COMMONWEALTH LAWYERS' ASSOCIATION
PROPERTY LAW CONFERENCE

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APARTMENTS LAW IN NORTHERN IRELAND: CURRENT REVIEW AND POSSIBLE REFORMS

The Honourable Mr Justice Bernard McCloskey
Court of Judicature of Northern Ireland

Chairman, Northern Ireland Law Commission

I INTRODUCTION

Welcome

[1] I am both pleased and honoured to address the esteemed members of this audience. This is a highly auspicious occasion. It is an event of pride and importance for the Northern Ireland community. As a welcome bonus, it unfolds at this splendid setting of Riddel Hall. I compliment Brian Spiers and his fellow organisers for the vision, imagination and sheer industry which have combined to culminate in this landmark Conference. As a member of the senior judiciary of Northern Ireland, I extend a particularly warm welcome to all visitors to this jurisdiction attending this event.

The Northern Ireland Law Commission

[2] First, the broader canvas. The Northern Ireland Law Commission ("*the Commission*") is an independent statutory body, established and governed by sections 50 to 52 of and Schedule 9 to the Justice (NI) Act 2002. The creation of the Commission represented one of the significant reforms of the Northern Ireland legal system effected by this ground breaking statute. By section 50, the Commission is a body corporate, consisting of a Chairman and four Commissioners appointed by the Minister for Justice. Pursuant to section 51 of the 2002 Act, the Commission is obliged to keep under review the law of Northern Ireland with a view to its systematic development and reform. Specifically, the methods prescribed for the performance of this overarching duty are codification, the elimination of anomalies, the repeal of unused legislation and the reduction of the number of separate legislative provisions. Section 51 further provides that the Commission should undertake the simplification and modernisation of the law of Northern Ireland: this lies at the heart of the Commission's statutory functions.

[3] By statute, each of the Commission's programmes of law reform must have the approval of the Minister for Justice. The act of granting such approval signifies, inter alia, ministerial acceptance that the authorised projects are of importance to Northern Ireland and that they reflect areas of the law in which an exercise of modernisation, simplification and the elimination of anomalies is considered necessary. It is for this reason that when the Commission completes any given project and presents its report, normally accompanied by draft legislation, there is a strong expectation that the Northern Ireland Assembly will legislate. The whole rationale and ethos of law reform would be dulled and undermined if this were not to occur. Furthermore, this expectation is harmonious with the legislative intention clearly underpinning the statutory provisions under which the Commission operates (contained in the Justice (NI) Act 2002).

[4] The process of law reform which has become so familiar throughout these islands during recent decades is not a worldwide phenomenon. A law reform map of the world would highlight extensive barren zones, particularly in the countries of Europe. Modern law reform is especially prevalent in those countries which, for historical reasons, have a common law tradition and,

hence, the juxtaposition of parliamentary laws and judge made laws. History confirms that those advocating the creation of independent law reform agencies had to struggle for many years for the realisation of their dream. The Law Commission of England and Wales is a case in point, its statutory inauguration in the 1960s being the culmination of a campaign which had begun over a century earlier. Law Reform in Northern Ireland is not an entirely recent phenomenon, being traceable to the non-statutory Law Reform Advisory Committee for Northern Ireland, established in 1989. Therein lie the title deeds of today's statutory organisation, which operates as an independent public authority. Looking backwards now at the Belfast Agreement of 1998 and the report of the Criminal Justice Review Group (2000), together with the various ensuing landmark statutes – the Northern Ireland Act 1998, successive Police Acts in 1998 and 2002 and the Justice Acts of 2002 and 2004 – one can readily identify the creation of the Commission as one of the constitutional reforms which have shaped the recent history of Northern Ireland.

The Rule of Law

[5] Law Reform is one of the supreme manifestations of the most important of all legal principles, namely the principle (or doctrine) of the rule of law. In his landmark publication, Lord Bingham said the following of this cornerstone principle:

> "*The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.*[1]"

The rule of law is consistently and inexorably the elephant in the room (including the courtroom), often overlooked and not infrequently undervalued. An acute awareness of and full deference to the rule of law is a daily challenge confronting all involved in the legal system. The rule of law provides the ultimate explanation for every legal rule and regulation and all litigation processes and procedures. These truisms, not less than fundamental in nature, are often neglected or diluted.

Apartment Living and the Law Commission's Project

[6] It is an incontestable reality that for many members of society the rule of law has the greatest and most visible impact in where and how we live. Our relationship and interaction with individuals, agencies, processes and procedures which, in one way or another, govern, regulate or restrict how we choose to live in residential accommodation and, further, how we must live are matters of acute importance to most members of society. Historically, the common law had an important role in this field. The notion of respect for

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[1] T Bingham, The Rule of Law, London: Allen Lane, 2010, p 8.

one's neighbour and one's neighbour's goods and premises lay at the heart of the tort of nuisance, as did the rule in ***Rylands –v- Fletcher***. The law of tort, unaided, was insufficient to cope with major changes and developments in society and statutory intervention in various fields – housing, public health and planning, to name but three – became necessary. Today, at the beginning of the 21st Century, apartment living has become an entrenched phenomenon in society of unforeseeable proportions and unexpected complexity. The challenge is to confront this phenomenon in all of its aspects and to develop a regime of legal rules and regulations, accompanied by good practice, designed to ensure that the law in this sphere is as fair, simple, accessible, comprehensible and comprehensive as possible. The proposition that the legal rules and regulations governing apartment living are in need of review, updating, expansion, clarification and reform seems unassailable. This is the exercise in which the Law Commission is currently engaged.

[7] At this juncture, it is appropriate to place the spotlight on two significant dates:

(i) **15th November 2012**: This is the date when the Commission will publish its Consultation Paper. The consultation period will then begin, ending in late January 2013.

(ii) **1st May 2013**: The date by which the Commission will present its final report to the Government of Northern Ireland.

In accordance with the statutory arrangements, the report will be presented to the Department of Justice. It is appropriate to mention that the other Department of Government which has exhibited a keen interest in this project is the Department of Finance and Personnel.

[8] Given the stage at which this project finds itself at present, it is neither possible nor appropriate for the Commission to express any firm views. This will have to await the outcome of the consultation process. However, the Commission's work to date, which has included extensive research, coupled with appropriate engagement with stakeholders and others, has served to identify a series of mischiefs, including complexities, in this sphere of the law. Today's event provides a welcome opportunity for exposure of this project in the earnest hope that the forthcoming consultation process will be as broad, meaningful and comprehensive as possible. This is a key element and requirement of law reform in all areas. This forum, moreover, provides an exciting opportunity for the exchange of views, information, successes and failures from various parts of the globe. In this vein, my Law Commission colleague, Sarah Witchell, senior project lawyer, and I look forward eagerly to engaging with as many of you as possible.

II THE BROADER CANVAS

[9] This project is not proceeding in isolation. Rather, it is properly to be viewed as a development consequential upon the Law Commission's Report on Land Law Reform.[2] I am pleased to record that this report appears to be progressing towards legislation. The Apartments Law Project straddles the Commission's First and Second Programmes of Law Reform, having satisfied the project selection criteria and having been approved, in accordance with statute, by the Minister of Justice.

[10] This is, in many ways, a paradigm law reform project. It is the product of a recent evolution in society. During the past two decades in particular, apartment developments have multiplied dramatically. This evolution is attributed to a series of social, economic, cultural and sociological factors, in particular:

- The increasing popularity of higher density living in urban areas.
- A demand for greater choice in housing provision.
- A burgeoning property development market – one of the off shoots of increasing political stability.
- A demand for affordable housing by first time buyers.
- An increase in the 'buy to let' market, particularly from 2003-2007.
- The emergence of more sophisticated forms of apartments living, including much larger scale developments. Prominent examples include the Titanic Quarter and the Obel Tower, both in Belfast.

[11] One can readily identify two separate periods. The first occupied the years 2003 – 2007. The second postdates 2007, this more recent era being marked by a depressed property market and a less favourable economic climate generally. During recent years, the owners and occupiers of apartments have, progressively, experienced novel and apparently insurmountable difficulties. These relate mainly to a series of management issues and the provision of services. At the outset, it is appropriate to identify **the reasons for these problems**. They are considered to be the following:

- The inability of developers to sell apartments in completed developments.
- The lack of available mortgage finance to fund purchases.
- The phenomenon of living in uncompleted developments.

[2] NICL8 (2010).

- Insufficiency of funds to complete access roads and other aspects of the infrastructure.

- Insufficient funds to properly maintain services, areas and surfaces maintainable by the developer/landlord.

- The insolvency of developers.

- The insolvency of management companies or managing agents.

- The insolvency of developers.

[12] Widespread apartment living is a comparatively recent phenomenon in Northern Ireland. Those aspects of our legal system which, directly or indirectly, affect and influence apartment living include the following:

- Property law.

- Company law.

- Planning law.

- Building Control Regulations.

- Environmental laws.

- Consumer law.

As a result, apartment developments operate within a relatively complex legal framework.

[13] **Maintenance and Management** are two of the key issues in which apartment owners and occupiers have an especially heightened interest. In this context, it is appropriate to highlight two central features of apartment developments. **First**, each apartment in a given development forms part of a larger structural building and is dependent for support on other apartments and parts of the structure. **Second**, all apartment developments are characterised by parts and areas, both internal and external, which are shared in common by the occupants. These consist of entrance halls; stairs and lifts; roofs and like structures (all examples of internal parts held in common); access roads and paths; car parking areas; gardens and landscaped areas (all examples of external areas held in common).

III PROJECT AIMS AND OBJECTIVES

[14] The project has an overarching aim. This is **to address by the most appropriate means the problems experienced in practice relating to the ownership and management of apartments in Northern Ireland.** This umbrella aim breaks down into a series of subsidiary inter-related objectives, which 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 from of company specifically to manage residential property;
- to consider mechanisms to enable existing company structures to be converted to a more appropriate formats;
- to consider appropriate dispute resolution mechanisms to address existing problems;
- to develop proposals which are tailored to the particular context of Northern Ireland and which address the problems arising in this jurisdiction.

[15] In formulating these aims and objectives, the Commission has identified a need to examine in detail the following discrete topics:

- Residential building developments in Northern Ireland;
- Current law and practice;

- The role of developers;
- The role of management companies;
- The role of managing agents;
- Consumer protection;
- Problems in practice;
- Legal problems;
- The background to related law reform in Northern Ireland;
- Schemes in neighbouring jurisdictions;
- Options for reform;
- Questions for consultation.

[16] Progress of this project. The Commission has carried out significant background research including extensive stakeholder consultation with professional and construction related interest groups. The Commission issued a Questionnaire to all owners' management companies registered in Northern Ireland. This stimulated in excess of one hundred responses which, *inter alia*, provide a valuable insight into the views and interests of apartment owners. The Commission made a submission to the NI Assembly Committee for Finance and Personnel outlining its initial views on the management of apartments and has had several meeting with the Minister for Finance and Personnel.

[17] Reorientation of the Project. In July 2012 the Commission restructured this project to focus specifically on issues relating to apartments and associated open spaces. The forthcoming Consultation Paper will reflect in particular the work undertaken since July 2012, coupled with earlier project work. Since the reconfiguration of the project the Commission has concentrated primarily on a review of the law under which apartments are owned. It has also examined the structures and framework under which they are managed. This includes the ownership and management of common areas and open spaces. The Commission confirms that it is its intention to consider, as a matter of priority, offering solutions for people currently living in apartments and other developments who are experiencing difficulties with the management of their development. This is proving to be a particularly interesting and challenging project, one which has attracted not insubstantial political and media interest.

IV THE ROLE OF THE DEVELOPER

[18] The developer is responsible for the development of the property and, in conjunction with its professional advisers, devises the layout and features of the development. The developer will plan the nature and type of the building development and everything ancillary to it. The process begins when a developer instructs an architect to draw up plans of the development. In some cases, but not invariably, the developer owns the development land. If the developer is not the owner, an agreement should be drawn up between the developer and the landowner for the development of the land. Such an agreement should set out the terms on which the developer is to undertake the construction work and how the sale proceeds of each site or unit are to be paid. When developing a site, developers are required to apply for the necessary planning permission and to ensure that adequate infrastructure is in place for the development. This includes proposals for the construction of roads, drainage and sewers as well as the provision of water and electricity supplies. Consideration also has to be given to telephone services and possibly mains gas.

[19] Those aspects of our extant legal system which govern, regulate and restrict the activities of the developers include in particular the laws relating to planning, roads, water and sewerage, Building Regulations and home building warranties. A series of diverse statutory codes is engaged:

- The Planning (Northern Ireland) Order 1991;
- The Private Streets (Northern Ireland) Order 1980;
- The Private Streets (Construction) Regulations (Northern Ireland) 1994, as amended;
- The Water and Sewerage Services (Northern Ireland) Order 2006;
- The Building Regulations (Northern Ireland) Order 1979, as amended.

V PURCHASING AN APARTMENT

[20] The following are the main features of the deceptively simple process of purchasing an apartment:

- Interaction with estate agents.
- Consulting a solicitor.
- The conveyancing process generally.
- Documents of title.
- The building agreements and agreement for lease.
- The draft lease.
- Planning permission.
- Building Control approval.
- The road bond and agreements under Article 32 of the Private Streets Order.[3]
- Sewer agreements under Article 161 of the 2006 Order.[4]
- NHBC or other building warranty.
- Energy Performance Certificate.
- Where the developer is a company, documentary verification of its powers.
- Re the management company – the Certificate of Incorporation and the Memorandum and Articles of Association; the Certificate of Acquisition of the purchaser's one share in the management company; and a written estimate of the service charge.
- Certificate of Insurance.
- The property certificates.
- Searching documentation.
- Pre-contract inquiries.

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[3] *Supra.*

[4] *Supra.*

- Execution of the contract for sale/purchase.
- Completion of the conveyancing process.
- The “snagging” process.

This complex and protracted documentary trail, infused throughout by legal requirements and formalities, is essentially the same irrespective of whether the purchaser is acquiring a newly constructed apartment or an existing one. In summary, there is a veritable plethora of steps, procedures, processes, hurdles and challenges to be undergone and overcome, presenting the citizen with an obstacle strewn course. One trusts that sensible and practical reforms of these laws will reduce delay, cost and complexity. Laws which have the opposite effect manifestly fail to serve the public.

VI OTHER SUBSTANTIAL ISSUES

[21] Time and space conspire to ensure that the multiple issues thrown up by this law reform project cannot be exposed comprehensively within the limitations of this paper. It is possible, however, to highlight, in at least cursory form, some of the other main issues of substance.

The Legal Entitlement to Apartments

[22] While there is no dedicated statutory regime tailored to the specific context of apartment developments, the current law has two basic elements. The first is that the owner of an apartment acquires an individual legal interest in the apartment itself. Secondly, the apartment owner acquires a separate interest in the common parts of the building concerned. In Northern Ireland, historically, the leasehold estate has been the most common form of grant of title. While under the present legislation the creation of new long leases of dwelling houses for terms in excess of fifty years is prohibited,[5] the grant of a long lease of a flat operates as one of the exceptions to this general prohibition. As a result, leasehold periods of several hundred years and longer remain commonplace. By the leasehold mechanism the landlord retains a freehold, or residuary, interest in the property and may also charge a ground rent. Furthermore, the landlord is able to enforce the covenants and to continue to exercise the rights reserved in the lease. Typically, leases are tripartite, the parties being the developer, the apartment owner and the management company. The lease is the main source of the legal rules and regulations governing the management of apartment developments. Every lease has multiple functions and purposes:

- To specify the physical perimeters of the apartment.
- To grant rights, in the form of easements, to the apartment owner.
- To reserve rights to the lessor – for example, a right of entry to effect repairs.
- To specify the covenants undertaken by the lessee – to include, for example, an obligation to pay a service charge.
- To specify the covenants imposed on the lessor – including in particular the lessor’s covenant to perform the services subject to the lessee paying the service charge.
- To make provision for related matters – for example, dispute resolution process and enforcement.

All new apartment leases must be registered in the Land Registry.[6]

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[5] By the Property (NI) Order 1997, Article 30(1), operative from 10th January 2000.
[6] See the Compulsory Registration of Title (NI) Orders 1995 – 2002.

[23] In summary, every apartment lease must make provision for a description of the apartment; easements; exceptions and reservations; covenants and the enforcement thereof; and service charges, normally listed in a schedule. In general, the leasehold mechanism is long established and familiar to lawyers and other professionals in this field. It is a useful tool for creating a framework of rights and obligations governing both lessor and lessee. On the downside, the language of leases may be archaic and obscure. Furthermore, form and content can vary substantially, to reflect the particular needs and features of individual developments. Drafting quality is also variable and the most appropriate model may not necessarily be deployed for the development in question. In addition, from the lessee's perspective, the legal rules are technical, complex and not susceptible of easy comprehension.

The Company Law Framework

[24] Since management entitles are, typically, standard private limited companies, established for the purpose of managing the development, company law has a significant role in this field. The most important protection enjoyed by the company's proprietors/promoters is that members are shielded from personal liability for unsatisfied company debts, liability being limited to the capital originally invested i.e. the nominal value of the shares in the case of a management company. Those provisions of the governing legislation[7] (an intimidating statute containing hundreds of Sections) which are of greatest significance in this context are those relating to:

- constitutional documents (sections 17, 29, 39);
- articles of association (sections 18–28);
- registered office (section 86);
- officers / directors (sections 154, 167, 168);
- removal of directors (section 168);
- directors' duties (sections 170-180);
- filing of accounts and annual returns (sections 441-442 and 854-855);
- failure to meet filing obligations (section 453);
- failure to deliver an annual return (section 858);
- accounting records (sections. 368-389 and 394-396);

[7] The Companies Act 2006, operative from 1st October 2009.

- exemption for small companies regarding accounts (section 415);
- circulation of accounts to members (section 423);
- resolutions / decision-making (sections 281–313);
- meetings (sections 303, 305, 318, 324, 355, 358);
- striking off, dissolution and restoration (Part 3 of the Act).

[25] The company law framework provides a ready made set of rules and is one familiar to conveyancers. It also provides a useful vehicle for ownership and management of the common parts of apartment developments. Furthermore, it requires the preparation and distribution of accounts and subjects directors to specific duties. By this assortment of mechanisms there is oversight and accountability. On the other hand, from the perspective of apartment owners, the framework of company law and its associated documentation can be complex, alien and intimidating. Furthermore, the standardisation of certain documentation such as model articles of association is undesirable in this context. It is also arguable that some of the company law obligations imposed on management companies are unnecessarily onerous, with unduly punitive associated penalties. Many apartment owners are unlikely to fully grasp the complexities and nuances of the operative company law rules – for example, the requirements and obligations bearing on directors. Overall, a simpler model for management companies would be plainly more desirable than the existing regime.

<u>The Management of Apartments</u>

[26] The subject of managing apartments is, on any showing, one of critical importance. Typically, the management company is established initially by the developer. The purchasers of apartments then become members and, ultimately, they assume management control which, in practice, is frequently delegated to a managing agent. The latter has no legal interest in the properties in question and has no general legal management responsibilities. Fundamentally, the relationship between management company and managing agent is contractual. Accordingly, a properly drafted contract is essential to ensure that the agent's responsibilities are couched in clear and comprehensive terms. The contract should make provision for the following:

- The property in respect of which the services are to be provided;
- The commencement and expiry date;
- The directors' authority to enter into the contract;
- Service levels;

- Arrangements for termination by either party;
- Arrangements for renewal;
- The procedure for calculating the agent's fees
- The procedure for dealing with disputes;
- The procedure for collecting charges and fees.

In practice, management agents typically perform the following tasks:

- collect service charges from owners;
- recover unpaid service charges;
- prepare and submit service charge statements;
- pay for general maintenance out of funds provided and ensure that service charge monies are used for the purposes specified (usually in the lease itself);
- provide annual spending estimates to calculate service charges and reserves as well as administering the funds;
- produce and circulate service charge accounts;
- administer buildings insurance if instructed and authorised (subject to FSA regulations);
- supervise staff, e.g. if there is a concierge on the development;
- arrange and manage contracts regarding plant and machinery such as lifts, boilers, etc;
- visit property and deal with minor repairs;
- deal with enquiries from owners / occupiers;
- keep records;
- keep the owners advised regarding statutory requirements;
- file appropriate returns with HMRC and the Companies Office, and any other bodies as required;
- any other matters reasonably required under the service level agreement with the management company.

To large numbers of apartment owners many of these tasks and functions will be viewed through the lens of a repeated drain on their increasingly scarce resources, a one way money flow.

[27] Other issues belonging to this discrete context include in particular service charges; the non-payment thereof; sinking funds; insurance; small developments; and phased developments. Worthy of particular attention also is the consideration that under the existing law managing agents are not regulated. They are not required to be members of any professional body (such as RICS) and there is no licensing system. Nor is their retention and handling of clients' monies regulated. One noteworthy development in this respect is a recommendation by the National Federation of Property Professionals entailing nationwide voluntary accreditation of all management agents, including a licensing scheme. Notably, there is statutory regulation in our neighbouring jurisdiction in the Republic of Ireland. There may be potential here for sensible and proportionate reform of the existing law.

Information and Documentation

[28] In principle, the owners of traditional houses can limit themselves, at their option, to an essentially inwards orientation. The quality and maintenance of externally facing structures, including the surrounding curtilage (typically vehicular/pedestrian accesses, yards, gardens and boundaries) is a matter of individual concern only. This "owner autonomy" is not transferable to the apartments context. The apartment owner, in contrast, has individual responsibility only for the interior of the unit, whereas the exterior and structure of the building – coupled with the access, entrance, landings, corridors, lifts and all related services – are a matter of collective responsibility, managed by a third party for the benefit of all apartment owners in the development. Apartments are physically interdependent and many facilities are shared. Given these considerations, the need for high quality, informative and coherent documentation is self-evident. This places the focus particularly on developers'/estate agents' marketing information; the Consumer Code for Home Builders[8], a voluntary form of self-regulation for the construction industry specifying the levels of service that home owners can expect; and certain Law Society of Northern Ireland publications.[9] Information, in this context, is generated not only voluntarily but also by assiduous enquiry on the part of the purchaser's solicitor.

[29] The formulation of fair, professional and uniform practices in this discrete context is plainly desirable.

Open Spaces

[30] Apartment settings which feature external landscaped areas, outdoor amenity lands and/or open spaces have become familiar to many. These

[8] Second Edition, operative from 1st April 2010.

[9] "Buying and Living in an Apartment", and "Buying and Living in a Property with Common Spaces". See also the Home Charter Scheme.

features are frequently a reflection of the grant of planning permission to the developer. Some open spaces belong to the internal boundaries of the development, whereas others extend beyond, to the benefit of the general public. Most open/amenity areas are managed and maintained by a management company, at the expense of the apartment owners, sometimes with the assistance of a substantial capital sum paid by the developer.

VII LEGAL PROBLEMS

[31] In the treatise of certain discrete topics above, some of the practical, day to day problems associated with purchasing, residing in and selling an apartment in Northern Ireland have been canvassed. A series of **legal problems** is also identified. In cantering through this maze one compiles the following non-exhaustive list:

- Problems in enforcement of obligations
  - Traditional use of leasehold to allow covenants to bind successors in title
  - No direct means of enforcement between apartment owners – generally reliant on OMC[10] acting on their behalf, dependent on effectiveness of OMC

- Defective elements to leases
  - Insufficient definitions especially in relation to common areas and apartments
  - The lease does not always cover all relevant issues such as noise, damage, repairs etc – leaves owners, agents and OMC in 'grey' area when trying to assess liability for matters
  - Unanimity required to amend lease

- Complexity of documentation
  - Difficult for owners to understand legal language
  - Documentation is more relevant to apartment owners than home owners as they are generally subject to more rights and obligations

- Transfer of title
  - 54 respondents said it had been transferred
  - Lack of obligation to transfer reversionary interest to OMC
  - Timing of transfer – if it is set at when the last unit is sold may never be triggered in current market conditions or if developer wishes to retain some units to rent out as a source of income
  - Consequences of lack of transfer – does OMC have authority to enforce obligations if they do not have an interest in the development?
  - Issue re release of bonds and the proceeding guarantee period that makes developer reluctant to transfer title too soon

- Lack of access to legal documentation
  - Some owners never see copy of lease etc which is particularly important for apartment owners compared to homeowners
  - Legal language can make documentation hard to understand

[10] Owners' Management Company.

- Constitution of OMC not sufficiently tailored to apartments – very vague
  - Adopt model articles of association which are geared towards covering all types of 'traditional' companies therefore the default procedures are often not appropriate or necessary for OMC's

- Forfeiture
  - Non payment of service charge may be a breach of covenant or if a service charge is reserved as a rent in the lease then it will open up the right to forfeiture
  - CML and Ulster Bank raised this as a particular issue for their perspective
  - Ulster Bank said recently they have added unpaid sums on to mortgages to try and avoid this issue

- Ground rents
  - 24 respondents pay a ground rent

Company law issues (issues with current OMC structure)

Incorporation

- Timing of the set up of an OMC - if best practice states that the OMC is to be established prior to sale there is an issue regarding the information which is required for incorporation:
  - A director needs to be appointed (but there may be no owners in place). There is no expiry or time limit to remain a director so it may not be possible to remove them.
  - The constitutional documents also need to be supplied at this point which will outline voting rights, decision making. In some cases this makes it very difficult to remove / appoint directors or make decisions. Although, in theory it should be possible to amend the constitution.
  - The Commonhold Regulations 2004 make an attempt to deal with this section 40 of Schedule 2 states that "At the first annual general meeting after the end of the transitional period, all of the directors must retire from office. At every subsequent annual general meeting, one-third of the directors who are subject to retirement by rotation must retire."

Yearly requirements

- An OMC is obliged to file abbreviated accounts and annual returns each year. This requirement can be helpful in that it will provide owners with a snapshot of the company finances and help to encourage good record keeping. The issue is that the penalties for non-compliance are too drastic.
- The OMC should also notify Companies House of any changes in directors, registered office etc as appropriate.

Administration

- Now, there is no longer a requirement to hold a general meeting unless it is to appoint an auditor or dismiss a director. This is a big issue for OMC's as there should be an appropriate forum to discuss matters and make certain decisions such as approving the budget and service charges, appointing directors etc.
- Large variation in the running of OMC's due to a lack of standardisation in the constitutional documents. It would be preferable to produce a standardised constitution for all OMC's outlining the requirement to hold meetings, how decisions should be made, appointment and removal of directors etc. England and Wales have adopted this approach, by producing a standardised constitution (Schedule 1 and 2 of the Commonhold Regulations 2004) for all commonhold associations.
- Director's are subject to director's duties under the Companies Act 2006. Some of the duties are helpful as they oblige directors to act in the best interests of the OMC and not their own, declare any conflicts of interest, not accept benefits from third parties etc. However it can actively discourage people from acting as directors and there can be civil consequences depending on the nature of the breach.

Strike off

- Potential for an OMC to be struck off, which occurs not infrequently. Where a development is still in existence, an OMC should not be struck off. New administrative restoration procedure in Companies Act 2006 has made the restoration process easier but OMC's should not get to that point.
- Any property owned by a dissolved company will pass bona vacantia and owners are left in a state of paralysis – apartments cannot be sold, penalties accumulate etc
- The legislation (s1000 of Companies Act 2006) does not make it clear on what grounds the Registrar will take steps to strike off a company i.e. how much documentation is outstanding
- The Commonhold legislation does not make reference to this possibility. Presumably it is still possible for a commonhold association as there are no express exemptions from filing requirements at Companies House.

Insolvency

- Potential for an OMC technically be declared insolvent by creditors e.g. managing agents or where large levels of maintenances are required

Membership of OMC

- No guarantee that owners will always become members of an OMC on the purchase of an apartment

- Issue in repossession cases where lender is mortgagee in possession

Limited liability

- There are doubts over whether apartment owners do have limited liability through the OMC. Some academics doubt whether owners are really protected from being sued. They argue that they are shielded as members of the OMC but some feel that creditors etc could go after owners in their status as unit owners.

Other

- Tenants
  - not interested in long term prospects
  - hard to communicate with or involve
  - no control over the content and terms of tenancy
  - confusion over who participates in voting etc
- Developer insolvency
  - Uncompleted developments
  - Should NAMA be mentioned?
- Developer acting through a joint venture shell company – no comeback for owners to pursue any problems
- General completion issues
  - Roads not adopted, other elements of infrastructure not in place such as sewers
  - Partially completed developments
  - Problems in getting completion certificates for individual units where the whole development was not completed.

VIII SOME OF THE MAIN QUESTIONS

[32] The activities, researches and enquiries of the Law Commission to date, which have included appropriate engagement with interested parties and stakeholders, have identified a series of perceived mischiefs and shortcomings in current law and practice. While these will be rehearsed *in extenso* in the forthcoming Consultation Paper, a foretaste is possible (and, given this forum, desirable) at this stage.

Specific Questions

Tenure issues

- Is leasehold the most suitable form of title for apartments or is there a need for a more radical overhaul to the form of title?

Legal documentation

- Are there any changes needed to the legal documentation used in a typical multi-unit development conveyance?
- Should there be standard form documents or alternatively default provisions which would apply to all developments?
- Should the Home Charter Scheme of the Law Society of Northern Ireland make specific provisions for multi-unit developments?

'*Understanding deficit"*

- Do apartment owners in general have a good understanding of the unique arrangements in relation to living in an apartment?
- Are there any additional measures which could be taken to assist apartment owners living in an apartment?

Multi-unit development structures

- Are there any alternative structures to manage the ongoing maintenance and operation of developments as opposed to the traditional OMC structure?
- What are the respective points of time in the conveyancing process at which:
  a) the OMC should be incorporated?
  b) the shares in the OMC should be issued to the apartment owners and control of the OMC should vest in the apartment owners?
  c) the conveyance of the developer / builder's reversionary interest in the title to the development to the OMC?
- Our work to date suggests that there are difficulties for apartment owners if the developer / builder retains control of the OMC and / or

fails to convey the reversionary title to the OMC. But would legislative reform to set mandatory dates in this regard create difficulty in, for instance, the funding of on-going development work?
- Should there be specific legal requirements placed on OMC's such as the requirement to establish a sinking fund?

Sustainability and maintenance issues

- Where developments are in need of major fundamental repairs and improvements and there is no sinking fund in place should there be a rescue mechanism or scheme?
- Are there any specific measures which could be implemented where developments are left partially completed?

'Restorative' provisions

All of the discussion above is focused on implementing legislative reform for new developments going forward (i.e. from the 'operative date' of any new legislation). However, this will not address all the problems in existing developments. Accordingly we are considering proposals for 'restorative provisions' which would allow existing developments to avail of the new legislative framework (whether that be a new form of new title or 'tweaking' / default provisions). There are obvious issues regarding retrospective implementation of provisions into existing developments that require careful consideration. We are currently considering and would welcome comments on the following potential restorative provisions:
- Should the new provisions (or perhaps an abbreviated form of them) automatically apply to existing developments from a specified operative date or alternatively should apartment owners be free to choose whether they are introduced into their developments? If, for instance a new form of title is introduced would it add to confusion to have two parallel systems in operation?
- What level of agreement would be required by apartment owners to implement restorative provisions? Options could include a simple majority of owners or a higher percentage?
- Should there be any form of court of tribunal supervision or approval before implementation of any restorative scheme or would the attainment of the required majority of apartment owners in a development suffice?
- If there is to be such scheme or approval would the Lands Tribunal be best placed to deal with such applications? Alternatively, the Chancery Court may be an option although it may increase costs significantly and the procedure may be longer.
- If there should be such supervision or approval mechanism would it be incumbent on the majority to submit the restorative scheme for approval or should it be a default provision from whereby the restorative scheme proceeds unless the minority makes an application to object?

Arrangements for the use and maintenance of common areas and/or facilities on private housing estates

In the case of private housing developments each house owner will generally have ownership of and be responsible for the entirety of their own home. But increasingly there may be planning requirements for areas and/or facilities to be owned in common such as:

- Play areas (with or without equipment) and sports pitches
- Open amenity areas
- Landscaped areas such as woodland
- Grass verges – outside garden boundaries
- Electrical/mechanical items such as (for ‘gated communities’) lighting systems and controlled entry gates
- Sustainable urban drainage systems which may include various elements such as waste water treatment plants and retention ponds

This then is a variant of ‘multi-unit development’ but the arrangements for apartment developments are not necessarily best suited to deal with all the particular circumstances of common areas and/or facilities on private housing estates.

There are several conveyancing methods which may be employed depending on the circumstances of each case to cover the common spaces and facilities of private housing developments:

- An owners management company arrangement analogous to the apartment owners system
- The developer retaining control and responsibility
- All the owners sharing ownership and responsibility in common
- An outside provision of maintenance and management functions assuming ownership and responsibility
- A system of covenants/obligations and easements/rights
- The district council taking ownership and/or responsibility

Undoubtedly, all the options will require that the owners pay for all maintenance, repair and renewal.
We seek views as on these various options.

- Are there any additional problems in this area which would not be apparent in apartment developments?
- Is the Owners Management Company the optimum arrangement? If not, what would be the preferred alternative?
- Is it always necessary or desirable to have a sinking fund?

Mixed use developments

The term mixed use developments normally refers to developments which serve more than one purpose i.e. those with an element of both

commercial (such as shops or offices) and residential (apartment) usage. Of course 'mixed use' developments will face the same problems and issues as purely residential (apartment) developments. But we are considering whether particular problems may arise when a development is shared between commercial and residential users. We invite, accordingly, views and suggestions on the following:

- Are there problems when common areas are used for the significantly different purposes of the commercial and residential users?
- How should service charges be apportioned between commercial users and residential users?
- How should the costs of insuring the development be apportioned?
- Is it feasible to use the owners management company (OMC) structure for both commercial and residential or would it be necessary to have separate OMCs for the commercial users on the one hand and the residential users on the other hand, or otherwise adapt the OMC structure for mixed use developments?
- Should any special provision be made for sinking funds in mixed use developments?
- Are there any other problems that are unique to mixed use developments?

IX CONCLUSION

[33] This paper, of necessity, is but a whistle stop tour of a large, complex and evolving subject. I trust that you, the passengers, have gained something from the ride. The Law Commission's Consultation Paper, when published, will touch on other important topics such as law reform in other jurisdictions; Article 1 of The First Protocol ECHR; commonhold; and regulation by mechanisms other than legislation – such as good practice, authoritative guidance and professional codes.

[34] I conclude where I began. Efficacious law reform requires active and bilateral engagement between the Commission and all interested and affected members of the community and all interested professions, agencies and public representatives. The final form, shape and content of the modern law of apartments in Northern Ireland will be influenced, critically, by events during the two-and-a-half month period commencing on 15th November 2012, marked by publication of the Commission's Consultation Paper. Please take the time to respond individually, collectively and on behalf of clients, having read and absorbed this in full. In doing so, you are likely to find yourselves interacting with Sarah Witchell and Rebecca Ellis of the Law Commission, whose outstanding work in this project will doubtless receive the recognition it deserves in due course.