Northern Ireland
Assembly

COMMITTEE FOR FINANCE AND PERSONNEL

OFFICIAL REPORT
(Hansard)

Apartment Developments' Management Reform Bill

8 December 2010

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Ms Jennifer McCann (Chairperson)
Mr David McNarry (Deputy Chairperson)
Dr Stephen Farry
Mr Paul Frew
Mr Paul Girvan
Mr Daithí McKay
Mr Mitchel McLaughlin

Witnesses:
Mr Kieran McCarthy MLA)
Mr Stephen Douglas) Alliance Party

The Chairperson (Ms J McCann):

I welcome Mr Kieran McCarthy and Mr Stephen Douglas, who will speak about the Bill. Kieran will make some opening remarks, after which I will open up the meeting for questions.

Mr Kieran McCarthy MLA:

Thank you, Chairman, for the opportunity to address the Committee on what I consider to be a very important matter for thousands of apartment owners in Northern Ireland: the Apartment

Developments' Management Reform Bill. The Bill contains 23 clauses, and I am sure that many of the problems that apartment owners encounter can be addressed if the Bill is passed.

We and, indeed, many others, including the Minister and the Law Commission, are of the opinion that this is one area of the law that needs modernised and brought up to twenty-first century standards. That is what my Bill sets outs to do. I have spoken to Minister Wilson, and he wishes to see the Bill enacted at some stage. I started work on the Bill some years ago, and we have had unanimous support on the Floor of the Assembly for that work. Let us, therefore, hope that we can progress this important Bill.

The Law Commission is an advisory body that sits at arm's length from government and is able to take a broad view of the law. Legislators also sit at arm's length from government, and we can take a broad view of the policies that should become law. This private Member's Bill is, first and foremost, a policy document expressed in the form of legislation; it is complete and ready to pass into law today. The Bill provides a means of addressing every problem that my constituents and those of other Members have raised about the maladministration of apartment developments. There are three problems in particular, and it is worth my highlighting how the Bill addresses them.

Yesterday, I received a note from an apartment owner, who summarised a problem that I have encountered again and again. The letter stated:

"I live in a small apartment development in Carrickfergus, and we have just found out that the developer has never handed the whole development over to the owners. We only found this out because he submitted plans to build more apartments on our site."

I have received many more such complaints. However, I will not bore the Committee with them at this stage.

A lease for an apartment in a new development will include a clause on landlord's obligations stating that a developer is bound to transfer ownership of the common parts — the stairs, the roof, the corridors, the outside walls, the paths and so on — to the owners' management company. Sometimes that clause states that the landlord will transfer the title after the last apartment has been sold. However, if somebody has bought an apartment in a mature development, his or her solicitor may have discovered that the landlord never got round to transferring ownership to the

apartment owners at all.

Before the credit crunch, your lawyer would probably have advised you to buy anyway and take a view on what he or she would have said. That is not happening today. Today, solicitors and banks are very reluctant to let a person sell or buy an apartment, the common parts of which are not owned by the apartment owners. Clauses 2, 3 and 4 will make it mandatory for the common parts of future, existing and partially built developments to be transferred to the apartment owners within six months of the Bill's being enacted.

The second common problem involves apartment developments that have found it impossible to fire or get rid of management agents who are not up to the job. You buy your apartment and pay your monthly service to look after the lights in the corridor, the intercom system and automatic gate, only to find that they are constantly broken or that the fire alarm goes off all week. After a few months of that terrible service, you and your fellow owners decided to get together and, as shareholders of the management company, decide to fire the rubbish management agent and hire one who will fix the lights and give you value for money — but you cannot do that. Why? Years before you bought your apartment, the original developer made a contract, so it is alleged, with the management agent. You cannot even see that alleged contract because it is not written down.

Clause 21 will end that practice by making it impossible for developers or management companies to enter into contracts with management agents for longer than three years. Why three years? On balance, that was seen as a reasonable period; more reasonable than 10 years and certainly more reasonable than six months. One has to draw a line somewhere. I have yet to find a management agent or an apartment owner who would object to that restriction.

The third common problem, which affects more developments than I can count, is this: if your service charges go up while your service standards go down, you have no legal means of challenge. I have encountered numerous cases of apartment owners ill advisedly taking the law into their own hands. They say that they are not getting value for money, that they pay money every month, but the lights do not work, the lifts are out of order, the maintenance contracts are not in place, there is a crack in the exterior wall, and so they refuse to pay their service charge. It

is the only power that they have.

I do not condone such activity; but it seems to be the only option left to people in such circumstances. When they are brought to court, as many I have met are, the judge will empathise with them but say that even though they have shown evidence that a service charge is not being used properly, his hands are tied, and the apartment owner is ordered to pay. Clauses 15 to 19 provide for mediation conferences in the case of disputes between apartment owners, apartment management companies and apartment management agents. Clause 10 lays out what a service charge is for and what an owner should expect in return.

Those are some of the problems that I have encountered and some of the ways in which my Bill would address them. The question now is whether we can afford to wait for the Law Commission's report or whether the problem is so urgent that we, as responsible legislators, must act now. In 1987, the Law Commission of England and Wales produced a report calling for what formed the basis of the Commonhold and Leasehold Reform Act 2002. That 15-year gap between the Law Commission's report and the legislation haunts me. Will we have to wait 15 years after our Law Commission reports? As responsible legislators, we cannot adopt a Law Commission report wholesale; we will have to turn it into practical and politically feasible legislation.

A more recent example of the invariable rule that a Law Commission's work has to be translated into politically feasible legislation can be found south of the border. In 2005, the Irish Law Reform Commission produced a brilliant report aimed at enshrining in law the same protections for apartment owners in the South as my Bill does today. Yet it was not passed until June 2010 by the Seanad — and in a much amended form. That five-year gap also haunts me. Is that how long our constituents will have to wait? We cannot rush legislation, but nor, when we have a workable, timely, practical and politically feasible solution, can we afford to delay for ever the fulfilment of our duty as legislators.

I remind the Committee of the two sentences with which I started this briefing. The Law Commission is an advisory body that sits at arm's length from government and which can take a broad view of the law; whereas legislators sit at arm's length from government and can take a

broad view of the policies that should become law. We could enact my Bill tomorrow; its policies are fit for purpose in addressing the problems that they are aimed at addressing. When the Law Commission finally gets around to finishing its work, we could tweak bits of my enacted Bill so that it includes some of the Law Commission's conclusions. The important thing is that apartment owners are protected today.

I conclude with two proposals. As I said earlier, I spoke to the Finance Minister about the Bill, and he wants to see it progressed. However, at a meeting with the Minister's officials last week, it was said that the Northern Ireland Law Commission team that is examining that area has the same resources of expert manpower and legal expertise as I have as a mere MLA. In fact, I have even more qualified resources at my disposal than it has.

For instance, I was told at a meeting of this Committee last week that clauses 2 and 21 of my Bill contravene the Human Rights Act 1998. I can only imagine that that was because the lawyer who made that judgement did not have the benefit that I have had of seeking the views of many lawyers on the provisions of the Bill. Three Assembly lawyers, a Northern Ireland Human Rights Commission lawyer and Northern Ireland's pre-eminent expert on human rights law have all given my Bill a clean bill of health. All agree that it does not contravene the Human Rights Act.

I can only conclude from that that the Law Commission needs extra people to help it on this project. I have been informed of various deadlines for the fruit of its welcome labours to appear. I was told that it would be February 2011, but that deadline was stretched to late 2011 for a consultation paper; I was then told that the report would not appear until summer 2012 at the earliest. That is why a timescale of 15 years haunts me; it is not acceptable. This may be a time of austerity, but I am not happy about my constituents being unable to sell their apartments or unable to buy the apartment of their dreams because it is inadvisable to do so until there is proper protection for them in legislation.

My second proposal is that the Committee consider inviting a written opinion from the Law Commission on my Bill; that would give us all a chance to start a conversation about the best policy solutions. Let us all learn through conversation, critique and counter-critique, using my Bill as a solution to our problems. From what I learned last week, the Law Commission has

already performed a detailed and welcome critique of my Bill. It would not take it long to put that in writing, and that would allow us to respond to its arguments with arguments of our own. That way, all of us can learn enough about this complicated issue to feel confident about enacting my Bill.

In summary, my Bill is a timely, practical and politically feasible solution to a serious problem that afflicts tens of thousands of apartment owners. I am grateful to the Chairperson and to the Committee for listening to my briefing.

The Chairperson:

Thank you very much, Kieran. I have spoken to constituents who have had similar problems with apartments. There are also problems with having to be contracted into block insurance in apartments, even though they might find individual insurance cheaper. You set out the Law Commission's view, and there is an urgency if the Bill is to be progressed in this mandate. Have you had direct consultation with the Law Commission, and is it aware of the timetable?

Mr McCarthy:

Yes. We had a brief session last week, and we are aware of the demand on us and that the Assembly mandate will run out at the end of March 2011. That is why I am so concerned. It was first to be February 2011, and then the end of 2011. Time is limited. We are all aware of those problems, and we want to overcome them as best we can.

Mr McNarry:

You are very welcome, and I commend you on your initiative. I know personally how difficult it is to get over the hurdles of a private Member's Bill. The thrust of your comments, Kieran, is that you think that the Law Commission's presence is delaying your Bill and that that could be addressed if the Assembly could tweak a few bits of your Bill when the Law Commission makes its suggestions. What suggested amendments from the Law Commission would you accept to your Bill — which, in fact, will become the Assembly's Bill?

Mr Stephen Douglas (Alliance Party):

We consulted the Law Commission on the issue for the first time two and a half years ago. We

have met the commission twice since, and last week we met a lawyer from it. In August or July 2010, we requested that the Law Commission update us on the progress of its project, which it did. Everyone who gets involved in the Bill goes through a certain learning curve; hopefully, the Committee will go through that over the next year or so. However, at that point, the Law Commission seemed to be at the stage of the curve that we were at two and a half years ago.

We met the Law Commission last week and discussed a couple of aspects that gave us some idea of its position. One point stood out: the commission appeared to be thinking that regulating management agents might be a way of dealing with the issue. There was a gap between 1987 when the Law Commission in England and Wales first produced its brilliant report on commonhold and 2002 when it was actually enacted. The reason was that the previous Tory Government introduced what they considered at the time to be a neat means of addressing the problem by simply giving householders the right to group together and to assert their right to manage a development.

Mr McNarry:

I understand what you are saying. You can see the difficulties with the statement that has been made to the Committee that, when a powerful organisation comes up with some ideas, we might need to tweak the Bill later. However, if you do not know what items are open for tweaking, perhaps you should. If you aware of the items to be tweaked and they are acceptable to you, it might be prudent for you to table an amendment to your own Bill. If you are aware of them, will you tell us what bits might you want to tweak? The Committee could, as you suggested, write to the Law Commission, but might that not create further delay?

I cannot speak for the Law Commission, but it would be difficult for it, given that it is such a long way even from producing a consultation document.

Mr McCarthy:

The document is out for consultation.

Mr McNarry:

I am referring to the Assembly Research and Library Services paper, which states that:

"The Northern Ireland Law Commission is also producing a consultation paper on multi-unit developments, which is due for publication in late 2011."

I am just trying to help. The Law Commission is unlikely to commit itself at this stage. I wonder whether, between you, you can establish the elements for "tweaking" to be resolved through amendments.

I know that you would not do it under any circumstances, but I would not want a promissory note attached that stated that this will come forward somewhere down the line and that there will be a few things to be tweaked. It would strengthen the Bill. I would not have been aware of it had you not mentioned it; however, since you have, it is the honest thing to do. Putting the Bill before the House untweaked would create doubt.

Mr Douglas:

I think that you slightly misunderstood Mr McCarthy's point about tweaking. He was trying to convey to you that although he believes that the Bill is perfect and addresses all the problems that your constituents and Kieran's have encountered as a result of owning an apartment, he is open, as all legislators must be, to future amendment to legislation. Attempts were made to address the problem in England and Wales in 1991 and 1998 before they came up with a definitive attempt in 2002.

Mr McNarry:

I accept what you say. The Hansard report will tell me whether or not I misunderstood. Forgive me if I am wrong, but I thought that the reference to tweaking concerned what might come out of the Law Commission's paper. If I have misunderstood that, I am sorry, but I think that that is probably what Hansard will show.

Mr Douglas:

The second point is that the Law Commission was good enough to give us an oral critique last week. The issues that it raised were then subjected to other lawyers' opinions. The foremost expert on human rights law in Northern Ireland pronounced an opinion on the issues that were raised. It seemed to us that the Law Commission had already engaged in a serious, interesting

and worthwhile critique of the Bill. The only issue raised was to put that in writing so that we can address the points one by one and get going. I do not want to pre-judge what the Law Commission will come up with, but I am really looking forward to its report.

Mr McNarry:

I wish you well. I was just ironing out some small points.

The Chairperson:

Perhaps the Committee could make an urgent request for that written response, as it might move matters along. Am I right that Second Stage is next week?

Mr McCarthy:

That is right; it is tabled for next Wednesday.

Mr McLaughlin:

I too congratulate Kieran for his initiative in bringing the Bill forward. Every MLA has come across this problem, which has evaded resolution for far too long. I was concerned to hear the reference to tweaking at this stage, as the Bill is good. Anyone can challenge the judgement of the Assembly and the legislation; people can also lobby their MLAs if they think that appropriate amendments can be made.

The Law Commission exercise is worthwhile. However, it is parallel; there is no contingency and no organic requirement that the one needs to be complete before the other can proceed. I wish you all speed with the legislation; hopefully, interested organisations will respond if there are issues that remain to be addressed. This is a significant beginning, and, to that extent, I would like to establish, perhaps formally through the Committee, that there is no impediment to the Bill, despite the clear interest that has been expressed. We should do that with a view to facilitating the Assembly in this work.

You have taken steps to consult, and I have a question about the consultation, but you have also taken the trouble to ensure, to the best of your ability, that it is human rights-compliant. That is the duty that we would expect, and it provides considerable reassurance to the Assembly as it

deliberates. Was the consultation of more than 3,000 people a public exercise?

Mr McCarthy:

Yes.

Mr McLaughlin:

Were there really 3,000 respondents?

Mr Douglas:

Yes; I delivered most of them personally.

Mr McLaughlin:

What were the main findings?

Mr Douglas:

The main findings are expressed in the Bill. There are eight issues. Kieran has read the three main ones, and he has another five here if you would like to hear them. To summarise, the main conclusion was that a piecemeal approach — for instance, regulating management agents — would not get to the nub of the problem. One reason for that is that the foundation stone of a person's property rights is being the legal owner not just of their apartment but the common parts of a development, such as corridors and roads. Until they become the legal owner of those, they cannot exercise control over their maintenance and the spending of their service charges.

I have seen quite a few leases for apartments, and in every one of them that was built in the past 20 years — although most of them were built in the past 10 years — there is a provision that the developer/landlord agrees to convey the legal ownership of the common parts to the management company of which you become a member or shareholder when you buy your apartment. I have yet to find an apartment where that lease obligation has been discharged.

Mr McLaughlin:

Your approach has been very competent. One of the reasons that the issue has not been resolved is that a significant vested interest is watching the process very carefully. Given its interests, it

may not particularly welcome this development, notwithstanding unanimous support from the Assembly. The consultation is useful in ensuring that the Bill is competent on those issues that people wish to see addressed. It is also very useful to you, in framing the legislation, to protect it against inhibition, delay or obstruction.

Those who want to indulge in that kind of obstruction will study the consultation to see whether there are issues that might sustain a human rights objection. My question — and I come at this from a strongly supportive position — is whether you are confident that there are no hostages to fortune in the conclusions of the consultation that the Assembly needs to be aware of.

Mr McCarthy:

I do not think so. I am sure that every member around the table will acknowledge that apartments are a relatively new phenomenon in Northern Ireland. People were so anxious to buy a brand new apartment that they signed up to a great deal of maintenance. I think that it is up to £1,000 a year to get work done. Whenever something goes wrong and people try to get something done, they do not know where to go. Often, they are pushed from pillar to post. We are trying to get on top of that. We have not come across anyone who objects to the Bill; everyone thinks that the law is outdated and needs modernisation. This is the way to go.

Mr McLaughlin:

Does the legal advice that you wisely sought address the findings of the consultation?

Mr Douglas:

Yes. One thing that has changed since we began this process, which is possibly the only positive thing that I can think about the credit crunch and the lack of work for many hard-working solicitors who were previously engaged in conveyancing work, is that we have hundreds, if not thousands, of developments around Northern Ireland in which the common parts have not been conveyed. If the developer has gone bankrupt or cannot be traced, the residents would probably have to pay for the conveyance of the common parts, but solicitors who are dying for work could do that. Things have changed since we started this process, and it has resulted in the opposite of hostages to fortune — whatever that may be. Lawyers who may not have been pleased about it at the beginning would now fall over themselves to see clauses 2, 3 and 4 enacted.

Mr Frew:

I support the Bill. Throughout the years, the Housing Executive has owned apartments. However, there is now a messy situation in which perhaps 30%, 50% or 70% are owned by the person who resides in them while the rest are still owned by the Housing Executive. What have the Housing Executive and the Department for Social Development said about the Bill?

Mr Douglas:

We have received no objection from them. That problem was encountered in England and Wales after the right to buy was introduced. The solution was for the Housing Executive, where it owned apartments or flats in a development, to have the same rights as the other owners but that the individual private owners, together with the Housing Executive, would then own shares in the company that owned the property. I would be interested to read what they have to say about the Bill, but they have made no objections so far.

Mr Frew:

What percentage of apartments is still in Housing Executive hands?

Mr McCarthy:

It is adding all the time, so I do not know.

Mr Douglas:

We were told that there are 40,000 apartments, including Housing Executive properties.

Dr Farry:

Welcome, Kieran and Stephen. I have two questions. I think that we have covered most of the issues. Do we have any indication of the number of apartments or townhouses in Northern Ireland, or must we wait for next year's census to get a firm determination?

Mr Douglas:

Forty thousand. It was given in a ministerial answer.

Dr Farry:

My question is for Stephen, as he is the lawyer. Will you outline the Bill's legal construction, bearing in mind Northern Ireland's land law, and how you went through the available options before reaching your conclusions?

Mr Douglas:

People in Europe have been living communally for centuries. However, people in Ireland and England have been doing so for a much shorter period. It became common in England and Wales between 1910 and 1920, when many big houses in London were turned into mansion flats. The Republic has probably about five or six years on us regarding the number of apartments built.

We started by looking at what neighbouring jurisdictions had done to solve the problem. The first solution that everyone in Northern Ireland and down South came up with was the England and Wales Commonhold and Leasehold Reform Act 2002, because it was so revolutionary. It was revolutionary in the sense that it introduced the first new form of land tenure — commonhold — since 1066; therefore, alongside leasehold and freehold, there was now commonhold. In fact, Kieran was advised at the start of this journey that it would be appropriate to adopt that Act here.

However, land law here is much more similar to that in the South than that in England and Wales. Since the foundation of Northern Ireland, many of the reforms to the land registration system and other aspects of land law in England and Wales were not introduced here; whereas, what was in force here in 1921 was basically the same as what in force in the South.

Commonhold would work here; however, it is a revolutionary idea. It took from 1987 to 2002 to convince people in England and Wales that it was an appropriate method, and we are perhaps 20 years away from introducing it here or down South. The Irish Law Reform Commission came to the conclusion that addressing the three kinds of apartment development, rather than introducing a new form of land tenure apart from freehold and leasehold, was a way forward because it would have the same effect. Therefore it ensured that the owners of apartment developments that had already been built could force a developer to transfer ownership of the common parts to them, and that ownership of the common parts of developments that were being built or that will be built in future would be transferred to the apartment management company.

Apartments that have yet to be built will be much easier to deal with than those already built. That is covered in clauses 2, 3 and 4.

The Bill sits on that framework, which is similar to the one used down South. I think that that system is more appropriate to the circumstances of the land law system here than the one in England and Wales. A much lighter solution is used in Scotland; however, Scotland has an odd, feudal land system that was not appropriate for dealing with the problem here. It is relatively simple here in that people who buy an apartment usually sign a 999-year lease, which is, in effect, for ever. However, there were some quite odd concepts in Scotland that did not translate to here.

Given all the problems, we opted for a framework that is similar to the one used in the South. However, it is not just apartment owners who encounter problems. We consulted architects, lawyers, developers, and, one of the main groups, apartment management agents, who are working really hard to clear up the messes that they come across. On numerous occasions, Kieran and I met apartment management agents of good repute who are pushing hard for legislation that will put their less reputable peers out of business, because they are the ones causing a mess.

Owners who ask reputable management agents to take over control of the management of their blocks are told that the agents' hands are tied; they cannot get their hands on the money that the previous owners had. Perhaps that answers your question.

Dr Farry:

That is great, Stephen. We look forward to the Second Stage.

Mr Girvan:

Thank you, Kieran, for bringing this Bill forward. I am sure that we have all had apartment owners through our doors with this problem. I appreciate that the Bill focuses on apartments, but in my area there are probably fewer apartments and more private developments that work with private management companies that maintain all the common spaces. We encountered a unique concept put forward by a developer recently: each property owner became a shareholder in the company, which was handed full autonomy. The company had complete freehold.

Is there provision in the Bill to deal with property management on private developments that have similar problems? A bad management company may not bother to cut the grass or maintain areas as it should. Is there provision in the Bill to protect such residents?

Mr Douglas:

There are two such provisions. Clause 1(1)(g) defines multi-unit development as:

"a development being land on which there stands erected a building or buildings comprising units".

It covers that situation.

However, there is a second issue, which I am reluctant to tell you about. It would be great if everyone got together and legislated on this appalling situation, which applies in Scotland, England and Wales and Northern Ireland. In a development where everyone owns their own house, the owners may form a company in which they are shareholders to control the common green space. Hopefully, the Bill will allow apartment owners to do the same.

There is a device that has been put into people's titles to allow the developer to convey part of the green space around houses to another company. A company in Scotland now owns little pieces of green space all over England, Wales and Northern Ireland in what I would call yuppie estates. When you buy your house, under the terms of the conveyance you are obliged to pay some £300 a year to this company. The developer sells that company the right to collect the £300 every year, and in return the company is supposed to make sure that the grass is kept in good order — it is literally grass or a few shrubs. The House of Commons is looking at this, as is the Scottish Parliament.

The problem is not so much that the company is not maintaining the grass, because it is often a relatively small piece of ground, although that is annoying, and, anyway, residents can get together to mow it themselves. What annoys residents is having to pay £300 a year for work that may not be done, and there is no way of getting out of it. It is analogous to the lease here.

Mr Girvan:

Is that not drawn up when deeds are compiled? Would the Bill ensure that such clauses were not

included in property leases?

Mr Douglas:

That is a very specific issue that could be solved in a two- to three-part Bill. However, it is a revolutionary idea, as it would involve interfering with the property rights of the company in Scotland that now owns the right to collect the £300 and maintain the grass. However, I have an inkling that the problem is such that it is interfering with the property rights of owners.

Such issues come to light only when the credit crunch kicks in and people are trying to sell their houses or find themselves poorer than they were. Preventing such deals between developers and maintenance companies would be a justifiable interference. We thought about including such a provision in the Bill, but it is quite a narrow issue that could be solved in a clever way. There is a big body trying to legislate in England and Wales, and the issue is similar to what happens here. I hope that it will be dealt with.

Mr Girvan:

Were the Bill enacted, would any existing agreement such as you outlined continue to stand or would the provisions apply to new property only?

Mr Douglas:

No, and that is one of the clever things about it. The conservative approach would be to deal only with apartment buildings that were to be built. However, most apartment developments that are planned for the next decade have already been built. The Bill injects itself into developments that were built 20 years ago and into those that are half-built.

It is controversial because its provisions will be injected into something that already exists. The human rights lawyers whom we consulted on the rights of apartment owners who could not fire their management agent or who have to pay a service charge told us that that would be a justifiable interference. That is the significance of clauses 2, 3 and 4.

The Chairperson:

Since there are no further questions, I will wish you both good luck at Second Stage. We will

seek an urgent response from the Law Commission for the debate next week and get it to members before the debate.

Mr McCarthy:

Thank you.