independent regulation, should self-regulation be permitted by an appropriate body or organisation?

## **RESPONSES TO QUESTION 16**

10.26 Almost half of the consultees who responded to this question stated that they would not be supportive of self-regulation. The prevailing view was against it in principle, although some respondents would be prepared to countenance it if the government was averse to full regulation. There was little enthusiasm generally and it was recognised that public confidence in self-regulation would be an issue. A form of regulation which is not independent would lack transparency and might be ineffective if it could not enforce compliance.

10.27 Various suggestions were made as to the body or organisation which might be a suitable provider of self-regulation if it was to be an option:

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<sup>33</sup> See Chapter 12 of the Consultation Paper, paragraphs 12.42 – 12.47). Also see paragraph 10.2 above and fn 30 for recent developments.

the RICS, the National Association of Estate Agents, the Lands Tribunal, the Land Registry, the Financial Services Authority and the courts.

## **RICS Proposal**

10.28 The RICS submitted the following proposal, providing examples of a basic approach regarding Regulation which it would be happy to explore further:

### **Option 1**

A Director of the Managing Agent would join our AssocRICS (or higher) level of membership and register their company as a “Regulated Firm”.

In brief this would:

- 1) Sign the Director and Firm up to RICS Firms Rules, Regulated Review Visits and Client Money Protection Scheme, independent redress such as Ombudsman Services;
- 2) Provide the Director and Firm with up to date information and guidance on market issues;
- 3) Monitor the Director’s Continued Professional Development – a minimum of 20 hours a year to keep the Director up to date with new issues and changes in legislation;
- 4) Provide a local forum for discussion of new issues, networking and training;
- 5) Allow customers to complain to RICS if the firm or member has behaved inappropriately; and
- 6) Allow redress through Ombudsman services or similar mechanisms.

Costs would be charged for membership, and Regulated Review Visits where arrangements for Client Money protection is reviewed.

Specific review of high risk issues could also be undertaken through a desk-based review or as part of the Regulated Review Visits should there be issues deemed to be of sufficient importance.

#### **Benefits:**

- Facilitates professionalism in the market through initial and continued education;
- Provision of relevant standards and ongoing guidance;
- “Arms length” regulation reporting to an independent board holding the professional and firm to account;
- Risk-based monitoring and proactive regulation of important issues such as the need for Client Money separation helping to educate all firms on what is needed, raise the standard of service and provide reasonable protection to consumers;
- Allows recourse through complaints to RICS and alternative affordable dispute resolution through Ombudsman Services; and
- Better individual career path through recognised designation.

## **Option 2**

Provision of licensing or “white label” regulation through a local entity with a combination of pro-active and reactive regulation.

This option would be similar to the Option 1 except that it would not involve the membership and continued professional development.

The Consultation Paper rightly identifies a number of key issues for comment. The response to each of the key issues should drive the approach to regulating them and we would recommend that the Northern Ireland Law Commission allocates them into one of two categories according to risk importance to the customer and then requests the appropriate level of regulation – either pro-active risk based monitoring if high risk, or complaints investigation for low risk. This is important because the cost of carrying out proactive monitoring vs. reactive investigations can be significantly different.

- 1) Where an issue is deemed to be high risk and important we would recommend a proactive form of regulation. In brief this would involve pro-active monitoring through desk-based review of information from those being regulated. Firms categorised as high risk would be subject to a site-based visit where processes to tackle the relevant issue would be reviewed against good practice. Taking the example of client money the benefits would be that the standard would be raised by identification of the issue and education materials available to all firms instead of waiting for a complaint when it would be too late to do anything about it.
- 2) Where an issue is deemed to be lower risk and less significant we would recommend a reactive form of regulation. In brief this would mean that we would investigate complaints of malpractice made but would not put in place a mechanism to pro-actively monitor and review the issue unless the risk and importance increased significantly.
- 3) Redress through a mechanism such as Ombudsman Services would be possible.

Costs would be covered through some form of license or regulated firm fee.

### **Benefits:**

- Risk-based monitoring and proactive regulation of important issues helping to educate all firms on what is needed, raise the standard of service and provide reasonable protection to consumers;
- Complaints investigation mechanism;
- “Arms length” regulation reporting to an independent board holding the firm to account;
- Allows recourse through complaints to local entity and alternative affordable dispute resolution through, for example, Ombudsman Services.

### **Option 3**

Provision of licensing or “white label” regulation through a local entity providing reactive regulation ie. investigation of complaints.

This option would not involve membership, continued professional development or the proactive monitoring of high risk issues.

- 1) Complaints received would be investigated
- 2) Redress through a mechanism such as Ombudsman Services would be possible

#### **Benefits:**

- Complaints investigation mechanism;
- “Arms length” regulation reporting to an independent board holding the firm to account;
- Allows recourse through complaints to the local entity and alternative affordable dispute resolution through, for example, Ombudsman Services

## **RECOMMENDATION 16**

10.29 The views of consultees strongly support full regulation in preference to self-regulation. Accordingly, the Commission is recommending the introduction of legislation to regulate managing agents. However, if government is not inclined to proceed with full regulation, the Commission recommends that consideration should be given to the proposals of the RICS for self-regulation.

## **LICENSING OF MANAGING AGENTS**

10.30 In the Consultation Paper (paragraph 17.11) the Commission drew a distinction between regulation and licensing. The difference is that 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 regulation the regulatory body has the responsibility of ensuring compliance once the services are being supplied; whereas with licensing the onus of responsibility shifts to the applicant to ensure compliance before engaging in the activity. The

Commission suggested that licensing could be considered as an option as part of a regulatory regime or it could stand alone as an alternative to regulation. In that respect although licensing may be a more limited and narrower option than regulation, it is nevertheless worth considering.

10.31 The Commission is interested to note a proposal made in Wales in this regard where the Welsh Government intends to introduce a licensing scheme for letting and management agents in the private rented sector landlords as well as for landlords<sup>34</sup>. There is also very recent evidence of a move towards licensing in England which may be the first step in the direction of a regulatory scheme which could lead towards further measures being considered in the future. On 17 April 2013, the Westminster Government introduced an amendment to the Enterprise and Regulatory Reform Bill which is going through Parliament.

10.32 The amendment proposes, *inter alia*, that all persons who are engaged in property management work in England must be members of a Government approved or Government administered redress scheme (to be determined by secondary legislation). Property management work is defined as “things done by any person in the course of a business in response to instruction received from another person” where they are required to “arrange services, repairs, maintenance, improvements or insurance or to deal with any other aspect of the management of premises in England” and “the premises must consist of or include a dwelling-house let under a relevant tenancy.”

## **QUESTION 17**

10.33 Question 17 asked the consultees for their views on the licensing of managing agents as an alternative to independent regulation or self-regulation.

## **RESPONSES TO QUESTION 17**

10.34 The consultees who responded to this question were more supportive of this proposal than the previous one for self-regulation. Just over half the respondents agreed that licensing was a viable alternative to regulation and may be worth considering. It was pointed out that the

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<sup>34</sup> Welsh Government, Huw Lewis (Minister for Housing, Regeneration and Heritage), proposal for a Better Private Rented Sector in Wales – Consultation Paper, 6 July 2012.

reputation of managing agents on residential developments has been compromised by the poor management practices displayed by a few of them. In the current economic climate it is very important to improve the marketability of small properties and having good managing agents is one factor in making the property attractive to purchasers.

10.35 Three consultees believed managing agents should be licensed as well as regulated. Others expressed views broadly in support of licensing as an alternative but with reservation, emphasising that it would be necessary to ensure that only licensed agents operate as managing agents. Again it would be essential that appropriate standards and insurance are in place and that there is appropriate supervision of the activities of a managing agent to make the system credible.

10.36 One respondent was totally opposed to licensing, commenting that regulation or licensing does not make a bad agent good. That consultee considered a licensing scheme would involve too much paperwork and the level of supervision required to police it would simply not be justified or practical. Another respondent was opposed to licensing on the basis that there is no evidence that self-regulation is effective in these circumstances.

## **RECOMMENDATION 17**

10.37 Although licensing is a more limited solution than regulation the Commission recommends that a licensing scheme should be established either as part of a scheme of regulation or if regulation is not to be introduced.

## **LICENSING STANDARDS**

10.38 In the Consultation Paper (paragraph 17.12) the Commission suggested that in principle a licensing system for managing agents might provide for:

- A voluntary licensing period before it becomes compulsory;
- A new agent to be licensed before commencing any activity;
- Existing agents to be given a specified time period within which it would be mandatory to obtain a licence (e.g. 6/12 months).



10.39 Examples of the conditions for obtaining a licence (as set out in paragraph 17.13 of the Consultation Paper) 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;

10.40 For comparison purposes the Commission looked at other similar activities which are licensed such as the landlord registration scheme which will be administered by DSD<sup>35</sup> (see paragraphs 17.15 – 17.21 of the Consultation Paper).

10.41 In Scotland, statutory licensing of managing agents has recently been introduced by the Property Factors (Scotland) Act. 2011<sup>36</sup>. 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 new statutory dispute resolution mechanism called the Homeowner Housing Panel. The statutory Code of Conduct for registered property factors sets out minimum standards of practice with which all registered property factors are required to comply. A property factor who offers property management services while unregistered is guilty of an offence.

10.42 In the Republic of Ireland the recently established National Property Services Regulatory Authority is responsible for the regulation of 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 controls are in place for the protection of clients' money. The Authority has produced a Code of Practice for Property Service providers which is currently voluntary, although there is power to make it legally binding.

10.43 It was explained (in paragraph 17.14 of the Consultation Paper) that the funding of a licensing regime would also have to be considered,

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<sup>35</sup> See draft Landlord Registration Scheme Regulations (NI) 2012 made under Article 72(3) of the Private Tenancies (NI) Order 2006 No. 1459 (N.I. 10)

<sup>36</sup> It came into force on 1 October 2012.

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.

## **QUESTION 18**

10.44 Question 18 asked if consultees are in agreement with the principles for licensing managing agents. Can consultees suggest any other matters that might be conditions of the licence to operate?

## **RESPONSES TO QUESTION 18**

10.45 Almost all of the consultees who responded to this question were in agreement that the principles mentioned in the Consultation Paper would be the minimum standards for the licensing of managing agents. Some respondents made additional comments underlining the need for a code of good practice and a register of managing agents as well as a sound knowledge of money management and credibility.

10.46 One consultee was of the opinion that managing agents should be able to demonstrate evidence of professional accreditation in accountancy, insurance, building surveying, law and company secretarial matters and also be a member of another body such as RICS, ARMA or regulated by a body such as FSA. The consultee considered that they should also show evidence of investment in recognised estate management software for recording, reporting and communicating all aspects of residential estate to internal and external stakeholders. In addition they should have adequate professional indemnity insurance in place to cover all their management activities together with minimum surplus capital on their balance sheet of £20,000.

## **RECOMMENDATION 18**

10.47 The Commission recommends that if a licensing scheme is to be established, it should be based on the minimum standards proposed in the Consultation Paper. Consideration should be given to establishing a licensing regime similar to that which operates in Scotland under the Property Factors (Scotland) Act 2011.

## **THE LICENSING AUTHORITY**

10.48 In the Consultation Paper (paragraph 17.21) the Commission gave examples of the bodies that might be considered potentially suitable to operate 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). Alternatively, it was suggested that it might be preferable to establish a new body for this purpose.

## **QUESTION 19**

10.49 Question 19 asked which body or organisation consultees consider might be the most appropriate to operate a licensing system for managing agents. How might this be funded?

## **RESPONSES TO QUESTION 19**

10.50 A range of suggestions were made in response to this question, and views were divided as to the most suitable organisation to operate a licensing system. Proposals included each of the bodies suggested by the Commission as well as others including: the new Housing Council; the Land Registry; a new body made up of experienced managing agents; the Department of Social Development Landlord Registration Scheme incorporated within the Land Registry Central Register; a statutory model similar to that operating in Scotland under the Property Factors (Scotland) Act 2011 comprising the compulsory register, a code of conduct and a statutory dispute resolution scheme together with the sanction of criminal proceedings; Northern Ireland Housing Executive; Department of Social Development; local councils; the Department of Finance and Personnel, and central government, perhaps an agency similar to the Driver Vehicle and Licensing Agency.

## **RECOMMENDATION 19**

10.51 In view of the complexity of the issues in identifying the most suitable body and the variety of views expressed by the consultees, the Commission is not making any recommendation in relation to this issue. If a licensing scheme is introduced, the funding and administration of it will be a matter for government.

## **A STATUTORY AGENCY DEALING WITH MANAGEMENT**

- 10.52 Instead of creating a regulator or a licensing system, the Commission suggested consideration of a more radical option in the Consultation Paper (paragraph 17.22). This was the possibility of establishing a new statutory body or agency to deal with all management matters. Ideally if it were established, such a body would oversee the running of the management and administration of all developments.
- 10.53 Given that there are so many management problems this may be considered an effective solution. However, the Commission recognised that it would be unlikely to work on a voluntary basis and it is doubtful that sufficient numbers would opt into the statutory body by agreement in the absence of incentives. However, it is possible that a statutory body could be considered as a means of last resort, subject to funding, where residents were unable to agree.
- 10.54 The Commission provided an example in the Consultation Paper (paragraphs 17.23 – 17.24) of a statutory scheme run by Edinburgh City Council in an effort to ensure that the historic housing stock was well maintained<sup>37</sup>. 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%.
- 10.55 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, 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.

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<sup>37</sup> The Housing (Scotland) Act 2006 sections 42 -51 confers power on local authorities to require or instruct repairs. Local authorities can impose a whole programme of maintenance on tenements by means of a maintenance order. See the City of Edinburgh District Council Order Confirmation Act 1991 c.xix.

## **QUESTION 20**

10.56 Question 20 asked consultees if they agreed that although creating a statutory body or empowering an existing body or agency to deal with all management issues may seem like an ideal solution, it is unlikely to work in practice.

## **RESPONSES TO QUESTION 20**

10.57 The majority of the consultees who responded to this question agreed that it was not a practical solution. However, a significant minority disagreed without elaborating in their answers. One respondent pointed out that the example given of the experience in Scotland provides limited support for the Commissions' preliminary view but does show that the monies involved suggest a role for an organisation that is part of central government with access to sufficient funding streams.

10.58 Before taking a definitive view, one consultee suggested that any scheme introduced in Northern Ireland could learn from the mistakes made in the in the scheme which operated in Scotland. That respondent pointed out that most of the housing stock in Northern Ireland is of relatively modern construction so the nature and extent of the repairs needed may be different to that in Edinburgh. The respondent felt that the idea that a statutory body could move in to carry out work where necessary and charge the cost back to the owner may have some merit.

10.59 Another respondent expressed the view that a better approach would be to build on existing market structures with managing agents having primary responsibility for management issues, and a regulatory regime focusing on those management issues.

## **RECOMMENDATION 20**

10.60 The Commission considers that creating a statutory agency to deal with all management issues is not a solution that should be considered in the short term. It would require the establishment of a large publicly funded organisation with substantial funding which the Commission does not regard as an appropriate or effective proposal in the current economic climate.

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## **CHAPTER 11. DISPUTE RESOLUTION MECHANISMS**

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### **INTRODUCTION**

11.1 Options to address management problems were considered in Chapter 17 of the Consultation Paper. In a case where the management of a particular development is not running properly it was suggested (paragraph 17.25 of the Consultation Paper) that it may be of benefit to consider creating a right to take an action in 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.

### **RESCUE PROVISIONS**

11.2 The Commission proposed (paragraph 17.26 of the Consultation Paper) that consideration should be given 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. It was emphasised that any mechanism for dealing with disputes should be able to address all the issues as a package so that the problem is effectively resolved.

### **QUESTION 21**

11.3 Question 21 asked if consultees support the idea for a remedial order grounded on one or more causes or 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?

## **RESPONSES TO QUESTION 21**

11.4 Most of the consultees who responded to this question supported the idea for a remedial order grounded on one or more causes of action as a rescue plan where management arrangements are not working. Although the small claims court was the venue of choice for some consultees, the point was also made that the small claims court system does not have the resources to address complex conveyancing and land management problems. Given the Lands Tribunal's expertise in property issues it was considered the more appropriate forum by the majority of consultees who responded to this question. One respondent suggested that as the legal remedy is often too costly for the typical resident, thought should be given to other options.

## **RECOMMENDATION 21**

11.5 In the Consultation Paper the Commission distinguished between the legal framework and remedies for matters of title on the one hand (Chapter 16) and management problems on the other hand (Chapter 17). The proposal for a remedial order was suggested as a means of resolving management issues.

11.6 Having reflected on this issue, the Commission recommends that further consideration be given to the proposal for rescue plans to be undertaken on particular developments where management arrangements have broken down. It also recommends that there should be a right of action to obtain a remedial order to enforce the rescue plan. Consideration needs to be given as to how this might be taken forward, potentially through the same forum as other management matters.

11.7 The Lands Tribunal may currently appear to be the most appropriate forum. However, if government decides to take forward the recommendation to establish a scheme for the regulation of managing agents, similar to that which operates in Scotland under the Property Factors Act 2011<sup>38</sup>, it may include a dispute resolution mechanism (similar to the homeowner housing panel in Scotland). The Commission supports this course of action and recommends that further consideration be given to the creation of a relatively informal process for adjudication of disputes relating to management matters

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<sup>38</sup> See Recommendation 15 which relates to the regulation of managing agents and recommends the establishment of a register of managing agents, a code of conduct and a homeowner housing panel as a dispute resolution service.

which would include the making of remedial orders. This might take the form of a panel, tribunal or commissioner to deal with management issues.

## **SEPARATE CAUSES OF ACTION IN MANAGEMENT MATTERS**

11.8 As an alternative to a remedial order which would address a multiplicity of issues, the Commission suggested (in paragraph 17.28 of the Consultation Paper) that instead 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. The consultees did not express any views or make any comments on this point.

## **SERVICE CHARGES AND SINKING FUNDS**

11.9 The Commission noted (in paragraph 17.29 of the Consultation Paper) that many of the problems experienced by apartment owners concern service charges and sinking funds which are by their nature management matters. The management aspects of the charges, such as whether the charge is reasonable, whether it is being kept in a designated account, whether it is being put to a suitable use and similar issues may be matters that could be addressed and determined by a regulator or licensing authority.

11.10 However, questions such as provision for the establishment of a sinking fund which may involve amendment of the lease, are more a matter of title. It was suggested in the Consultation Paper (in paragraph 17.30) that power to deal with these issues could be conferred on the same body as would deal with matters of title. 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.



## **QUESTION 22**

11.11 Question 22 asked consultees if problems relating to service charges and sinking funds should 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 should this be? Are they a matter for the licensing or regulatory body?

## **RESPONSES TO QUESTION 22**

11.12 The consultees who responded to this question made a number of comments and expressed a range of opinions. Some respondents took the view that matters relating to service charges and sinking funds should be considered in the same forum as title matters. Some thought that all matters of title, lease and management issues should be kept together because they are interlinked. Several suggested that service charges and sinking funds should fall under the authority of a new regulatory body. One suggested that service charge issues could be addressed by mediation, or if that fails, by litigation. Views were expressed in favour of referring title matters to the Lands Tribunal. It was suggested there might be a right to appeal to a new regulatory body or licensing authority, the important issue being effective enforcement.

11.13 One consultee who responded in general terms to the Consultation Paper drew attention to the effect of market conditions and cash flow problems on management companies. For example, there can be a tendency for developers or management companies to defer or decline essential increases in service charges in order to make the properties easier to sell in a very tough market. However, it is essential that all developments have a sinking fund to allow for the inevitable deterioration of the buildings and to cater for any future emergency. That consultee continued by pointing out that the current financial environment means that increasing numbers of owners are reluctant to contribute to these critically important funds, thus storing up problems for future years as the buildings age and problems occur.

11.14 Another consultee drew attention to the fact that non-payment of service charge, for whatever reason, can severely impact a management company's ability to function. That consultee pointed out that every assistance must be given to the management company in law to collect service charges where the company is operating normally

with regular AGMs and has the support of the majority of shareholders. The consultee also mentioned that the small claims court at Laganside is very effective in this regard.

## **RECOMMENDATION 22**

- 11.15 The Commission was unable to discern any consistent theme from the responses to this question, but it considers that the distinction between matters of title and matters of management is a valid one. It also recognises that the Lands Tribunal is the preferred forum to address title issues but that it is not necessarily best suited for management disputes.
- 11.16 As with Recommendation 22 above, the Commission having taken into account the benefits of recourse to an affordable and accessible process, has reached the conclusion that there may be a role for a new purpose built panel, tribunal or commissioner to deal with management issues. This could be pursued by means similar to the homeowner housing panel in Scotland, established under the Property Factors (Scotland) Act 2011, along with regulation of managing agents. The new scheme could operate in conjunction with the other remedies considered in Question 23.

## **PLANNED MAINTENANCE**

- 11.17 The Commission recognised (in paragraph 17.31 of the Consultation Paper) that 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. The home owners have to understand the benefits of such a fund and the importance of making appropriate contributions to it. 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

11.18 The Commission explained in Chapter 17 of the Consultation Paper (paragraphs 17.32 – 17.35) that there are alternative ways of dealing with disputes in general other than going to a court or tribunal<sup>39</sup>. Leaving aside issues in relation to defective documentation and enforcement of covenants, it may be that disputes which are more concerned with management matters are 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.

11.19 Methods of alternative dispute resolution include conciliation, mediation, neutral evaluation, adjudication, arbitration as well as the use of ombudsman 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 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.

11.20 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;

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<sup>39</sup> See “Alternatives to Court in Northern Ireland” published by NI Ombudsman, Law Centre (NI) and Queen’s University Belfast, 2011.

**Arbitration:** arbitration involves an independent arbitrator making a decision which is binding on the parties after receiving their submission 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.

- 11.21 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 (RICS).

## **QUESTION 23**

11.22 Question 23 asked if 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?

## **RESPONSES TO QUESTION 23**

11.23 All of the consultees who responded to this question, except one, agreed that alternative means of resolution should be encouraged for resolving management issues. One consultee strongly agreed, adding that greater use could be made of mediation and arbitration as this is not currently utilised to its fullest extent. It also provides a more cost-effective approach than the automatic pursuit of legal action.

11.24 One respondent commented that mediation provides an alternative informal, flexible, pragmatic and conciliatory mechanism for resolving disagreements and another said that it considered most disputes can be resolved through the mediation process. Comments were also made that clients feel more comfortable about arbitration because it is a less formal process. Other consultees, by way of general comment, expressed views that there is no-one to consult with when problems arise and that there appears to be very little in the way of support for resolving disputes which would not arise in any other accommodation.

11.25 The Law Society of Northern Ireland emphasised that it has consistently supported the use of alternative dispute resolution mechanisms as a way of resolving issues. It is particularly appropriate in the context of apartments and management companies that ideally there should be a consensual approach between the managing agent, the management company and the residents. The efficient functioning of the management arrangements is in the interests of all the residents. If a code of practice is established as part of a regulatory or licensing scheme it should also include a mechanism for disputes to be referred for mediation or arbitration.

11.26 The RICS suggested that any new legislative framework for managing agents in Northern Ireland should include a mandatory requirement for each agent to operate a complaints handling procedure (CHP) which they publicise to their clients as the outset of conducting business with them. The CHP should include an appropriate alternative dispute

resolution mechanism appropriate to the clients with which the agent is conducting business.

11.27 For business to business transactions (contractual disputes) it was suggested that this is likely to be a dispute resolution service such as the RICS Dispute Resolution Service. For consumer complaints it is likely to be an Ombudsman service such as The Property Ombudsman and Ombudsman Services - Property. The RICS considered that such an approach will give the potential for the majority of disputes that arise between managing agents and their clients to be resolved in a proportionate way without the need to involve the courts. It mirrors the requirements already placed on RICS regulated firms.

### **RECOMMENDATION 23**

11.28 It appears to the Commission that mediation and arbitration are likely to be the methods most suited to property management disputes. The Commission recommends that both management companies and managing agents should have complaints procedures providing for disputes to be submitted for mediation or arbitration. The schemes highlighted by the Law Society and the RICS should be more widely publicised.

### **PROVISION OF AN ADVICE SERVICE<sup>40</sup>**

11.29 In the Consultation Paper (paragraph 13.11) the Commission noted that apartment owners and occupiers feel that it is very difficult to obtain redress for any grievances or to find a solution to alleviate the problems that they are experiencing. A recurring theme emerging from engagement with stakeholders was that there are no organisations in Northern Ireland which can offer support or advice on the issues connected with ownership and management of apartments.

11.30 The Northern Ireland Executive is committed to ensuring that all citizens have access to a level of advice which meets their needs. Given the demonstrated level of need which exists, an appropriate and practical recommendation would therefore be for government to address this current gap in provision. The Commission has had discussions with Leasehold Advisory Service (LEASE) in London about

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<sup>40</sup> The text that appears here is also included in Chapter 4 above (paragraphs 4.56 – 4.57) as part of Improving Consumer Awareness

the service that it provides. LEASE is a Non Departmental Public Body (NDPB) funded by Government to provide free advice on the law affecting residential leasehold property in England.

11.31 The Commission takes the view that it would be of great benefit to private home owners if a similar service could be provided in Northern Ireland. It recognises that funding is an important issue and also that there may be procurement processes which have to be observed. Following up on an initial contact the Commission held a meeting with representatives from the Housing Rights Service (HRS) about the possibility in principle of providing such a service and received a very positive response.

11.32 HRS agrees with the Commission that funding should be provided for a service which can offer free, independent and impartial advice and support on the law affecting residential leaseholders in Northern Ireland. It suggests that a service should be provided that would complement rather than duplicate or displace existing services. It would not deal with conveyancing issues or other legal proceedings typically provided by private solicitors or surveyors.

11.33 HRS subsequently submitted a paper to the Commission which outlines the proposed objectives for an advice service and identifies the key elements which a comprehensive service should offer. Whilst the service could offer a level of help to all stakeholders, its primary focus would be on helping the residential leaseholders and other tenants living in apartments to make well informed decisions and to effectively resolve any problems which they encounter.

**The Housing Rights Service proposal:**

<b>Service Objectives</b>	<b>Key Elements</b>
<b>To promote awareness of rights and responsibilities of all relevant parties involved in the use of residential apartments in NI.</b>	<b>Provision of range of basic information</b> for use by potential and existing purchasers and other stakeholders. The information would be provided on line and included on identified relevant websites such as <a href="http://www.nidirect.gov.uk">www.nidirect.gov.uk</a>

To:

- **Assist occupiers to make informed choices and to ensure they are not disadvantaged through lack of knowledge of their rights / responsibilities:**
- **Actively support occupiers, where required, to resolve their difficulty in an efficient and effective manner.**

**Provision of initial advice** by specialist legal adviser. This advice would aim to help people understand the information provided and how it relates to their own circumstances. It would be accessed via: *a dedicated telephone helpline; email; virtual adviser facility and face to face by appointment if required.*

**Provision of practical assistance** to help people act on the information which has been provided when they are unable to help themselves. This would include: *assistance in the identification of the problem(s); clarification of the options available; and consideration of their preferred course of action for resolution.*

**Provision of advocacy / representation OR access to mediation services.** For more complex problems additional support may be required to help resolve the issue.

The options available are likely to include negotiation; advocacy / formal representation or legal action to challenge decisions or actions of the other party. For some disputes a less expensive, and often more effective, alternative may also be mediation – this type of service should therefore also be available.

There may already be a number of existing specialist providers who can offer such services to assist in resolution of the problem or issue (*e.g. if legal casework is required this service is already likely to be available via practising solicitors*). It would not necessarily be appropriate therefore for the new service to offer additional support in all cases.



	<p>Criteria should be agreed to help determine the most appropriate progression route. Factors to be considered may include: nature of the issue; financial means of client; suitability of the issue for mediation and client preference.</p> <p>Whilst not continuing to be engaged in all cases the service should however:</p> <ul style="list-style-type: none"> <li>• Maintain a list of leasehold practitioners / professional advisers;</li> <li>• Provide basic guidance on how to select and appoint a professional adviser;</li> <li>• Offer the client assistance with instructing professional advisers/other specialists if necessary.</li> </ul>
<p><b>To:</b></p> <ul style="list-style-type: none"> <li>• <b>Develop the capacity of other agencies and advice providers to offer advice and support on leasehold law relating to apartments in NI;</b></li> <li>• <b>Promote good practice by all parties through the provision of a range of support services.</b></li> </ul>	<p><b>Provision of range of support services</b> designed for professional practitioners &amp; other stakeholders e.g. managing agents, surveyors, solicitors and other advice providers.</p> <p>Focusing on the law relevant to residential leasehold these services would include:</p> <p><b><i>Development of legal information</i></b> on residential leasehold for inclusion in existing on line resources used by frontline advice providers e.g. Housing Law in Practice in NI (HLPNI).</p> <p><b><i>Development of range of more detailed information resources / guides</i></b> for leasehold practitioners.</p> <p><b><i>Development &amp; delivery of practitioner training</i></b> ranging from short seminars to formal accredited training courses. To promote accessibility the option for provision of on line training should be explored.</p>

## **ADDITIONAL RECOMMENDATION**

11.34 The Commission recommends that an advice service should be established for residential leaseholders to which those owning and living in apartments and other properties with elements of share ownership could have access.

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## **CHAPTER 12. PROBLEM DEVELOPMENTS**

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### **INTRODUCTION**

12.1 In Chapter 17 of the Consultation Paper (paragraphs 17.36 – 17.38) the Commission described the situation which arises where 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.

12.2 Similar issues may arise where the development is unfinished, but the problem under consideration in the present context is 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.

### **TENDERING FOR MANAGEMENT**

12.3 The situation on developments where serious problems are being experienced is urgent. The residents who are currently feeling frustrated and powerless should not have to wait for a new legislative solution or regulatory framework to provide them with a means to take action or to make a formal complaint. The Commission suggested that as a starting point it might 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.

## **QUESTION 24**

12.4 Question 24 asked if consultees consider that allowing managing agents to tender for the contract to take on a problem development would be a good practical solution.

## **RESPONSES TO QUESTION 24**

12.5 The majority of consultees who responded to this question were in favour of the proposal for tendering to be permitted on the basis that it may offer a practical solution in these instances. However reservations were expressed about whether any managing agents would wish to tender for a problem development and the costs of doing so. It was pointed out that some unscrupulous agents might put in a low tender to get the business and then raise their charges afterwards. It was also suggested that only managing agents who are licensed and fulfil the required criteria should be allowed to tender.

## **RECOMMENDATION 24**

12.6 The Commission has taken the views of the consultees into account and has considered this matter carefully. It has concluded that enabling managing agents to tender for the management contract of problem developments may be of assistance to some residents who are currently experiencing serious problems with poorly functioning management arrangements. There would have to be some supervision or regulation to ensure that only managing agents operating in accordance with recognised standards can tender for the contract. Accordingly the Commission recommends that further consideration should be given as to how this might be facilitated. It may be an issue that could be considered if regulation or licensing of managing agents is implemented (see Questions 14 - 19).

## **AN ACTION PLAN**

12.7 In the Consultation Paper (paragraphs 17.39 – 17.40) the Commission went on to consider further alternatives if the situation arose that no-one could be found to manage the development. It was suggested that it might be possible for the key stakeholders in the development to 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, the lender, the property owners, the managing agent and possibly professional advisers such as surveyors, accountants or solicitors.

- 12.8 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.

## **QUESTION 25**

- 12.9 Question 25 asked consultees if there is no-one who 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?

## **RESPONSES TO QUESTION 25**

- 12.10 The number of consultees responding to this question was not very large and opinions were divided amongst those who did reply. Some consultees thought that a co-ordinated approach involving an action plan would be helpful but others felt that it was an impractical suggestion. One respondent pointed out that if all communication and mediation has broken down it would be impossible to resolve issues without a legal determination. Another noted that in such circumstances there may be a necessity for all key stakeholders to be involved in the situation to agree a way forward where possible.
- 12.11 Concerns were raised about the funding of an action plan and it was pointed out that finance would be required both to complete the development and to cover the costs of managing it. One respondent noted that there is very little enthusiasm or capacity in the current climate for the parties to fund such a venture. Another respondent thought that any action plan would have to be funded by the owners. Other suggestions included provision of funding by the Housing Council, DETI or a government department to provide encouragement and incentives to the construction sector. It was pointed out that because it is estimated every £1 invested in construction generates

approximately £3 in the wider economy, the practical outworkings of such a plan could contribute to wider financial health.

## **RECOMMENDATION 25**

12.12 The Commission has taken into account all the comments made by the consultees in response to this question. Clearly there is little discernable support for a co-ordinated action plan and there would be issues with raising the necessary funds to address the problems. Although the Commission considers that it is important to offer some solutions for residents of problem developments it concludes that promoting the provision of a co-ordinated action plan may not be practical in the current climate.

## **QUESTION 26**

12.13 The Commission suggested (paragraph 17.41 of the Consultation Paper) that an opportunity could be given to the local councils to become involved, either as an alternative or by default where informal arrangements have been unsuccessful. A local council might be considered as more suitable to the role of identifying and working out a strategy to resolve critical issues. Either way, the provision of funding and the administrative support should be considered in detail.

12.14 Question 26 asked consultees whether as an alternative, or in default, the local council should be brought in to devise an action plan and put it into effect. If so, how would it be funded?

## **RESPONSES TO QUESTION 26**

12.15 The majority of the consultees who responded to this question were in favour of the proposal in default of any other option but others were against it, given the lack of available funding and experience. One consultee pointed out that local councils are currently not resourced to assume such a role and could not do so unless appropriate and sustained funding was made available. Another consultee suggested that it would be helpful if the council would take on responsibility for the maintenance, upkeep and insurance of open spaces with the householder being charged a contribution annually towards the cost of same. On the source of funding question, suggestions included local

authority rates income, government funding, managing agent licence fees and lender finance.

## **RECOMMENDATION 26**

12.16 The Commission considers that it is very important to offer some solutions for residents of problem developments. However, it recognises that consultees do not consider that it is realistic to suggest that the responsibility to devise and put action plans into effect should be imposed on local councils. The Commission therefore recommends that government should take the lead role in taking a co-ordinated approach to drawing up action plans and finding the funding to ensure that action plans can be implemented.

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## **CHAPTER 13. UNFINISHED DEVELOPMENTS**

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### **INTRODUCTION**

- 13.1 Chapter 19 of the Consultation Paper sets out the position in relation to unfinished developments. It is recognised that 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.
- 13.2 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.
- 13.3 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 a 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**

- 13.4 For comparison purposes it is interesting to look at the situation in the Republic of Ireland where there have been very serious issues with unfinished developments (paragraph 19.4 of the Consultation Paper). 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.

### **QUESTION 31**

13.5 Question 31 asked if 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?

### **RESPONSES TO QUESTION 31**

13.6 The consultees who responded to this question were unanimous in expressing their agreement with the proposal in principle. They considered that a survey of unfinished apartment blocks would be useful for information purposes and for highlighting deficiencies. One consultee commented that this would be of use not only to owners and potential buyers but also to DRD, Water Service and Building Control in identifying which sites need to be monitored and remedied. It was also suggested that the relevant departments may have a vested interest in funding the compilation of such information.

13.7 A range of suggestions was made as to how it might be organised and funded. The proposals for the body which would organise a survey of unfinished developments included the Housing Council, the RICS or the local councils which should already have details of the stage of development of each apartment block in each area through their building control departments. One consultee pointed out that the Roads Service and Water Service are already identifying and compiling information on unfinished developments with a view to determining where the major roads and services problems exist. This should include information on developments where unfinished apartment

blocks form part of the overall new development of houses and apartments but may not necessarily include those where the unfinished areas will remain under private ownership. Consultees suggested that either a government department or the financial institutions might fund the survey.

### **RECOMMENDATION 31**

- 13.8 Having received the unanimous approval of consultees, the Commission recommends that further consideration should be given to undertaking a survey of unfinished developments. It would be of great benefit to all the parties involved because it would identify the deficiencies in the infrastructure and site resolution plans could then be put in place where necessary to finish the uncompleted work. The suggestions for organising and funding this scheme should be explored by government.
- 13.9 The Commission notes that Article 37 of the Planning (Northern Ireland) Order 1991 (1991 No. 1220 (N.I.11) provides for the Department of Environment to make a completion order where it is of the opinion that development will not be completed within a reasonable period. The Commission recommends that consideration be given to using this provision where appropriate.

### **UNADOPTED ROADS**

- 13.10 Attention was drawn in the Consultation Paper (paragraphs 19.6 – 19.10) to the debate about the problems caused by incomplete infrastructure and the Inquiry into Unadopted Roads undertaken by the Northern Ireland Assembly. Although the focus of the Apartments project is to concentrate more widely on all the issues involved in unfinished developments the Commission confirmed that it welcomed any proposals that emerged to address this particularly problematic issue.
- 13.11 The economic downturn and its consequent effect on 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 the present circumstances Roads Service will split up road bonds covering large areas into bonds for roads that have been completed and those for future completion.

13.12 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**

13.13 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. 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<sup>41</sup> 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.

13.14 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 funds were available for the uncompleted works to be finished. However, the financial institutions or other bodies looking at the risks of providing sureties need to be confident that there is a realistic prospect of bonded work being completed as agreed.

## **QUESTION 32**

13.15 Question 32 asked for the views of consultees in relation to the bonding of construction work on developments.

## **RESPONSES TO QUESTION 32**

13.16 Those who responded were supportive of the idea for full bonding of construction works in principle. One consultee believed that the spinal network for roads and sewerage should be completed prior to the building of the housing development, but did not comment on the

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<sup>41</sup> For example, the National House-Building Council (NHBC)

proposal for a construction bond. Another suggested that any money available in an existing road bond should be used to complete any necessary roads and sewers that have been constructed, ignoring any others. If at some point in the future another developer comes to complete the development, they can provide new bonds for the undeveloped part of the site.

13.17 An individual consultee was attracted by the idea of construction bonds to provide security and peace of mind to the future apartment owners and dwellers in respect of the construction work of the development. It was suggested that the return of the bond should take place on completion of the work, subject to inspection and certification by Planning Service and Building Control.

13.18 Several consultees recognised the impracticalities of a construction bond, largely because the cost of providing such a bond would be prohibitive. It was pointed out that the developer would require loan facilities to fund the work and the repayment of such borrowing would be secured against the developer's assets. The developer may also have provided other bonds to DRD and NI Water for road and sewerage services for the development. Therefore it is unlikely that the lender would take on the risk of entering into a bond in favour of a third party to secure the performance and completion of the development works.

13.19 One consultee proposed a collective and co-ordinated approach on a cross-departmental basis to resolving outstanding bond issues in relation to roads and sewerage. It was suggested that this should be done in tandem with proposals for improvement of bonding of the sewerage and roads infrastructure. The consultee commented further that from a consumer confidence and awareness raising perspective, it would be preferable for this to be implemented through one set of legislative changes.

## **RECOMMENDATION 32**

13.20 Whilst recognising that the proposal for the bonding of construction work is initially attractive, the Commission is also conscious of the difficulties in the provision of funding the bonds and the substantial costs that would be involved. In these circumstances, the Commission considers that unless a collective and co-ordinated approach could be taken to bonding on a cross departmental basis, it is not realistic to recommend that this proposal should be pursued any further.

## **PROVISION OF FUNDING TO HOUSING ASSOCIATIONS**

13.21 Chapter 19 of the Consultation Paper (paragraphs 19.11 – 19.13) went on to describe how the provision of funding by the Department of Social Development to housing associations had enabled housing associations to buy “off the shelf” developments from private developers. This funding allowed housing associations to buy properties from developers for the purposes of social housing. 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 model housing solution. Such a scheme can provide an effective solution as long as all the parties co-operate and work together in partnership<sup>42</sup>.

13.22 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 development.

## **OTHER INNOVATIVE SOLUTIONS**

13.23 The Commission gave further examples (in paragraphs 19.14 – 19.15 of the Consultation Paper) of the alternative innovative models for funding new social housing that the Department of Social Development (DSD) is continuing to explore, such as entering into long term leases with private sector developers or changing legislation to allow housing association grant to be paid to a wider range of bodies, including housing associations registered in Great Britain or the private sector.<sup>43</sup> It highlighted that 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.

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<sup>42</sup> 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.

<sup>43</sup> ‘Consultation on Northern Ireland Housing Strategy 2012 – 2017’ produced by the Department for Social Development, October 2012.

### **QUESTION 33**

13.24 Question 33 asked if consultees have any suggestions as to how private landlords or other bodies could be encouraged to invest in apartments or other properties on incomplete developments to alleviate some of the current problems.

### **RESPONSES TO QUESTION 33**

13.25 The consultees who responded to this question put forward a range of proposals to encourage investment in incomplete developments. A few expressed support for housing associations which are best placed to manage and resolve situations where social housing is required. One consultee with experience in mediation confirmed that the bringing together of housing associations and the private sector does work. That consultee added that housing associations are by far the much preferred option because they are not for profit organisations with a long term view whereas private landlords are short term profit orientated.

13.26 Another consultee proposed that the local authorities should be given a power to invest in incomplete developments. A further consultee took a different view, stating that the solution does not lie in private landlords buying to let or any public body becoming involved. Instead that consultee considered that the solution is to encourage owner occupiers by introducing a stamp duty exemption. There was also a suggestion from a consultee to put the development up for auction to housing associations or the NI Housing Executive for rental accommodation, adding that conditions of being able to borrow to complete developments could be agreed. One consultee proposed that consideration could also be given to the potential for the co-ownership scheme to be expanded and developed accordingly.

13.27 Another consultee observed that this is an issue of confidence on the part of investors and is unlikely to change until the broader economic climate improves. A different consultee noted that for a private landlord to buy in an incomplete development it will come down to price and their assessment if the development can be adequately managed. Outside Belfast or perhaps near universities the consultee did not see an appetite for investors in apartment blocks. If housing associations can buy apartments in the same block it would not be an attractive investment.

13.28 There was a suggestion by a consultee for discounting if bought en bloc with a contractual obligation to complete works within a certain timeframe and some form of inspection to ensure that this has been done. The DRD, Water Service or DOE (as appropriate) could be party to the contract to ensure that it has direct rights to enforce compliance. The consultee commented that consideration could also be given to a closer examination of other models across Europe and elsewhere. The same consultee explained it understood that in some places the property portfolios are managed by large companies or by local authorities.

### **RECOMMENDATION 33**

13.29 The Commission recommends that the Department should give further consideration to the suggestions and comments made by consultees in encouraging investment in properties on unfinished developments.

### **THE BANKS**

13.30 The Commission mentioned (in paragraph 19.16 of the Consultation Paper ) that it 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.

### **QUESTION 34**

13.31 Question 34 asked if consultees could suggest any ways in which the banks might 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?

### **RESPONSES TO QUESTION 34**

13.32 Again the consultees responding to this question made a range of suggestions. It was generally agreed that it should make good business sense for banks to divest themselves of such property by selling it at auction to the highest bidder. Also, that it would be most

helpful if banks took greater responsibility in management and resolving problems.

- 13.33 In the meantime, while the development remains unsold it was recognised that there can be problems. One consultee proposed that, as the owner, a bank in possession should be legally compelled to take on the owner's role in managing it. Another consultee gave an example from its own experience of a situation where a suggested owner-led management company was rejected by the administrators of the developer on behalf of a bank leaving it with no management structure in place. In that case, the administrators considered that the proposed management scheme might be contrary to the plans of a perspective buyer.
- 13.34 A different consultee expressed the view that the potential role of a bank in management is up to individual financial institutions to address in line with their policy in and risk appetite for this area. If it is not a bank's policy to engage in the long-term management of a development the bank may consider engaging a contractor to complete any unfinished works and establish the management company (if one is not already in place) to assist with the sale of the individual units and eventual repayment of the debt. In contrast, an individual consultee thought that the banks were not to be trusted in the management of developments. Another considered that as the banks have no experience of managing this type of property, it is better left to those who do.
- 13.35 One consultee commented that any potential solutions will depend on banks being willing to lend on such projects and as they will also be mortgagees in possession, lenders should be called upon for imaginative solutions to assist in the completion and sale of unfinished developments. Another noted that it appears such considerations lie outside the concerns of banks at present.
- 13.36 A suggestion was made for deemed completion notices to be served on any unfinished units and the lenders in possession billed for service charges, sinking fund contributions and rates. On receipt of such a notice the lenders will either pay for the properties to be completed and sold or they will contribute to the running cost which means that the development can be managed effectively.
- 13.37 However, one consultee was of the opinion that banks will most likely divest themselves of property of which they are in possession if there are contamination / asbestos issues or other overriding health and



safety concerns. Banks will not wish to have the responsibility which comes with the role of mortgagee in possession of these types of matters. The best incentive would be sale at a discount with commitment on the buyer's part to take all responsibility for remediation.

13.38 Another consultee was in favour of the approach taken in the Republic of Ireland (as set out in the Consultation Paper paragraphs 19.4 – 19.5 and above paragraph 13.4) or the Spanish model where the government intervened and the banks are not allowed to repossess properties as quickly.

### **RECOMMENDATION 34**

13.39 The Commission recommends that the Department should give further consideration to the suggestions and comments made by consultees in encouraging the banks to divest themselves of property of which they are in possession as mortgagee.

### **COMPLIANCE WITH PLANNING PERMISSION**

13.40 Although not dealing with planning matters in general, the Commission drew attention in the Consultation Paper (paragraphs 19.19 – 19.23) to two issues which are relevant in the present context. Currently, 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.

13.41 To prevent some of problems with non-completion and unfinished works it might be helpful if there was a condition attached to the planning permission for the developer to ensure that 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.

- 13.42 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 has not been completed there could be an enforcement process.
- 13.43 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.

### **QUESTION 35**

- 13.44 Question 35 asked consultees if they considered that a requirement should 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?

### **RESPONSES TO QUESTION 35**

- 13.45 With one exception, the consultees enthusiastically supported this proposal and agreed that it would be a positive step forward. Comments were made confirming that it would be a good idea to have a completion certificate in the planning process as there is no final inspection at present. One consultee thought that there should be a requirement for developments to be completed within a specified period of time although the dissenting consultee considered that this was simply not practical.
- 13.46 A different consultee mentioned that there is a certification process in conveyancing practice in the Republic of Ireland. Another pointed out that following the Committee for Regional Development Inquiry into Unadopted Roads, proposals for improving the inspection and certification of buildings, roads and services are under discussion.
- 13.47 Several consultees drew attention to the final inspection and certification already provided by building control. One suggested that rather than develop a separate inspection system, a planning certification element could be included in the building control final inspection. In any case, there may be improved collaboration between

planning service and building control from 2015 when it is intended that planning service functions will transfer to local government.

### **RECOMMENDATION 35**

- 13.48 The Commission recommends that consideration should be given to the implementation of a provision for the Planning Service to inspect property on completion and certify that the building work accords with the conditions of the planning permission.
- 13.49 The Commission notes that Article 37 of the Planning (Northern Ireland) Order 1991 (1991 No. 1220 (N.I.11)) provides for the Department of Environment to make a completion order where it is of the opinion that the development will not be completed within a reasonable period. The Commission recommends that consideration be given to using this provision where appropriate and to include as part of the completion order a requirement that inspection would take place at the end of a specified period to check that the development had been completed.
- 13.50 If it is considered that Article 37 is not to be used, the Commission recommends that certification of completion and compliance with planning permission should be taken forward in conjunction with the certification system currently administered through building control inspection. This could be put in place when responsibility for planning matters is transferred to the local councils.

### **A PLANNING CONDITION FOR TRANSFER OF TITLE**

- 13.51 A final point was raised in the Consultation Paper in relation to a frequently occurring problem which might be addressed by the imposition of a planning condition. That 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.

## **QUESTION 36**

13.52 Question 36 asked consultees if, in appropriate cases, a planning condition should be introduced for transfer of title to the management company so that a failure to do so would be a breach of planning consent.

## **RESPONSES TO QUESTION 36**

13.53 To an even greater extent than the previous question, the consultees strongly expressed their support for this proposal. One consultee saw the need for a transfer in developments where there are apartments but was uncertain whether there was a need for a transfer in developments without apartments. The point was made by another consultee that planning conditions deal with planning matters so it may be difficult to deal with a non-planning issue through the planning process, such as transfer of title.

13.54 Whilst recognising the attractiveness of the proposal, a number of consultees highlighted the point that there may be issues in respect of enforcement. One consultee drew attention to the difficulty of enforcement where an agreement already exists to transfer title. It was suggested that there should be stronger enforcement of Planning Policy OS2 – Public Open Space in new residential developments. It was also proposed that developers should be prohibited from changing the use of open spaces to squeeze in more houses.

13.55 Many consultees recognised and agreed with the view of the Commission when considering the issue in the context of a management scheme (see paragraph 16.30 of the Consultation Paper) that it is difficult to determine when the transfer of title should take effect. One consultee made the point that in some instances developers have been unable to transfer communal lands to the management company because they have been unable to sell the final units and complete their work. One consultee recommended that a timescale of 6 months should be imposed for the transfer of the common areas once the final apartment has been sold, or the building work is independently judged to be completed.

## **RECOMMENDATION 36**

- 13.56 Whilst recognising that this proposal is superficially attractive the Commission is aware that it is not a straightforward matter. It is clear from the range of comments made by the consultees that the complexities involved in considering the transfer of title are widely recognised. One fundamental issue is the matter of defining the point at which the transfer should occur. There is also the question as to how a condition to transfer title would be enforced because it is not a planning matter and the transfer would not be apparent on a physical inspection of the property.
- 13.57 It may seem simple to impose a time limit (for example, a period of 6 months) 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. 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 clear cut as might originally have been supposed.
- 13.58 Taking these factors into account, the Commission recommends that careful consideration should be given to a further analysis of the point at which it would be beneficial for the transfer of title to take place, bearing in mind the drafting difficulties and the need for the provision to be enforceable to be fully effective.

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## **APPENDIX A. SECTION 75 OF THE NORTHERN IRELAND ACT EQUALITY SCREENING**

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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. The Commission's Equality Scheme sets out how the Commission fulfils these obligations in carrying out its functions.

The Commission conducted an initial screening of the proposals outlined in the Consultation Paper. The screening exercise concluded that it was not necessary to conduct an Equality Impact Assessment because it was not envisaged that the policy would have any negative impacts on any section 75 categories. Consultees were invited to comment on the conclusions drawn from this initial screening as part of the consultation process. Of the responses received during the consultation period, no consultees raised any issues with the Commission's preliminary conclusions.

The Commission has carried out a further screening exercise on the final recommendations contained in the report.

### **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 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 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 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 Apartments (NILC 15 (2012)), 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 used have been referenced throughout the main text of the Consultation Paper and the Report.

Of the statistics available, there is a focus on the number of apartments being built, housing prices, owner occupied compared to social housing 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 are increasing more rapidly than the number of people. The number of households has increased by 12%, whereas the population has grown by 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, <i>Northern Ireland Housing Condition Survey 2011</i> ).
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 ( <i>Northern Ireland Housing Condition Survey 2009</i> ) show that apartments are occupied by higher proportions of lone adults (19%) and lone pensioners (16%) than other types of housing. The <i>Northern Ireland Housing Condition Survey 2011, Preliminary Findings</i> also shows that lone adults are more likely to live in apartments than households with children. 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 category	75	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	None

	different political opinion.	
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 orientation	The Northern Ireland Law Commission does not consider that the policy has an impact on people of different sexual orientation.	None
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 <b>Yes</b> , provide details	If <b>No</b> , provide reasons
Religious belief		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better 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 better 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 better 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 better 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 better 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 better 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 better promote equality of opportunity for people of different genders.
Disability		The Northern Ireland Law Commission does not consider that this policy provides opportunities to better 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 better 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	None

	between people of different political opinions.	
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 <b>Yes</b> , provide details	If <b>No</b> , 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.

**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 did take such factors into account when it was 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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## **APPENDIX B. ACKNOWLEDGEMENTS**

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The Commission is most grateful to the bodies and individuals who responded to the proposals in the Consultation Paper, as set out below:

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- Co-ownership Housing Association
- Regulatory Department, Royal Institution of Chartered Surveyors
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- Michael Donaldson
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- Mounteagles Ratepayers Association
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- Law Society of Northern Ireland
- Law Society of Scotland
- Northern Ireland Ombudsman
- Housing Rights Service
- Northern Ireland Housing Executive

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- Fermanagh Solicitors Association

- Omagh Solicitors Association
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- Northern Ireland Ombudsman
- Citizens Advice Bureau
- Housing Rights Service
- Construction Employers Federation
- Council of Mortgage Lenders
- David Little, National House Building Council
- Northern Ireland Housing Executive
- Sarah Lennox, Bank of Ireland
- Fiona Sturgess, Danske Bank
- Derek Wilson, Ulster Bank
- Julie White, First Trust Bank
- Judge Wells, Small Claims Court
- Patricia Montgomery, Land and Property Services
- Mounteagles Ratepayers Association
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- Professor John Wylie
- Irish Law Reform Commission
- Law Society Republic of Ireland
- Property Services Regulatory Authority
- John Buckley, Solicitor
- Peter Byrne, Solicitor
- Law Society Scotland
- Scottish Government
- Association of Residential Managing Agents
- LEASE Advisory Service
- Law Society England and Wales



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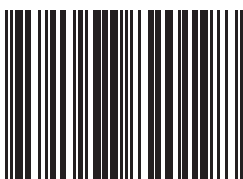
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