Home ownership with responsibility

Practical governance remedies for Britain's flat owners

Douglas Robertson and Katharine Rosenberry

The **Joseph Rowntree Foundation** has supported this project as part of its programme of research and innovative development projects, which it hopes will be of value to policy makers and practitioners. The facts presented and views expressed in this report are, however, those of the authors and not necessarily those of the Foundation.

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Foreword

The Joseph Rowntree Foundation concentrates its research efforts on projects that will contribute to policy change and practice improvement. Rarely, however, is the Foundation in a position to make such a direct, timely contribution as with this work.

The research project on which this report is based has come at a time when reform to the law relating to the ownership and governance of multi-owned housing is under consideration, both in England and Wales and in Scotland. In England and Wales the Commonhold and Leasehold Reform Bill is now before Parliament and offers reform for existing leaseholders as well as an innovative and robust structure for new developments. Katharine Rosenberry has been able to offer guidance and advice based on her extensive knowledge and involvement in commonhold law in California and other parts of the United States. In Scotland, against the background of a different legal structure, consideration is being given to incremental reforms in this field and the contribution of Douglas Robertson will inform and stimulate this debate.

This project has presented a considerable challenge to Katharine and Douglas and I am grateful to them and to the group who advised them. It is a particular strength of both researchers that they recognised the need for a social scientist and a lawyer to work together and this is not always easy. But their advice now combines an appreciation of behaviour and context, as well as experience of other legislative arrangements and possibilities.

I am confident that their work will contribute not only to the well being of flat dwellers and their properties, but also will support other kinds of high density, multi-owned properties that we are likely to see in our towns and cities over the coming years.

Margaret Booth
JRF Trustee
April 2001

Executive summary

Flats and other forms of multi-owned high density property have some common characteristics, given their physical structure and resulting ownership requirements. Yet, in Britain, while the notion of individual home ownership is well understood, given its strong and long-lived cultural and political overtones, where ownership also encapsulates certain mutual or collective responsibilities, this causes major problems. Who owns what, and who is responsible for what, deeply affects the individual's security and enjoyment of such property. If high density housing is to play an integral part in the continuing growth of mass individual home ownership in Britain, there needs to be a new legally defined ownership arrangement whereby the individual ownership of the property is also able to accommodate collective responsibilities for its ongoing governance.

Both English and Welsh, and Scottish approaches to accommodating individual home ownership within multi-ownership buildings, have long proved highly problematic. Outright or freehold ownership of individual flats is uncommon in both England and Wales. This is because legally it is not possible to enforce 'affirmative covenants' on subsequent purchasers of that property. Thus it is impossible to make adequate provisions for the long-term maintenance of the building. As a result, leasehold became the tenure norm for flatted and other multi-owned property.

In Scotland, with its different legal tradition, it was possible to make both 'positive' and 'negative' obligations run with the title of the property. Consequently, within any multi-owned property the common elements can be made the joint responsibility of all owners. However, where this arrangement falls down is in the infinite variety of arrangements that are in existence, through the use of both title and common law provisions. Both the variety and their highly variable quality act as a constraint on the proper governance of the property.

This experience is in marked contrast to the approaches adopted in other countries. Rather than keeping existing legal models of property ownership, most countries developed a new form of property ownership to accommodate the ownership complexities presented by such multi-owned private property. Under such arrangements individual property is owned in freehold, while the common parts of the building are either owned by all owners, or are owned by an association to which all owners are required to be members. Such arrangements are statutorily set down, thus providing a degree of uniformity across all multi-owned properties.

What this study sought to do was illustrate, through the use of comparative study, the merits of introducing such an arrangement in Britain. Given the universality of ownership and governance issues, within multi-owned property, the study was able to bring to the attention of a receptive audience, composed of practitioners and policy makers, a number of significant lessons from the Australian and American experience which assisted the reform process in Britain.

As a result the project made a contribution to the reform process within England and Wales, as a close reading of the Commonhold and Leasehold Bill will reveal. The leasehold reforms in the Commonhold and Leasehold Reform Bill will result in leaseholders gaining greater control over their homes, should they wish to do so, by being given the Right to Manage their building

and an easier means of collectively buying-out the freehold. While these reforms go some way to address the perceived ownership and management failures of the leasehold system, the parallel introduction of commonhold provides a clear admission that the leasehold reforms are inadequate. Although commonhold ownership will not eliminate all problems that can and will arise within property that has more than one ownership interest, it will create a structure better able to address most of them.

Commonhold, when enacted, will establish a new home ownership system, which mirrors very closely governance systems that operate in both Australia and the United States of America. Individual ownership and collective governance ensures the proper ongoing management of the building in the interests of all owners. Further, moves are being made to set in place a number of the supporting structures necessary to ensure this new system functions properly. Ensuring a good information and advice service as well as a responsive and inexpensive dispute resolution system will be core to the success of this major piece of property law reform.

While England and Wales have opted to create a new form of property ownership, in Scotland incremental reform remains the preferred approach. This is not surprising given that within Scotland there was a markedly different starting point for reform, namely that individual ownership of multi-owned properties was already possible. Consequently the debate to date has largely focused on legal concerns around title provisions and the common law. This study did, however, manage to open up a wider reform debate encompassing both consumer and professional property interests. It is also worth noting that this issue is a core consideration of the recently created Scottish Executive Housing Improvement Task Force. So although this work has fostered much debate in Scotland, it has yet to deliver any tangible policy response.

This work has, in essence, advocated a particular policy approach based on a considered understanding of the key issues, both here in Britain and in other comparable national contexts. It has also built upon a significant body of previous research work, funded by the Joseph Rowntree Foundation, on ownership and governance, property maintenance, and the need to make better use of flats within future housing strategies.

1 Ownership with collective responsibilities

Purpose of study

Flats, whether within purpose built or converted properties, have some common characteristics, both as a consequence of their physical structure and resulting ownership requirements. If flats or other high density housing developments are to play an integral part in the continuing growth of mass individual home ownership in Britain, there is a need to create a legal arrangement whereby individual ownership of the property also accommodates collective responsibility for its ongoing governance.

Cross-national experience is having an increasingly powerful impact upon public policy makers (Clasen, 1999). Governments are now more likely to look to other countries for new ways of addressing specific, yet universal, problems such as social security, criminal justice or housing allowances. Such cross-national lessons are, however, often based on a superficial understanding of these programmes since due consideration is rarely given to the socio-cultural institutions which underpin these particular social policies and strategies (Ball *et al*., 1988; Lowe and Kemeny, 1998). Clearly, there is a far wider range of conditions that contribute to the success or failure of a particular policy approach. While lessons can be drawn from cross-national experience, it is critical to appreciate and respond to the different legal, political, social, economic and cultural contexts.

Within this context it is also critical that the problems being addressed are directly comparable (Doling, 1997). Valid lessons from cross-national experience can only be drawn on the basis of a systematic application of knowledge about the particular problem under investigation, coupled with an appreciation of how specific national policies and institutions operate (Heidenheimer, 1990). Only by adhering strictly to these requirements is it valid to draw lessons from one jurisdiction and apply them in another.

Given the universality of the ownership and governance issues that are common to flats and other high density housing developments, it seemed highly pertinent to examine how other countries have sought to address these same issues, albeit within different and distinct legal and cultural contexts. Both Australia and the United States provide useful bases for comparison in this regard, given that both share the same legal inheritance, English common law, as well as a common language. Given the parallels outlined above, and the explicitly practical focus of the study, many of the difficulties associated with superficial comparative analysis can be overcome.

This study builds upon previous work in this field (Bailey and Robertson, 1997a). It also initially draws on two recent legislative reform exercises, namely the initial leasehold reform proposals for England and Wales, and the proposed Law of the Tenement reforms announced for Scotland. The prime focus of the initial envisaged legislative change for England and Wales was on resolving the ownership issue. The notion of creating a new legal form of ownership, called commonhold, was still very much in limbo. In Scotland, where the nature of ownership had not been at issue, the focus of legal reform was on enhancing the common law as a means to encourage more effective decision

making to ensure ongoing property maintenance. Neither legal exercise appeared to appreciate fully that effective management within multi-owned property is dependent on establishing an effective governance regime. Ensuring this was properly appreciated and core to any reform exercise has been a key consideration for this study.

This comparative socio-legal study was specifically designed to engage fully with this dynamic policy environment. Its prime focus was to examine and appraise the practical day-to-day operation of the ownership and governance regimes which operate for multi-owned housing developments in both the United States and Australia. The lessons learnt from this work would then be used to suggest improved legal and governance remedies for similar 'owners' in both England and Wales, and Scotland. The specific legislation which was analysed included the United States Uniform Common Interest Ownership Act, the California Common Interest Development Act, the New South Wales Strata Schemes Acts, the Community Land Development Act and the Queensland Body Corporate and Community Management Act. All the applicable regulations were also analysed (see Budgen, 1999; Budgen and Allen, 1999; Rosenberry, 1998a, 1998b, 2000a).

Revised method

The study, as originally envisaged, was to be conducted in three distinct parts. The first of these was a thorough examination of the failings and limitations of current ownership and governance arrangements, in both England and Wales, and Scotland. As part of this work the potential problems which could emerge from their respective reform agendas would also be considered. Both parts of this first stage exercise were to be conducted in close consultation with the key actors in this policy area. From this consultative work a checklist of problems and issues, which must be fully considered in any reform package, were to be drawn up. It was this checklist that was to provide the basis, or specification, for the socio-legal comparative exercise involving both Australia and the United States.

The comparative aspect of the work, the second part of the study, would attempt to focus on the applicability of the legal options available from both Australia and the United States to the respective English and Welsh, and Scottish contexts. Again the options which emerged from this comparative work would be discussed with the respective key actors, before a preferred approach was advanced. It would be the outcome of this process that would then be fed into the respective legislative reform exercises.

With the legislative timetable for England and Wales becoming active, within a few months of the study starting, the production of the comparative element had to be brought forward. This decision was given added emphasis given the Government's stated aim of bringing forward commonhold proposals, as well as those already highlighted in respect of leasehold. Given that commonhold would require existing models as operated in other countries to be drawn upon, this was an opportunity which could not be passed over. As a result, a great deal of consultation work was conducted with the property professionals, which was focused on addressing problems and potential solutions within an envisaged

commonhold context. It was not possible to structure this consultation element as had originally been planned. Thus eight months into the 16-month project, a comparative law report was produced which identified the issues in relation to the creation and operation of commonhold projects (Rosenberry, 2000a). By the time the study was completed the Government had introduced the Commonhold and Leasehold Reform Bill for England and Wales.

The reform efforts in Scotland also changed during the course of this study. The Scottish Law Commission published a report detailing its proposals to reform of property titles conditions (Scottish Law Commission, 2000). This detailed set of legal reform proposals was the logical next step following the abolition of Feudal Title in Scotland. Although having been passed by the Scottish Parliament, and receiving Royal Assent in 2000, this piece of legislation still awaits final implementation. The forthcoming Title Conditions (Scotland) Bill will set down a reformed system of property ownership for Scotland and, once passed, the last piece of property reform, the long awaited overhaul of the 'Law of the Tenement' will then commence (Scottish Law Commission, 1998a). So although in Scotland the pace of legislative change did not demand any alteration in the original sequence of the study, careful consideration had to be given to the dynamic nature of the rapidly changing policy environment.

Conducting any study within such a fluid policy-making environment has its difficulties. As a result, the project differs from the normal research work funded by the Joseph Rowntree Foundation. Rather than being one of the many contributors to an elongated policy debate, which in time may result in policy change, in this case the English and Welsh elements of this study have helped greatly in shaping the commonhold legislative proposals that were introduced. It is hoped that the Scottish component will have a similar influence on Scotland's property law reform agenda.

Background

Flat living has a long tradition in Britain. Although purpose built flats in England and Wales do not constitute a substantial housing tradition, they do exist and have become more significant over time. Conversions, especially of larger terraced and detached properties, have been common since the 1950s (Hamnett and Randolph, 1988). In London there are now some 900,000 flats, although other parts of England and Wales do not display such significant concentrations (DETR, 1998).

Recent data published by the NHBC show that across England in 1999, over 17 per cent of 124,676 new housing starts that year were either flats or maisonettes (an individual flat on two levels) (NHBC, 2000). Greater London dominates, with 59 per cent of new starts for 1999 being in this category, marginally up from 58 per cent in 1995. Significant growth in flat and maisonette construction was also recorded for the South East, up from 15 to 19 per cent; the North East, from 9 to 11 per cent; and Merseyside, from 14 to 19 per cent. Other English regions displayed a slight dip in such starts over the same period. Flats now represent a significant and growing part of the English housing market, dominating the London market, and distinct sub-markets in other

regions. Overall, the last house condition survey estimated that 8 per cent of the private housing stock in England and Wales consists of flats, while a small element of other high density housing forms, particularly in newer developments, has collective management agreements and responsibilities (ONS DETR, 1998).

Scotland has a stronger tradition of flat living, which reflects the European underpinning of Scots Law, rather than the English common law tradition (Robertson, 1992). Tenements were the main housing form built in urban areas in the nineteenth century. The quality and room size of these urban housing forms varied considerably, from the cramped Glasgow 'room and kitchen' and 'single end', to the spectacular Edwardian tenement suburbs of Glasgow's Hyndland district, and Edinburgh's Morningside (Laird, 1999; Worsdall, 1979). The four-in-a-block was also a common flat format in most Scottish towns during the nineteenth century. Although flats became very much the preserve of social housing, from the 1930s to the 1970s, they are now, once again a key component of the private housing market.

Figures, again from the NHBC, for 1999 show that construction of flats and maisonettes amounts to 28 per cent of the 18,144 starts for that year (NHBC, 2000). The last Scottish House Condition Survey estimated that 38 per cent of Scottish private housing were flats (Scottish Homes, 1996). This figure has been boosted over the past 20 years by the high proportion of flats which have been sold into home ownership through the statutory right of public sector tenants to purchase, at discount, their rented home, the so-called 'Right to Buy'. In total, just over three-quarters of such sales were flats, reflecting the traditionally higher proportion of flats constructed by local authorities and state housing bodies such as the Scottish Special Housing Association and the New Town Development Corporations (Scottish Homes, 1996).

So the varied and different developmental histories of Britain's towns and cities have created markedly different concentrations of flatted and high density accommodation. Yet, across Britain, flatted and other multi-owned developments are undergoing something of a renaissance. This is largely because current urban, housing and environmental policy debates favour such developments given the need to achieve urban concentration through the reuse of brownfield sites (see Breheny, 1996, 2000; CEC and Coleman, 1990; DETR, 1999; EDAW, 1997). Again this recent change has a significant geographic dimension, given the severe development pressure on London and the South East. Other urban areas, or distinct parts of urban areas, are also undergoing similar development pressures.

Problems with multi-ownership housing

Multi-ownership housing in Britain does, however, pose particular problems. Within Britain the notion of individual home ownership is well understood, given its strong and long-lived cultural and political overtones. Where ownership also encapsulates certain mutual or collective responsibilities, the popular notion of 'a man's home being his castle' is challenged. This is further compounded when owners completely misunderstand the nature of their ownership interest.

England and Wales

Outright, or freehold ownership of individual flats is uncommon in both England and Wales. This is because legally it is not possible to enforce 'affirmative covenants' against subsequent purchasers of that property. Thus, under a freehold system, it is impossible to make adequate provisions for the long-term maintenance of the building because it is not possible to enforce service charges, or other affirmative obligations against anyone other than the initial purchaser, who had agreed to this arrangement.

As a consequence, what are commonly thought of as 'owner occupied' flats are, in fact, held on long leases. Legally, leasehold tenure and freehold ownership are not the same thing. A leaseholder is a tenant of a landlord (or freeholder) who holds outright ownership of the building and the land upon which it sits (Barnes, 1968). The leaseholder has a right to occupy the flat in return for a significant initial premium and a small annual ground rent. The leaseholder also has the right to sell the flat, or more accurately, to sell the occupancy rights for the remaining period of the lease. Lenders add to the popular confusion about ownership by treating long leases as mortgageable assets, provided the lease has a sufficient unexpired term to run. The lease's value, therefore, declines over time with full ownership rights reverting to the freeholder when it expires. Hence the notion of a lease being a 'wasting asset', rather than an appreciating asset, as has been commonly, but not always, the case with home ownership.

Leaseholders do not, however, consider themselves to be renters. Rather they see themselves as 'owners'. Because of this false perception they are often shocked to find out that they have so little control over the maintenance of their building. So while the concept of home ownership is so firmly embedded in the British psyche, the actual legal realities are often at variance with that popular understanding.

Attempts have been made by consecutive governments to solve the problems inherent in the existing leasehold system. For example, leaseholders under certain circumstances have been given the right to purchase the freehold. This is referred to as 'enfranchisement'. However, the most fundamental criticism of the freehold system, and the source of greatest resentment is the leaseholders' inability to control the actual day-to-day management of their flats. Rather it is the landlord, or freeholder who decides upon the quality and cost of the management and maintenance regime. There is also strong evidence that this arrangement has been open to abuse, with unscrupulous freeholders taking advantage of their position (Cole and Smith, 1994; Cole *et al*., 1998). Leaseholders are obliged, under their lease agreement, to pay these costs in full.

Overall, English leasehold law has become extremely complicated and confusing. Few solicitors or barristers fully understand the intricacies of the current law, and even fewer 'tenants' understand it. Leasehold as a form of property ownership, has proved to be unstable in the long term, and has been subject to almost continuous reform, much of it misplaced (Bright, 1994; Cole and Smith, 1994; Greenish, 1994).

Scotland

Scotland has a very different legal tradition. Through the use of what are termed real burdens,

a Scots Law conveyancing device, both 'positive' and 'negative' obligations can be made to run with the title of the property. Within any multi-owned property in Scotland common elements, such as the roof, associated rainwater goods, common stairs, external walls, the solum [bare earth below a building], backgreen, backcourt or common garden can be made the joint responsibility of all owners. This is achieved through specifying such arrangement in individual title conditions, not through the common law.

Property law in Scotland has always had two distinct elements. Firstly, and most importantly, there are the individual properties' title provisions. Secondly, there are a set of common law rules, the so-called 'Law of the Tenement'. The common law rules of 'common interest' also play a role. Legally title provisions always take precedence over the common law.

Provisions detailing the responsibilities for the upkeep, management and maintenance of the building are typically to be found in the property's title deeds. Title deeds define the physical extent of the property and specify the rights and responsibilities that pertain to that particular property. The deeds also set down the real burdens and servitudes to which the property is subject, either at length or by reference to another deed, the most common of these being the Deed of Conditions.

Typically these documents, either individually or collectively, set down the management, maintenance and use arrangements for the property: its governance regime. Maintenance responsibilities are detailed, as are any management arrangements to ensure decisions are made and then implemented. Within the Deed of Conditions, provision is often made for the appointment of a property manager, or Factor. Arrangements for apportioning the cost of any works or services may also be detailed.

While the theory is sound, practice often produces less than satisfactory outcomes. Although specific governance requirements can be included within the title deeds, this is a far from universal practice. Generally speaking, the older the title deeds the less detail they contain. Specified management arrangements are often partial or inadequate, the result of either poor initial drafting or the inability to predict situations that will arise in the future. Crucially, the titles fail to prescribe a decision-making process that allows owners to make a decision that is binding on them all. Owners may, therefore, be obliged to maintain the common parts, but the title deeds do not allow for majority decision-making. As a result, organising repair and maintenance work can become an administrative nightmare. More modern title deeds usually create a comprehensive and workable set of management arrangements.

The common law provides a basic default position for all tenement properties. If title deeds are silent with respect to a particular issue, then the common law applies. However, the 'Law of the Tenement' adopts the view that ownership within a tenement is individual, the only exception being the common entrance (or close), the roof above the close and the common stairs (Reid, 1996). In the case of the common stairs, however, only those flats that obtain access, via the stairs, share that particular maintenance responsibility. All other building elements are deemed to be in the individual ownership of one or other of the flat owners. Owners of top floor flats have the responsibility

for maintaining the roof immediately above their property, and ground floor flats have the same responsibility for the solum immediately below their flat. Ownership of all internal walls separates at the mid point, while each owner owns their respective portion of the external walls. Under the common law there is, therefore, no requirement for a common decision-making body, because there is no commonly owned property (Scottish Law Commission, 1998a).

The problem with this arrangement is that such apportionment of responsibilities is generally considered to be unfair. Top and ground floor flats have a disproportionate liability for repair and maintenance costs. The argument that these differences are reflected in property value variations, namely that ground floor and top flats are generally cheaper than mid flats, is no longer accepted. As a result of this perceived unfairness, individuals often come to different informal arrangements with the cost for roof repairs, for example, being equally shared. Such agreements are, however, not legally binding on all owners, unless they are properly set down in the title deeds. A change in ownership can often bring to an end such internal arrangements.

Finally, the law of 'common interest' is designed to protect an individual's property rights. Under Scots Law each flat owner has a right of 'common interest' in those parts of the building which, although they do not own them, provide either shelter or support to their property. An owner can carry out building works to their property but such works must have regard to their duty of 'common interest'. Removing an internal wall, for example, which is of structural significance to the building, would be a breach of 'common interest'.

Summary

Overall, the Scottish, and English and Welsh approach to accommodating individual home ownership within multi-ownership buildings has long proved highly problematic. This experience is in marked contrast to the approaches adopted in other countries. Rather than holding with existing legal models of property ownership, most countries have developed a new form of property ownership to accommodate the ownership complexities presented by such multi-owned private property (see Bailey and Robertson, 1997a; Budgen, 1999; Budgen and Allen, 1999; Rosenberry, 1991, 1998a, 1998b; Van Der Merwe, 1994). Under these arrangements the individual property is owned in freehold, while the common parts of the building are either shared amongst all owners, or are owned by an association to which all owners are required to be members. These arrangements are statutorily set down, thus providing a degree of uniformity across all multi-owned properties. In Chapter 2 the various issues that arise through the creation and operation of such legal arrangements are considered. Chapter 3 examines the lessons such models could provide for England and Wales; Chapter 4 does the same for Scotland. The report concludes with proposals for taking forward this reforming agenda.

2 Common interest communities

Introduction

Common interest ownership is a form of multi-ownership private housing prevalent in both Australia and the United States. This chapter explains the elements common to such ownership arrangements by examining the laws and practices that operate in California and those states in the United States that have adopted the Uniform Common Interest Ownership Act. To gain an understanding of the context in which the Australian and American systems operate, readers should consult the report *Flat Management in Three Countries* (Bailey and Robertson, 1997a). A more detailed exploration of these particular legal systems is provided in a separate report emanating from this study, *Commonhold Law: Problems and Potential Solutions* (Rosenberry, 2000a), published by the Joseph Rowntree Foundation.

Unlike the situation described in Chapter 1, for Britain overall, home owners in multi-ownership housing developments in Australia and the United States have a freehold interest in their individual property (or unit), plus an ownership interest in the common parts, or a compulsory interest in the community association that legally owns and controls the common parts. The prime objective of this study was to improve general understanding of how such arrangements function, with a view to promoting their adoption within both England and Wales, and Scotland.

Property interests in common interest communities

In both Australia and the United States, common interest communities can be residential, commercial or industrial. Residential common interest properties generally require more consumer protection because it is assumed that residential consumers are not as sophisticated as business people when purchasing property. As a result, the power of both the original developer and the subsequent board of directors in such residential communities is usually more restricted. Regardless of whether a common interest community is residential, commercial, or industrial, there are four basic legally defined common interest arrangements:

- *Condominium* (termed strata titles in Australia)
  In a condominium the unit owner owns a freehold interest in a unit coupled with a tenant-in-common interest in the common areas. It is also possible to have a property interest called limited common area, which refers to a portion of the common area that is used by one or more, but not by all the owners. For example, balconies, patios and parking spaces can be limited common areas. The advantage of such an arrangement is that it offers more control over the maintenance and appearance of these areas.
- *Housing co-operative* (termed company titles scheme in Australia)
  In a housing co-operative the entire structure is owned by a corporation. Each owner has a lease for a unit within the building coupled with an interest in the corporation. This form of ownership is similar to the situation that arises in England and Wales where the leaseholders have agreed to collectively enfranchise.

- *Planned community* (termed community titles in New South Wales)
  In a planned community the unit owner owns a freehold interest in a separate area, sometimes called a unit (or lot), coupled with an interest in the community (owners) association. It is this association that owns the common areas. The unit owner may also own an interest in a portion of the common area that is defined as a limited common area. As noted earlier, these are portions of common area reserved for the use of one or more, but not all, of the owners.
- *Master planned community*
  A master planned community consists of two or more of the above arrangements. For example, two blocks of flats (A and B) could be part of one master planned community. Representatives of both blocks would vote on matters that apply to the common area. However, only the owners of flats in block A would be eligible to vote on those matters affecting block A and similarly only owners of flats in block B would be eligible to vote on those matters affecting block B. This form of ownership is particularly beneficial in a building in which both commercial and residential units co-exist. The residential owners would not vote on matters that solely affect the commercial area, and the commercial owners would not vote on those matters that solely affect the residences. Both owners do, however, have interests in common in relation to the block as a whole.

To determine what type of common interest community exists, all you need to know is who owns the common area. If it is owned under a tenants-in-common arrangement, then it is a condominium. If a corporation owns both units and common area, it is a housing co-operative. If an association owns the common areas, it is a planned community. If there are two or more commonhold communities in one association, then it is a master planned community.

In the United States few housing co-operatives exist outside of New York and Chicago. Co-operatives also tend to be older communities. It is now rare for a developer to create a housing co-operative, because in some states the interest in the corporation is a personal property interest and owners cannot obtain a mortgage on their individual unit. Thus, it is difficult to obtain financing. Also, if one of the owners fails to pay their portion of the mortgage, then all the other owners risk having the entire building sold off at a foreclosure sale. This is because the mortgage is held over the entire building, and is not broken down into the separate units. Consequently, co-operative members will either have to cover the defaulting member's debts, or risk losing their individual interest in their own unit. These problems do not exist in all states.

Housing co-operatives, or company titles schemes, also exist in New South Wales in Australia. As in the United States, most of these pre-date the creation of condominium and planned community law. Under state co-operative law the association that owns the building has to be a traditional company, with each co-operative member being a shareholder in that company. As one solicitor expert in this field observed, 'that means they operate as a

free for all', producing a wide variety of individual company arrangements. The negative experiences of this lack of standardisation (Budgen and Allen, 1999) added to the pressure to create a new form of multi-ownership arrangement in this state.

Ownership interest in a common interest community

Within a common interest community, as was noted above, an owner has two, and on occasions three distinct property interests. They are as follows:

- *Freehold*
  In a residential common interest community this is the area that the owner regards as their home. Within a condominium this is sometimes called a 'unit', whereas in a planned community consisting of detached houses it is often referred to as a 'lot'.
- *Common parts*
  In all common interest communities the owner has an interest in the common parts. In a condominium the owner owns a tenant-in-common interest in the common parts, which are typically areas such as the roof, external walls, common gardens and common walkways. In a planned community, which is usually detached housing, the owners are members of an association that owns the common area. In a planned community the common areas may include parks, internal streets, and recreational facilities.
- *Limited common parts*
  An owner may also own an interest in a limited common part. As mentioned earlier, these can include balconies, patios and parking spaces.

Functions of the commonhold associations

In one respect the directors act like a quasi-government in that they enforce rules, which is similar to enforcing laws; maintain quasi-public common facilities such as gardens or parks; and levy assessments to carry out their duties, which is similar to a government levying taxes.

The community or owners association is also required to act like a business, ensuring the well being of their collective asset, via prudent financial and risk management. It is important to note that although the association is generally a legally defined corporation, in both the United States and Australia, they are treated differently from other corporations because of a number of distinct operating differences.

For example, volunteers generally do not run traditional companies. For-profit traditional companies are in business to make a profit, whereas commonhold associations are not. Thus, some laws that have been created to govern traditional commercial companies may not be applicable to community associations. Traditional companies do not levy assessments on their members, and individual members do not risk losing their homes if these charges are not paid. This in a large part explains why more consumer protection is needed for a residential commonhold association, than is the case for traditional companies. Voting in traditional companies is by shareholding, not based on a variety of measurements, such as floor area or

the market value of real property, as can be the case within certain commonhold associations.

Further, the ownership interest in a traditional company is a personal property interest. In a commonhold association the interest is in 'real' property. Finally, few traditional companies have the same control over the daily lives of their members, as is exercised by a residential community association.

In addition to the governmental and business role, associations are also expected to play a role in fostering and developing a sense of community. It is felt that if there is a shared sense of community between all the owners, they are more likely to abide by the rules set down for the community. Encouraging and promoting participation in the decision-making processes of the association is expected, but it is not a legal requirement. A sense of community is generally created through owner education and the promotion of social events.

While owners associations tend to act through their elected board of directors, the law in both the United States and Australia restricts their actions. There are usually certain designated rights that only the owners can exercise. For example, in California the board cannot raise assessments by more than 20 per cent over those of the previous year without a specific vote of all the owners. Some state statutes prohibit the board from selling association property without a vote of all owners, and some also restrict the type of rules which the board can enact.

Volunteer boards of directors have a duty of ordinary care as well as a duty not to engage in self-interest. In some American states the developer, while in control of the board during the initial marketing stage, is held to a higher standard, trustee standard, because of the inherent conflict of interest. The basic issue being addressed by such a law is to guarantee that the developer is acting in the best interest of the owners, rather than in the developer's own business interest.

Given these responsibilities it is often difficult to get people to serve on these boards. Board members are volunteers, and as such usually do not receive any payment. Further, they can sometimes be hassled by their fellow owners who hold them to account for all the decisions they make. Owners would be even more reluctant to take on such responsibilities if they could be sued individually for their actions as a board member. Thus, some states limit the liability of board members, either through common or statutory law.

Statutes can also limit the owner's liability to their percentage interest in the association. In other words, if an owner owns a 1/100 interest in a 100-unit block of flats, that owner is only liable for 1/100 of any judgement made against the association.

Operational issues for community associations

Voting

Most jurisdictions provide for a 'one unit – one vote' arrangement. If two or more people own a unit, they still only receive one vote. Other jurisdictions provide voting rights based on floor area, or the value of the unit. Also, it is possible for a jurisdiction to indicate a preference for one type of voting structure, but permit the governing documents of the community to provide for an entirely different scheme.

Some states also permit developer 'weighted voting', because they believe the nature of any project being marketed should not be dramatically altered until after a significant percentage of the units are sold. For example, for a limited period of time, during the marketing period, the developer may be entitled to three votes per unit owned, rather than just one. In this way the developer retains overall control until three-quarters of the units are sold. Other states expressly prohibit this practice, insisting that all units have the same number of votes. In those states there are usually other ways in which developers can retain control.

Proxy voting can pose particular problems if, as a result of their use, either one owner, or a group of owners are able to control the association. The limitations on proxy voting are discussed later in this report.

Covenant and rule enforcement

Commonhold communities cannot function unless what are termed negative and affirmative covenants can be enforced against subsequent purchasers. Examples of negative covenants include restricting pets in the common areas and prohibiting specific items, such as hanging washing, on balconies that are open to public view. Examples of affirmative covenants include the obligation to pay assessments and to maintain the owners' portion of the common building.

There is a need to have an effective, fair and inexpensive method for enforcing such covenants. Both internal and external dispute resolution mechanisms exist for such associations. The internal dispute resolution mechanisms relate to the manner in which the association notifies owners of violations, if necessary fines them, and in protracted disputes places a lien on their freehold interest. A lien is a charge placed on an individual's property when they have not paid a debt owed to the association, such as past due assessments. An assessment lien is like a mortgage lien that is placed on property when one borrows money. Courts can foreclose liens and sell the property to pay off the debt to the association.

External dispute resolution mechanisms can include mediation, informal arbitration, formal arbitration and litigation mechanisms. In certain American states there is widespread use of private mediation and informal arbitration procedures that often do not involve lawyers. Typically these are designed to precede formal legal action in an attempt to secure some form of resolution without having to pursue a potentially expensive contested case. Individual states in the United States are not required to follow a uniform procedure. In Australia, however, the use of specialist state funded disputes resolution systems are standard, and are considered to be both effective and inexpensive.

Asset and risk management

States differ in the extent to which they control the association's ability to deal with the repair and maintenance of major building components and capital improvements. For example, a jurisdiction may prohibit the association from making capital improvements costing in excess of a specified amount, without a vote of the owners. The definition of what is considered to be repair or maintenance, and what is an improvement can become an issue of contention within an association.

Many states also require the association to maintain a variety of insurance policies.

Insurance is one of the main protections for individual owners. Some states also require the association to maintain property, general liability, and director and officer liability insurance. Associations may be required to maintain additional forms of insurance, depending on either the characteristics of the association or the property it manages.

Financial management

While the requirements for financial reporting vary considerably amongst the different states in the United States, it is standard to require an association to prepare an annual budget. In addition, some insist that the board of directors not only keep financial records, but also require them to review the financial records on a periodic basis and reconcile all bank statements.

Most states require the association to fund both a general operating fund and a reserve fund. Even where there is no statute or regulation that specifically demands the funding of reserves, the common law duty of ordinary care probably does. This common law obligation requires association directors to act as reasonably prudent people in the management of all corporation assets. In the case of commonhold communities it is considered prudent to maintain a reserve fund for future long-term repairs. In addition some states demand periodic reserve studies. The association, in order to meet this obligation, needs to compare the community association's estimated long-term expenditures against its reserves. Only then can it determine whether it is, in fact, setting aside enough of a reserve fund to cover long-term major repairs, such as replacing a roof.

To meet all these associated costs associations levy monthly assessments against all the units. In both Australia and the United States it is the board of directors, which determine the level of assessments. This power is often subject to the approval of the owners. As the owners, in effect, set their own charges, they are not in a position to argue that the assessment is unreasonable. If the owners do not like the assessment level they can recall the board, elect a new board of directors, or in some specific instances override the decision of the board of directors. The courts do not, as a rule, become involved because it is felt that the system would not work if owners could challenge the reasonableness of assessments. If one owner does not pay, the other owners will be required to cover the debts of the defaulting owner if the property is to be adequately maintained. Further, the legal costs to defend a challenge must be paid by someone, and these costs could fall on the other owners.

However, owners can file a lawsuit alleging that the board has violated a particular legally required procedure. They can also take similar action if it can be proved that the association's board has breached its duty of ordinary care in setting assessments. It is, however, much more difficult to prove such an allegation than it is to prove that assessments are unreasonable. As a result, assessments are rarely challenged under either legal theory.

As mentioned previously, when an owner fails to pay their assessment, for a specified period of time, the association may file a lien. If the lien is not paid the court can sell the property at a foreclosure sale. At the sale, the owner receives any proceeds remaining after the debts and any legal costs owed to the association have been paid. Certain jurisdictions permit what is termed a non-judicial foreclosure

that is a private sale. Most jurisdictions, however, require court proceedings. Such foreclosures rarely occur because owners generally pay their assessments, usually prior to a lien being filed.

In the United States it is relatively easy for an association to borrow money. It can either use the common parts as security for a loan, or it can use its income stream. Using the income stream is similar to a business using its income stream as security for a loan.

If the loan is not paid, the bank can step in and collects the association's assessments in order to repay the loan. The bank can also foreclose on a particular unit, if the owner fails to pay their pro-rata share of this debt. There is a very competitive market for such loans because the associations do not permit these loans to go in default.

While associations can enter into contracts with banks, some jurisdictions impose limitations on the board of director's ability to enter into specific contracts with third parties. For example, while the developer is in control of the association, the law often imposes restrictions on the types of contracts into which the association can enter, or alternatively gives the association the ability to cancel what are termed 'sweetheart contracts'. Sweetheart contracts are those that are advantageous to the developer, but financially harmful to the subsequent owners. An example of a sweetheart contract would be where the developer requires the association to enter into a long-term arrangement with the developer to use recreational facilities at an inflated price.

Amending the documents of commonhold community

Statutes, regulations and governing documents usually provide for the amendment of governing documents. This is an essential requirement given that even the brightest of developers cannot fully anticipate all the changes that might occur over the lifetime of the development. Some jurisdictions permit a simple majority to amend particular provisions, such as use or pet restrictions. However, they generally require a super-majority (for example, $66\frac{2}{3}$ per cent) to amend provisions, that would alter an individual's property interest. One example of this would be the termination of the community association. Lenders may also demand an affirmative vote of a super-majority of the owners to amend provisions, given that such a change directly impacts upon their security interest.

Problems can arise when a super-majority is required to amend the documents. It is often difficult to get such a super-majority to vote. California responded to this situation by permitting the court to amend documents, but only if certain prescribed procedures are met. The state of Queensland in Australia adopts an interesting approach when a unanimous decision is required. Rather than requiring a 100 per cent vote in favour of the amendment or proposition, the association needs to achieve a vote without dissent. Under this system, someone who does not vote is counted as a vote in favour instead of a vote against.

Consumer protection

Most states require specific disclosures in the sale of properties within commonhold communities. California, which traditionally adopts more stringent consumer orientated legislation when compared to other American states, requires every purchaser in a commonhold community to receive a copy of the governing documents. In addition, purchasers receive a brochure from the California Department of Real Estate that explains the owners' rights and obligations under such ownership arrangements.

The prospective purchaser can also evaluate the community's reserve study. This, as was noted earlier, identifies the association's major building components, estimates their life expectancy, and then compares this to the level of reserves available to replace or repair them. Finally, state law requires the purchaser to be told about the insurance policies maintained by the association and whether the association is in litigation. California also demands numerous other disclosures which, although not part of the commonhold legislation, are covered by California real estate sales law. Although California requires more disclosures than most other American state jurisdictions, it is generally agreed that purchasers need to fully understand their rights and obligations prior to taking up residence in a commonhold community.

Administration of commonhold communities

The extent of government involvement in the creation of commonhold communities differs markedly among the different states. Some jurisdictions have almost no regulation other than through local planning law. However, others such as California insist that a developer cannot create a residential commonhold community without receiving the formal approval from the Department of Real Estate. This arrangement allows the Department of Real Estate an opportunity to closely review the governing documents to ensure that they conform to regulations. The Department also reviews the developer's proposed initial budget to determine whether the estimated assessments are sufficient to properly maintain the property. There is an assumption that developers have an incentive to initially set low monthly assessments in order to sell the homes more easily. This practice, called 'low balling', causes major problems later on when the owners discover the assessments are insufficient to meet the association's obligations and a dramatic increase is demanded. Again, California, as a result of its strong consumer protection legal culture is alert to this practice. Most other jurisdictions, however, do not review the governing documents of new developments in this detail.

Summary

Common interest community ownership stands in stark contrast to the existing arrangements in both England and Wales, and Scotland. Owners are in fact owners, and they share with their fellow owners a direct interest in the governance of the building and associated grounds. In contrast to leasehold arrangements, owners do not hold a diminishing asset over which they have little effective control. Owners exercise control through direct participation in the community association that is directly

responsible for the governance of the community, including enforcing the covenants and maintaining the common parts. This association, generally acting through its board of directors, governs the development in what some describe described as a quasi-governmental manner. It determines the amount of monthly assessments it requires the owners to pay, and uses this money to govern the community and maintain property values. It may also serve a social function, organising events for the mutual benefit of all owners. Depending upon the size of the community it can provide other services or perform other functions.

Unlike the situation in England and Wales and Scotland, statutes and common law create a standardised procedure for organising the governance of common property. Owners are more likely to know in advance of purchase what they are getting into, and understand the sanctions should they fail to play their part. They are also made aware of the ongoing costs associated with living in this type of development, and do not budget solely on the basis of mortgage repayments. The following chapter picks up on these issues, and explores them in greater detail in respect to the situation in England and Wales.

3 The reform context in England and Wales

Introduction

As mentioned in Chapter 1, when the study began the focus of legislative reform in England and Wales was solely on leasehold. Shortly afterwards the emphasis changed, with leasehold reform becoming but one element of a wide-ranging reform of English property law. The introduction of commonhold, in effect a new form of property ownership, represented a second key element of property reform. This study, by opting to bring forward its comparative legal element, was able to offer insight into the issues that arise from these changes. Through using this insight, and sharing it with those directly affected by these proposed legislative changes, it was hoped that a more robust set of legislative arrangements could emerge. Blending such international insight with existing English and Welsh experience of these matters would help to ensure the successful implementation of both these radical new ownership arrangements.

Reform process

A consultation paper was issued in 1998 on leasehold reform, to which some 900 responses were received. In 1999 the Government then opted to combine leasehold reform with the introduction of commonhold law. A bill introducing commonhold had been prepared by the previous Conservative Government, but it was not introduced due to the lack of Parliamentary time caused by the run up to the 1997 General Election. The draft bill published in August 2000 represented a significant advance upon the previous Commonhold Bill (Lord Chancellor's Department and DETR, 2000).

As with the previous set of proposals, this White Paper also underwent an extensive consultation exercise (see Wagstaff *et al*., 2001). It was helped in this work by the Leasehold Reform Working Party, a body originally convened by the Leasehold Advisory Service (LEASE) to respond to the initial leasehold consultation paper. Included in this ad hoc grouping were representatives from a number of interested parties, including the British Property Federation, the Royal Institute of Chartered Surveyors, the Campaign for the Abolition of Residential Freehold, the Association of Residential Managing Agents and the Council of Mortgage Lenders, in addition to a number of individual leasehold specialists.

At the same time the Lord Chancellor's Department created a working party to discuss the introduction of commonhold law. The membership of this working party closely mirrored the Leasehold Reform Working Party, but was not identical due to the inclusion of representatives from Companies House, the Land Registry, as well as a number of others who would ultimately be involved in the creation and operation of commonhold communities.

Both working parties met many times, with a member of the appropriate governmental department attending most of these meetings. In the case of the Commonhold Working Party, a representative of the Lord Chancellor's Department chaired the meeting. As a result, many useful legislative suggestions developed out of these meetings. Equally as important,

however, was the fact that these meetings brought together, in some cases for the first time, this grouping of interested parties. Specialists from different fields, therefore, had the opportunity to speak directly with each other, and hear first hand from those ‘on the other side’. These discussions, held in a non-combative setting, proved very valuable to the overall policy development process. The contacts and relationships struck up through this process of active participation should have an impact that will last well beyond this preliminary legislative period. It is also something that should be capitalised upon for the future, given the need to develop workable regulations for day-to-day operation of the proposed commonhold communities. In both Australia and the United States the continuation of such arrangements ensures a process of ongoing reform able to accommodate the changing requirements of their commonhold communities.

Problems and reforms

As discussed in Chapter 1, there have long been problems with English and Welsh leasehold legislation. There are, at its core, three major problems that consecutive reform exercises have sought to address. Firstly, long leaseholders consider themselves to be ‘owners’, with all the rights of a freehold owner. They fail to understand that they are, in reality, ‘tenants’ with limited rights, who possess an asset with a value which diminishes over time.

Secondly, long leaseholders within blocks of flats have very little control over the actual management of their homes. They are unable to dismiss their managing agent because such agents are invariably either the landlord, or people hired directly by the landlord. This arrangement allows the landlord to hire any supplier they wish and, with some limited exceptions, pass the associated costs directly onto the leaseholders in the form of service charges. Again, except in a very limited set of situations, leaseholders have no right to object to the level of these charges. This arrangement also gives the landlord the option of hiring family and friends to provide such services, even when it is clear that others would be able to provide them more efficiently and at a lesser cost. Thus leaseholders, unlike other ‘owners’, do not have control over their homes.

Thirdly, if the tenant fails to fulfil the obligations of the lease they can lose their home through a process called forfeiture. The most common example of this practice is the leaseholder who, for whatever reason, fails to pay their service charges. Forfeiture permits the landlord to repossess the flat without compensation. It has always been felt that this sanction is completely out of proportion with the offence, given that action can be taken over the failure to pay just a few pounds. Although in practice forfeiture rarely occurs, the threat of its use is applied.

As also noted in Chapter 1, these three sets of problems affect a significant portion of the population. There are, in England and Wales, approximately 900,000 leaseholders resident in houses and a further one million in flats (DETR, 1998).

Numerous efforts have been made over the years to address these issues within the context of the existing system. Leasehold enfranchisement, namely the right for leaseholders to buy out the freehold of their

homes, has been demanded since 1880 (Hague, 1999). Initially, these demands were focused solely on the leaseholders of houses, whose lease terms were about to expire. This led to leasehold reforms being introduced under the Law of Property Act, 1925 and further revisions in 1951, 1954 and 1967. Later reforms measures, coming in 1985, 1987, 1993 and 1996 extended and broadened the reform agenda to include long leaseholders of flats. Many of the specific reforms introduced by these later revisions moved from addressing the freehold issue to challenging the landlord's monopoly management position. Incrementally, successive governments have sought to introduce ever more protections to long-term leaseholders, with the key reforms being as follows:

- The right to purchase the freehold, via enfranchisement, under certain prescribed circumstances.
- A leaseholder's right to information about the landlord and their service charges, insurances and related matters.
- The right for leaseholders to challenge, before the independent Leasehold Valuation Tribunal (LVT), the reasonableness of service charges, insurance premiums and the like.
- A legal obligation on landlords to hold service charge and sinking fund contributions in trust.
- A leaseholder's right to ask the LVT to appoint a new manager if the landlord is found to be in breach of their obligations.
- An additional right of compulsory purchase of the freehold, on more favourable terms, if the landlord is found to persistently default on his or her obligations.
- A legal obligation on landlords to first offer the freehold to the leaseholders if they intend to sell the property.
- A leaseholder's right to be consulted about (but crucially not exercise any control over) major works, the selection of contractors to carry out such works and the employment of a managing agent.
- A leaseholder's right to have a management audit carried out.

Yet, despite all these reforms most commentators believe the leasehold system of ownership is fundamentally flawed (DETR, 1998; Sopp *et al*., 1992). Bad landlords still continue to find ways to abuse their position over leaseholders, and this has generated significant press and political interest. Leaseholders, in turn, have found the systems established to redress their grievances to be cumbersome, time consuming and expensive (Blandy *et al*., 2001; Cole *et al*., 1998). Although legislators and practitioners have struggled over the years to keep the leasehold system going, it has clearly outlived its usefulness. At the most basic level it is an ownership anachronism, ill suited to an age of individualism. The time has long been ripe for the introduction of an entirely new ownership system for flatted or other multi-owned property.

Commonhold reform

As noted previously, the Conservative Government introduced a draft Commonhold Bill in 1996. Solicitors, property owners, lenders

and others all considered such a radical departure too complicated. Furthermore, the fact that approximately one third of the Bill was devoted to issues of insolvency, which has not proven to be a significant issue in either the United States or Australia, indicated a lack of understanding of the issues that arise in commonhold.

The incoming Labour Government made leasehold reform a key policy priority, but initially appeared less convinced about introducing commonhold. This attitude changed, however, and in August 2000 a combined Draft Commonhold and Leasehold Reform Bill and Consultation Paper was published (Lord Chancellor's Department and the DETR, 2000). The commonhold portion of the resulting Bill was far less complicated than its 1996 variant, largely because it opted to include only what were deemed to be essential provisions. The implementing regulations, which will be subsequently enacted, will control many of the operational aspects of commonhold communities. The advantage of having much of the operational law in regulations is that it will be easier to address any problems that may arise because the regulations are easier to change than statutes are.

The goal of this new system is not to correct the problems of the existing leasehold system, but rather to create an entirely new form of ownership for England and Wales which, by drawing upon experience from elsewhere, should avoid many of the problems that have long plagued the leasehold system. It will be a new form of ownership that shares a number of features with other ownership systems that already exist in most parts of the world.

Commonhold law will apply predominately to newly built structures, or entire buildings that have been converted from other non-residential uses. Because of the flexibility in the definition of commonhold, a wide variety of projects will be able to adopt this ownership arrangement. However, existing leaseholders cannot create a commonhold project through conversion, unless 100 per cent of the affected leaseholders wish to do so.

As mentioned in Chapter 2, there are three basic forms of common interest ownership: condominiums, co-operatives and planned communities. Commonhold ownership will closely mirror the systems that exist in both Australia and the United States. In a commonhold community the owner will again have two, and perhaps three distinct property interests: the freehold interest in the unit; a membership interest in the association that owns the common parts; and perhaps a limited use interest in certain common parts.

As in other countries, commonhold communities will primarily operate in residential buildings, such as a block of flats or an estate of single-family detached houses. Commonhold communities will, however, not be exclusively residential. A wide variety of other uses can employ this ownership vehicle. The model has been used to develop shopping centres, professional office buildings and parking structures. Further, it is also possible for commonhold communities to consist solely of vacant lots rather than occupied buildings. In each instance the lot, or unit, is held in separate individual freehold ownership. As a consequence of their holding, each owner automatically becomes a member of the owners association, which owns the common parts. Opportunities will also exist for a single

commonhold development to be composed of a combination of commercial and residential elements. For example, the top four floors of the development may be residential commonhold with the bottom floors being commercial commonhold. While similar arrangements would be subject to a Master Association in both Australia and the United States, this particular option was decided against within commonhold.

In order to create a commonhold community, it will be necessary to register the Commonhold Community Statement and Memorandum and Articles of Association with both the Land Registry and Companies House. As a result of this registration all potential owners will be aware of all the rules that relate to the unit they are intending to purchase. These two documents further define the rights and duties of the owners and the association. Once these documents are registered and a unit is conveyed, the commonhold community comes into existence.

A commonhold community, whether residential or commercial, will be governed by the commonhold association, the membership of which will be composed of all the individual unit owners. The association will be a company limited by guarantee, governed by a board of directors, elected annually by the membership.

As mentioned previously, most of the association's rights and obligations will be provided for in the regulations. Some, however, will specifically be mentioned in statute. For example, the association will have the obligation to maintain the common parts, and it must assess and collect commonhold assessments, to pay for the maintenance of these common areas. Assessments are similar to service charges, and will be set annually, based upon an estimate of the annual income and expenditure statement which the association will be required to prepare. The regulations may also require the association to create one fund for short-term maintenance and repair items and another, either a reserve or sinking fund, for long-term maintenance elements. Given that the monthly assessments may be insufficient to cover all unforeseen events, such as the need to replace all windows due to a design fault, the Bill allows the association to borrow money on the income stream generated from future assessments. The association will also have an obligation to insure the property.

In addition to the obligations to maintain and insure the property, the association will have an obligation to govern the community. This means that it will have responsibility for enforcing covenants or restrictions. The Bill recognises that it may not always be in the best interests of the community to have all covenants literally enforced and, thus, it will permit the association some leeway in this regard.

Because the association is to be a company limited by guarantee, it will be subject to corporate law. Corporate law was not, however, created to anticipate the particular needs of a commonhold association, an issue discussed in Chapter 2. There are significant differences between traditional companies and commonhold associations. As a consequence, careful attention will need to be paid to the nature of these differences when drafting the operational regulations for these associations. For example, generally speaking, a share in a company is personal property, whereas in a commonhold company it needs to be 'real' property. Another consideration is that the first

annual general meeting of a commonhold association will need to be sooner than that required under company law. Waiting a year to convene the first meeting would be highly inappropriate. Further, the commonhold association needs more than one director, and one director should not be permitted to have total management control. These represent just a few of the issues that will require careful consideration when drawing up the regulations for commonhold associations.

There will also be defined limits on the rights of owners in a commonhold community. For example, the Bill permits the regulations to control the length of leases. It is important to remember that any tenants within a commonhold community will be short-term tenants. There will be no long-term leaseholders, as is the present arrangement for flatted properties.

The Bill gives the association the power to enforce the covenants against any tenants. It also permits the association to collect assessments from the tenant if the owner is in default on his or her payments. Not all countries give the association this power. The reasoning, in this case, is that the association needs a remedy against the person who is enjoying the use of the property as well as those whose actions are affecting the other residents.

Finally, the Bill provides several means of altering the commonhold community once it is created. Some of the rights and obligations on the owners can be changed if they agree to amend the Commonhold Community Statement. The developer also has the right to add property, but only under prescribed circumstances. Common parts of the association can be sold, but again only if the owners agree to this. Units can also be altered, but only under certain prescribed circumstances. The commonhold community can also be terminated, but this would require an 80 per cent vote by the owners, or be the consequence of insolvency proceedings. Not all countries permit a termination on an 80 per cent vote of the owners; 100 per cent is more common. However, this provision is sensible given the experience of other countries. For example, in 1994 an earthquake destroyed major parts of Californian commonhold communities. As it is virtually impossible to get 100 per cent of the owners to vote for anything, it proved impossible to terminate these particular associations. As a result, the affected owners were in the unfortunate position of still having to pay their mortgages, but were not able to live in their homes. Yet, because the association could not be wound up they were also unable to sell the land on which their homes had existed. This provision will prevent a similar situation arising in England and Wales.

Leasehold reform

As mentioned previously, one of the most serious deficiencies under the existing leasehold system is that leaseholders, despite having a major equity stake in the building, have no right to manage the property. To address this issue the Government proposes that, after certain requirements are met, leaseholders will be given this right. Unlike the situation in the past, leaseholders will no longer have to prove that the landlord has improperly managed the building. Further, the landlord will also not be entitled to any compensation from the leaseholders should they take on the management of the block.

The Right to Manage does not replace the

Right to Enfranchise that allows a long leaseholder the opportunity to purchase the freehold interest on their property. Rather it provides another means of addressing the perceived failings with the current management arrangements for long leaseholders.

If leaseholders opt to exercise their Right to Manage, it will be necessary for them to create a company limited by guarantee. It is similar to the type of company that will operate under enfranchisement. This company structure will also be similar in operation and function to that which will be created under the commonhold legislation. In the case of the Right to Manage company only qualifying tenants and landlords will be members of the company. In commonhold companies all owners will be members. There are likely to be other differences between a Right to Manage company and a commonhold company, but these will only become apparent once careful consideration is given to enacting the subsequent operational regulations.

In addition to creating a Right to Manage the building, the legislation will make it easier for leaseholders of flats to exercise the Right to Enfranchise, which is their right to collectively buy out the freehold. The enfranchisement provisions of the 1993 Leasehold Reform, Housing and Urban Development Act created a complex set of rules limiting the types of leaseholders who could take advantage of the Right to Enfranchise and the types of properties to which the right applied. The current Bill attempts to simplify these rules. It eliminates the current requirements that two-thirds of leaseholders must participate in the enfranchisement process and that at least half of the participating leaseholders must have lived in their flats as their main or only home for the past 12 months. In addition it increases the proportion of the building that can be occupied for non-residential purposes from 10 to 25 per cent, which will enable more leaseholders who live above commercial premises to qualify. In a further effort to simplify procedures, the Bill also proposes that the qualifications for the Right to Enfranchise and the Right to Manage will be similar.

In order to enfranchise, leaseholders must pay a financial premium to the landlord, the so-called 'marriage value'. This payment is designed to compensate the landlord for the enhanced value of the property, which accrues to the leaseholders on gaining the freehold. The payment of this 'marriage value' has discouraged many people from pursuing enfranchisement, because the determination of the actual price payable by enfranchising freeholders is not always readily agreed between the parties and can, as a result, be subject to protracted and expensive legal disputes. The Bill not only simplifies the determination of the 'marriage value', it also limits the freeholder's capacity to utilise the appeals system to frustrate the legitimate ambitions of leaseholders. The overall goal here is to make it easier and less expensive for leaseholders to buy-out the freehold.

The Bill also provides remedies for long-term leaseholders of houses who have extended their leases. If the Bill is enacted these people will have a new right to enfranchise and purchase the freehold.

The finances involved in managing a block also receive attention in the Bill. In the future landlords will be required to consult leaseholders of flats about any proposed

contracts for works and services. The Bill also broadens the leaseholder's ability to challenge any landlord inspired changes to the building.

In addition the Government has also consulted on proposals to provide greater security for client monies, held by landlords and their agents. It is generally felt that greater transparency is needed in this regard. These proposals were not included in the Bill when it was introduced to Parliament. They could reappear, however, as Government amendments at a later stage in its Parliamentary progress.

Summary

It would be impossible in this short summary to discuss fully all the advantages of the reforms proposed under the Commonhold and Leasehold Reform Bill. The leasehold elements of reform ensure that leaseholders can gain greater control over their homes, by providing them with the Right to Manage their blocks, without first having to prove that the landlord is at fault and without having to pay compensation. The Bill also makes it easier to collectively buy-out the freehold. While these reforms go some way to address further two of the three basic problems with the leasehold system, namely those affecting ownership and management, the third, that of forfeiture, still remains in place.

When enacted, a system of ownership similar to that existing in Australia, the United States, and numerous other countries will emerge. Owners within a commonhold development will own a freehold interest in their homes and have direct control of their residential environment, exercised by voting in an association that will govern the entire development. While commonhold ownership will not eliminate all problems that can and will arise when there is more than one ownership interest in a property, it will establish a system which is better able to address most of them. It will be important to ensure that the implementing regulations for commonhold communities build on the experience of other countries operating similar systems and the wealth of practical management experience that exists in England and Wales.

The problems associated with leasehold will persist for many years to come, because neither an enhanced Right to Enfranchise or the new Right to Manage will bring about its rapid demise. The demise of leasehold would, however, be accelerated if commonhold was successfully implemented and shown to be a truly workable alternative.

4 The reform context in Scotland

Introduction

Given the different time-scale for reform in Scotland, this part of the project was able to adhere to the original research plan. A wide ranging consultation exercise was undertaken, involving 20 representative organisations and a dozen individuals, each with a specialist interest in this field. It sought to elucidate views about the problems and issues that arise from the current ownership and management arrangements for multi-owned property in Scotland. Opinions on the proposed reforms to Scots property law, which emanate from the recent abolition of feudal property law in Scotland, were also sought. In particular, these discussions focused on the imminent reform of real burdens and, following on from this, the common law, or 'Law of the Tenement'.

With the initial consultation work concluded, a paper was produced detailing the themes and issues that arose, along with a tentative set of suggestions for reform based upon the comparative socio-legal research on community interest ownership. This paper was presented to all participants at a follow-up meeting, and an agreed approach for assessing and shaping the imminent property law reforms was agreed. Having set down a common set of objectives it is to be hoped that a closer working relationship will develop between these parties, as has been the case in England. Encouraging a more inclusive and creative policy-making culture within this important public policy area should be a priority for the new Scottish Parliament. This chapter, therefore, provides an overall summary of this particular exercise.

Consultation process

Four broad groups of organisations and individuals participated in the research. The first of these were the legal interests, covering practising solicitors and academics as well as legal professionals working within government departments and agencies. Unfortunately the Law Society of Scotland, the body that represents solicitors' interests, declined to participate. The next broad grouping were property interests. These included traditional factors and those who provide similar services within a local authority or housing association context. In addition, this group also included architects, surveyors, housing professionals and mortgage lenders. A third group encompassed the consumer interest who, after having been actively sought out, have come together through the offices of the Scottish Consumer Council to provide a distinct voice on these matters. Finally, the consultation exercise also engaged with a number of interested politicians, and their advisers.

Problems and reforms

As detailed in Chapter 1, there are two distinct elements to Scots property law. Firstly, there are the title provisions that apply to a particular property. Under Scots law, through the use of real burdens, it is possible to ensure that the common building elements are made the joint responsibility of all owners. Secondly, there is the 'Law of the Tenement'. Legally, however, title provisions always take precedence over the common law. As was also noted earlier, the common law rules of 'common interest' also have a bearing in this context.

Title deeds define the physical extent of the property and specify, though the use of burdens, the associated rights and responsibilities that pertain to that particular property. Real burdens and servitudes are set down within the deed, either at length within one document or by direct reference to another deed, so-called subsisting burdens, the most common of which is the Deed of Conditions. Such deed provisions were introduced from the 1870s to ensure an element of standardisation in relation to the properties governance regime, given that this was not always achieved in the title deed itself. Typically, common maintenance responsibilities are detailed, as are any management arrangements to ensure decisions are taken and then acted upon. Within this context the Deed of Conditions often makes explicit provision for the appointment of a property manager. Arrangements for apportioning the cost of any associated works or services may also be detailed.

The common law, on the other hand, provides for a basic default position for all tenements. However, only where title deeds are silent, in respect of a particular matter, can the common law apply. If the title conditions are inoperable, the common law cannot override these stated provisions. The 'Law of the Tenement' adopts the view that ownership within a tenement context is individual, the only exception being the common close, the roof above the close and the common stairs (Reid, 1993). All other elements of the building are held in the individual ownership of one or other of the flat owners. Top floor flats owners have the responsibility for maintaining the roof immediately above their property, while ground floor flats have responsibility for the solum. Ownership of external walls divides amongst all owners, while ownership of all internal walls separates at the mid point.

To protect each individual's property interest, an implied right of 'common interest' is placed over all owners. Each flat owner has a right of 'common interest' in those parts of the building, even those they do not own, which provide either shelter or support to their property. Owners may carry out building works to their property, but these works must not threaten their 'common interest' responsibilities to their neighbours.

As became evident from the consultation exercise, a number of major problems arise out of these arrangements. While the problems with the common law are well detailed in the Scottish Law Commissions report on the 'Law of the Tenement', the problems resulting from poor title provisions are less well articulated (Scottish Law Commission, 1998a).

Title deed conditions are not consistent and vary markedly from property to property. Generally speaking, the older the property, the shorter the title deed and, therefore, the greater the reliance upon the common law. As noted in Chapter 1, older title deeds make little or no provision for common decision-making mechanisms, because they tend to adopt the common law maxim that ownership in a tenement context is, for the most part, individual. This is in marked contrast with new flatted developments, which are sold on the basis that a comprehensive set of management services will be provided. To ensure such services are delivered and paid for, comprehensive title provisions exist which facilitate owner decision-making and the effective implementation of these decisions. So

while certain flats have a comprehensive set of title documents, others have the bare minimum, making the execution of even the most basic maintenance task something of a challenge.

As also noted in Chapter 1, every property in Scotland has a single title. Until recently, title was registered on a search sheet within the Register of Sasines. As of April 2003, this system will be replaced by a Land Register, with each title being recorded on a separate title sheet. All the burdens pertaining to that property will be required to be registered on the land certificate within that document. The Land Registry will be charged with ensuring this information is properly recorded when the property details are submitted for registering after a sale. Up until this change, the Register of Sasines would record the original breakaway deed and describe every deed thereafter. A separate deed is produced with every transaction; it is this document that gives legal effect to the transaction. With the advent of the Land Register only the title sheet will require to be consulted to ascertain ownership and its accompanying rights and responsibilities.

As a result of previous Scots legal practice, many varied forms of title documentation exist. With the switch from block ownership by landlords to individual home ownership, the original landlord owner would grant a breakaway deed to the first owner. Subsequent owners would each have their own title deeds drawn up after the property was conveyed to them by its previous owner. Each of these deeds refers back to the original breakaway deed, for rights and burdens, and any subsisting burdens which affect the property.

Differences in the historic patterns of property ownership, as well as regional differences in legal practices, produced significantly different title deeds between one part of Scotland and another. Such patterns have, however, tended to decline over time. In Edinburgh and the East of Scotland for example, it is common to have slight variations in the real burdens that apply to individual flats within the same block. This is a consequence of breakaway deeds being created at different times, as and when the individual flats were sold. As a result, in order to ensure effective maintenance, all owners within the block would have to read each and every title deed, because the burden obligations could differ. In Glasgow and the West of Scotland in general, title deeds typically make reference to a deed of conditions. Although these documents vary in their detail, as noted above, the basic provisions are relatively standard. Management, as a result, is often easier to organise given that a rudimentary governance system is in place. That said, problems with the deeds may mean that executing work will prove difficult, as will be detailed later.

The cause of this variation is historic, arising out of distinct differences in nineteenth-century property ownership, and in particular between Scotland’s two main cities, Glasgow and Edinburgh (see Adams, 1978; Elliot and McCrone, 1989). Edinburgh being the longer established commercial and administrative centre had a greater prevalence for large individual landlord holdings. Glasgow, by contrast, underwent a rapid, but short-lived period of industrial expansion. Financing the city’s massive associated tenement flat construction programme came largely from small investors and trusts who were organised through factors (Sim, 1996). The term factor

comes from rural Scotland, where the landowner of an estate would employ a factor to act as the steward of their entire property interest. The notion of the stewardship of property is still a feature of Scottish property management interests, as will be discussed later. So while in Edinburgh the scale of individual property holdings ensured the landlords themselves controlled the management task directly, in Glasgow this became the remit of the factor (see Robertson and Bailey, 1996; Sim, 1996). Given the range of distinct ownership interests they had to incorporate, factors promoted their own particular deed of conditions to ensure the standardisation necessary in order to run their property businesses.

It should be said that being in possession of a comprehensive set of title documents does not necessarily deliver satisfaction. Concerns were expressed during the consultation exercise about certain modern deed conditions which effectively denied owners a real say in who was the manager, and in the quality of service delivered. Private sheltered housing was considered to be particularly prone to this marked lack of effective consumer choice. The notion of the empowered manager, or steward, has long been favoured by property management interests, but appears to be less well received by certain consumers. It was also shown that good co-operation, on the part of all owners, could produce a satisfactory management arrangement, in spite of the most basic of title deeds. A change in one owner could, however, bring an end to such an arrangement, through their insistence upon being subject only to common law provisions. Where this often comes to a head is not with the payment of a regular common charge, but rather when a major piece of repair work is required.

Overall, it is evident that a wide range of title provisions exist, resulting in markedly different governance regimes. These, in turn, create problems for a significant minority, if not the majority of flat owners. While certain problems can be worked around, typically to the disadvantage of some owners, and the advantage of others, certain governance problems cannot be resolved, causing great frustration and resentment on the part of all owners. These feelings are intensified when it is clear they can do little or nothing to resolve the situation. For those who view flat living merely as the first stop on the home ownership ladder, this lack of clarity has its benefits, given their intention to save money for a deposit and move on quickly.

Current conveyancing practice also came in for heavy criticism. There was a general impression that flat purchasers were not being properly advised as to the potential problems that could arise from having a defective set of titles. A common problem, for example, relates to the apportionment of costs between owners. Certain deeds, rather than opting for equal shares, make reference to the individual property’s valuation roll entry as the basis of apportionment. Yet, because the solicitor, in drawing up the original breakaway deed, failed to register the actual figures within the title, this particular provision is inoperable. Too often such problems only come to light as a result of a crisis, rather than when the property is being conveyanced. Further, flat purchasers, in general, and those purchasing through the ‘Right to Buy’, in particular, were thought to

have a limited appreciation of their responsibilities in respect of ongoing management and maintenance of common property. This conclusion also mirrors research evidence on this matter highlighted by two recent consumer focused studies of house buying purchase practices within Scotland (O'Neill, 2000; Randolph *et al*., 1997). It is worth bearing in mind, that although it is not impossible to have a title deed altered, this does require the unanimous agreement of all the affected owners, and this has always proved hard to achieve.

Within a 'Right to Buy' housing context, many purchasers still expect their previous public sector landlords to continue carrying out maintenance work on their property, but actively resist paying for these services. This belief has undoubtedly been aided by the inability of many public sector landlords to bill individual owners for such works, preferring instead to recover these costs from their remaining tenants' rents.

It was also evident that the governance problems detailed above were not necessarily being overcome when new flatted accommodation was created. Again, given the capacity of solicitors and developers to generate different governance arrangements, there can be marked variations between one block and another. It was also revealed during these sessions that some new flats in Dundee had been sold with no provisions for ongoing maintenance, let alone a governance regime.

As a consequence of the variable nature of title deeds no real concept or culture of good governance practice currently exists for a significant number of flat owners in Scotland. This in turn has a direct bearing on the maintenance of the building, especially where no management arrangement is in place. Typically building work is only activated in response to a crisis, such as a leaking roof, and as contractors are needed in a hurry they tend to be randomly selected, typically through the *Yellow Pages*. Owners generally have no knowledge of the particular skills or expertise of the selected company, and neither the contractor, nor owners will have a good knowledge of the previous repairs history of the block. Given the desire to minimise costs there will also be a strong desire to employ companies or individuals who work within the 'black economy', namely those who do not pay VAT. Demands that poor workmanship is properly rectified are often harder to insist upon in such situations.

Again due to a combination of speed and a desire to save money, owners will seldom make use of either an architect or surveyor to specify the required works. As a consequence no written tendering procedure is initiated. Work procured in this way has a tendency to alter on site, with options to solve unforeseen problems having to be presented to the owners as it arises. This inevitably causes costs to rise. A combination of poor workmanship and poor working practices also ensures poor value for money. This in turn generates dissatisfaction and disagreement amongst fellow owners. Where such work is technically covered by building insurance it is not uncommon for 16 separate and different building policies to be required to process a claim, with the allocation of certain works having to be pursued on an individual basis. The excessive organisation required on the part of owners to successfully execute common repairs without professional

help is never fully appreciated, until it is too late. It is also the case that professional help may also produce a similar outcome.

Overall, these problems go some way to explain the unacceptable levels of disrepair in older tenemental properties, as revealed by the Scottish House Condition Survey (Scottish Homes, 1996). It should also be borne in mind that without the high levels of recent public investment, over large tracts of this stock, disrepair would be even worse. That said, given the lack of evidence of regular ongoing maintenance, disrepair is bound to re-emerge, but this time public money will not be available to help resolve this problem (Robertson and Bailey, 1996). Recent newspaper articles allude to this situation having already emerged in Edinburgh's New Town, and other highly prestigious tenement districts of the city (Denholm, 2000) as well as in Glasgow's popular west end (Naysmith, 2000). Such problems also act to ensure that flats are not perceived, by consumers, to be either a secure, or long-term investment. In time, this could act as a significant drag on what has only recently become a key and growing part of the Scottish housing market.

Given this broad set of inter-related problems, what reforms are being envisaged to address these issues and what were the participants' views on the potential impact such reforms will have?

Real burden reform

As noted earlier, the whole land ownership system in Scotland is currently being reformed. Although the Abolition of Feudal Tenure Etc. (Scotland) Act, 2000 has received Royal Assent, it still awaits a vesting date, given that other associated legislative reforms are required to be brought forward before the entire package can be implemented. Critical in this context is the reform of title conditions which underpin land ownership in Scotland. The Scottish Law Commission recently published its recommendations in this regard, and the accompanying draft bill will be subject to a Scottish Executive consultation exercise this Spring (Scottish Law Commission, 2000). This follows an earlier consultation exercise (Scottish Law Commission, 1998b). It is then envisaged that the Executive will publish its own Bill in the autumn, for consideration in the next session of the Scottish Parliament. The publication of the real burden proposals occurred after the first stage of consultation had been concluded, but was core to the follow-up meeting.

Given the central significance of real burdens to property ownership, the outcome of this legislative process is fundamental to ensuring any reform of flat governance arrangements. In particular, the designation of a distinct subset of real burdens – to be known as 'community burdens' – will have a major bearing on ownership rights within multi-owned property. This is a new name for an old idea, namely that owners who share common facilities are required to be subject to a common regulatory regime, which in future will created by 'community burdens'. Only after this piece of legislation has been passed will the 'Law of the Tenement' reforms be considered. It is also worth noting that certain proposals outlined in the Scottish Law Commission's 'Law of the Tenement' report are taken up within the Draft Title Conditions (Scotland) Bill. The most important of these is the Model Development

Management Scheme, which supersedes Management Scheme B as proposed under the 'Law of the Tenement' reforms. It is, therefore, critical to fully understand what is being proposed, and consider how these changes will affect future governance arrangements for multi-owned properties.

The prime intention of title reform is to ensure the system of land ownership becomes transparent. These reforms, therefore, seek to ensure that title conditions, namely real burdens, and any associated rights to enforce, are clearly identified within the title. As previously noted, the full implementation of the Land Register system is critical in this regard, as individual land registration will clearly record all burdens on the property, as well as on the property that benefits from these particular burdens.

The abolition of the feudal property law effectively extinguishes all feudal title conditions. Feudal burdens were created by the original landowner to set down certain use conditions to which all future vassals were required to adhere. These were, in effect an early form of land use planning (RICS, 1999a). Any feudal burdens that are to be preserved will be required to become real burdens. All existing non-feudal real burdens will remain enforceable, should the owners wish this to be the case. Real burdens, the more recent legal creation, allow servitudes to run with the title of the property. In future all burdens will be required to be real, that is they will need to be tied to the land, and not to the person. Where the current title deeds impose on two or more owners burdens that are identical or equivalent, then these burdens are taken to be mutually enforceable by each owner. One way burdens, by contrast, are used to secure certain land use rights by one owner over another. Such burdens are typically created when an individual sells off part of their land to allow another house to be built on what was previously his or her ground. Such burdens will continue to be registered, but only as long as they benefit the land, and not the individual. For all property, currently expressed rights will survive for a period of ten years. The implication here is that as this is the average turnover period for any property, the real burdens will be examined through the conveyancing process; if any are found wanting, they would not be re-registered.

Community burdens are real burdens that confer reciprocal obligations on all owners within a community, such as a block of flats. They will also be used to set down maintenance arrangements for common ground within a residential housing estate. All existing real burdens which stipulate a collective, or shared responsibility will, in the future, automatically become community burdens. Again they will be subject to the general proviso that the burdens are implied, and can be enforced. In future a majority, that is in excess of 50 per cent of affected owners, will be able to vary or extinguish community burdens.

The registration process also opens up the opportunity to create new community burdens. Where a real burden is inoperable, for whatever reason, the affected owners can choose not to register it. Owners who have no interest in the right to enforce an existing real burden will not bother to register such rights. This aspect of reform offers an opportunity to overcome many of the problems outlined earlier. Workable governance regimes can be preserved, or created. They could also be abandoned, in that

owners will be able to pick and choose the community burdens to which they wish to be subject. In such a context, however, the owners would find themselves more subject to the new default system that will result from the imminent reform of the common law, which will be discussed later.

Real burden reform also takes the view that as there is no straightforward way of dealing with the future, rather than opting for a standardised statutory system, which attempts to cover all situations, there is sense in keeping the system as flexible as possible. Whether this approach is justified was the subject of much discussion. While legal interests generally supported this view, in line with Scots Law traditions, all other interests expressed deep reservations about retaining such unlimited flexibility. This core issue will be returned to later.

Where a dispute arises between owners in relation to enforcing, varying or extinguishing a real burden, the Lands Tribunal for Scotland will arbitrate. In coming to a view in such cases the Lands Tribunal is expected to judge the disputed decision on the basis of its reasonableness, and to aid them in this task reasonableness is defined under seven separate headings. Reasonableness is taken to relate to changed circumstances; the extent of any private benefit; the extent of any public benefit; changes in enjoyment; the practicality of compliance; the age of the condition in dispute; and whether there are any planning or other constraints. Any other material circumstances should also be taken into account. Should the Lands Tribunal not satisfy the disputing parties there will be one further appeal mechanism available, namely to the Inner House of the Court of Session.

As the workload of the Lands Tribunal will undoubtedly increase, in light of these changes, concern was expressed by a number of participants that the organisation, as presently constituted, would be unable to cope. Its track record to date was also considered, by some, to justify the establishment of a new independent body with a clearly defined remit in these matters that would employ people with appropriate expertise. There was also felt to be scope for other disputes resolutions vehicles to be employed, prior to any case coming before a tribunal.

Within the Scottish Law Commission's recommendations there is outlined a Model Development Management Scheme which has been developed to govern what are termed 'community facilities', as determined by specific community burdens. The basic model suggests the creation of an association, which would be a body corporate, rather than a company subject to the Companies Act, as is favoured in England and Wales. The association's membership would be composed of all owners who are subject to the specific community burdens that apply to the particular set of community facilities. This could be the common elements of a block of flats, or merely the common ground in a residential housing estate.

The association would be expected to meet once a year to approve a budget, and accept the previous year's accounts for the ongoing maintenance of the said community facility. The annual meeting would appoint a manager, who would have responsibility for managing the necessary work, and collect the required monies in advance. The manager is also expected to regularly inspect the property and advise the owners of any issues arising from these

inspections. There is also an expectation that the manager would supervise any works that take place on the defined community facility. The association may also be able to make, or amend regulations in respect of recreation facilities. Its regulations or obligations will be binding on owners and any tenants resident within the block. There will also be a new power, within real burdens, to allow an association to own or acquire any part of the development. This, of course, assumes that someone is willing to sell, for example, the common ground to the association. There is also scope to establish a sinking fund to cover any future major repairs. Provisions are also outlined for the manager to invest these monies, but there are no guidelines or procedures outlined in relation to this issue. Given the problems previously encountered in this area, more precise guidelines need to emerge, similar to those outlined for commonhold managers in England and Wales.

The owners will also have the power to hold a special general meeting to dismiss the manager, should their performance fail to meet expectations. There will be a separate statutory power to dismiss the manager should the owners so desire. This, in part, reflects the problems previously discussed in relation to private sheltered housing.

The Model Development Management Scheme represents a major advance, in that it sets in place a body corporate structure with a clear set of operating rules. The focus adopted has been to create a workable and usable system, with specific responsibilities clearly being laid down. The provision for annual budgeting and establishment of a reserve fund was also met with widespread approval. On the downside, however, the overall management emphasis was that of the empowered manager or steward, rather than using the opportunity to facilitate greater owner control.

From the property manager's perspective the idea of running backwards and forwards to their clients to get approvals represents a hassle. Their clearly stated view was that once the range of tasks have been clearly specified the manager should be left to get on with it. The problem here is that the owners association could become, in effect, an advisory committee with no real power. Only the association's AGM would be vested with real power, that is in relation to specifying the actual management contract and hiring and firing the manager. Clearly, there is a need to look at the overall balance of power under this proposed arrangement, and ensure that if owners want to adopt a more proactive role they are not denied this opportunity. Consumers were clear that owners needed to get some direct experience of management issues so they are able to decide upon what service best suits their particular circumstances. The owners are, after all, both the owners of the building and its facilities and the consumers of the management service provided. In such circumstances the consumer interests thought they should be given a greater say in how they want the service they pay for to be delivered. Again the evidence presented from certain new private sheltered housing developments illustrates the problems that can arise by going too far down the road of the empowered manager. The Law Commission's recommendations in this area would appear to be at variance with what is standard practice in other countries who operate similar systems. Empowered owners appear to be the model favoured, an approach that perhaps emanates

from the much stronger consumer focus of their respective property law arrangements.

Another critical weakness of the proposed management scheme is the lack of provision for an effective disputes resolution mechanism outwith the Sheriff Court system. In other countries, court hearings only occur once agreed adjudication or arbitration mechanisms have been exhausted. Again comparative research illustrates the necessity of having a robust, accessible, fast and inexpensive disputes resolution mechanism to support the day-to-day operation of this type of property management arrangement (Bailey and Robertson, 1997a; Budgen, 1999; Rosenberry, 1998a). Disputes between neighbours, and between owners and managers are bound to arise, but without adequate resolution mechanisms, the whole system will quickly become devalued in the eyes of owners and managers alike.

Further, these proposals totally ignore the need for a range of support mechanisms that are necessary to back up such a management arrangement. These would include the provision of proper consumer information to help educate flat buyers of their rights and various responsibilities; the establishment of advice and support mechanisms for flat owners; a regulation framework for professional management agents; and the promotion of profession training for managers and association office bearers. Again such support arrangements are standard in countries where common interest ownership models operate, as illustrated by earlier research (see Bailey and Robertson, 1997b).

The real point of contention in all of this discussion was that a developer, in future, would still be able to set in place either all, or just parts of this management scheme. They could also amend it, or simply ignore it and continue using their own standard deed of conditions. While this may suit the developer, in other countries they also try and take some account of consumer interests. After all it is the owners that will have to live with the long-term consequences of developer imposed title deeds. This proposed arrangement, therefore, appears to be in stark contrast to the statutory approach that is pursued in both Australia and the United States, and which will shortly be introduced in England and Wales, following the advent of commonhold. It was also argued by property and consumer interests that allowing for the continuation of such unlimited flexibility on the key governance elements, rather defeats the whole purpose of reform in that further variation and confusion would be introduced into title deeds provisions, the very issue which title conditions reform seeks to resolve. It was also felt ironic that the common law reforms seek to establish, in effect, a statutory default system.

Common law reform

In regard to the common law, the Scottish Law Commission was asked, in 1984, by Parliament to come forward with proposals for the reform. The Commission eventually published its recommendations in 1998 (Reid, 1998; Scottish Law Commission, 1998a). Two guiding principles govern the Law Commission's recommendations.

The first of these is that all existing, and all future tenemental property, will be subject to these default provisions. These are detailed in the report under the heading Management Scheme A. Management Scheme B, which was conceived as a model default scheme for new

multi-owned developments, has now been incorporated into the draft Title Conditions (Scotland) Bill, discussed at length above.

Secondly, and in keeping with Scots Law practice to date, all existing ownership rights and responsibilities, as defined within title deeds, will remain in place. Critically, all that changes is the background common law, which only has relevance where no preference is stated in the property's title provisions. The Law Commission took the view that to do otherwise would leave the Scottish Executive open to a challenge under the European Convention on Human Rights (ECHR).

With the establishment of the Scottish Parliament in 1999 the ECHR became enshrined within Scots Law. This has already proved to be a very sensitive matter in Scotland, with the then existing arrangements for the appointment of temporary Sheriffs being ruled illegal under these provisions. It was also noticeable that a more cautious line was adopted by the Scottish Executive, in relation to ECHR matters, than had been advocated by the Scottish Law Commission in relation to what became the Feudal Titles Act, 2000. There are contrary opinions on this interpretation. The ECHR, for example, makes specific provision for national interest opt-outs, but for these to be enacted the Scottish Executive would require to take a view that housing maintenance issues were in the national interest. Such a decision would also be open to challenge.

As a result, what the Law Commission recommends is essentially a legal compromise, in which existing ownership rights remain unchanged, but the background law affecting that property is amended. Where title deeds are silent the default would apply. Whether this position is not itself open to legal challenge, given that it indirectly alters pre-existing ownership rights, poses an interesting legal question.

The proposals to revise the common law, which will apply to all tenements, are outlined by Management Scheme A. These will provide for a more robust default situation, but critically, only where the title deeds are silent on a particular matter. Management Scheme A sets down what is termed 'scheme property', namely what they consider to be the strategic building elements within any tenement property. Scheme property includes roof and associated rainwater goods; the solum; foundations; external walls, any shared gables and any other load bearing walls; and the close stairs, associated walls, windows and the external door. Scheme property will be subject to a maintenance arrangement involving all owners within the block. Decision making will be by majority, with all owners being bound by any majority decision. All decisions are binding upon all owners, including any dissenting minority. They will also be binding on all future owners. Unless the property consists of three or less flats, each flat would receive one vote. Basic procedural provisions are laid out for decision making, which are designed to be both informal and simple to operate. Decisions do not require a meeting to take place; given consents can be collected by going round the doors. Although written consents are not needed, the Law Commission considers that they would be advisable in cases where there is likely to be a disagreement. Safeguards are built in for small tenements, and where there is a serious discrepancy between voting powers and liability. The right of veto is available to owners

whose group liability exceeds 75 per cent or more of costs. This can occur where commercial premises carry a significant proportion of the common costs.

Oppression of such minorities, as it is described, is avoided by allowing an owner(s) who did not support the decision the right of appeal to the Sheriff Court within 21 days of the meeting which made the disputed decision. Again it should be noted these are only default powers: where the title provides for decision making, these will continue to apply, as before. It should also be noted that the right to challenge a decision in the Sheriff Court is only a negative power. Owners cannot use the Sheriff Court to get works carried out on the block, only to stop work from taking place. Further, having dispute resolution via the Sheriff Court was not felt to be an adequate vehicle for disputes resolution. As discussed under the real burden reforms there was felt to be a need to explore alternative disputes resolution mechanisms, and perhaps the provision of a specialised service, as is the case in Australian state models.

The scope of works to be covered under Management Scheme A refers almost exclusively to property maintenance. Incidental improvements are acceptable, but only if they are a consequence of repair works. The prime focus of these provisions is on maintaining what is there, rather than providing a means to improve upon it. The Law Commission approach also precludes the introduction of an obligation to maintain scheme property, as is stated in the model management scheme for community facilities.

Procedures for the appointment of a managing agent are also outlined, as are the arrangements for the delegation of powers in relation to arranging and/or instructing works. Provisions are also made for the execution of emergency works. Owners can decide to collect the projected cost of the works in advance, with this cash being banked and paid to the contractor on completion of works. Liability provisions become slightly more complex. Title deed provisions, where these exist, will prevail, otherwise the default position will be on the basis of equal shares. The only exception to this will be where there are unequal sizes of flats, in which case floor area would be adopted. The Law Commission also states that both the seller and purchaser would be jointly liable, but ultimately liability still lies with the purchaser. Overall, the position of liability was still felt to be unnecessarily complex.

The default management scheme will also introduce certain reforms which will not be within most titles. The most significant of these is the requirement for all owners to maintain adequate buildings insurance for fire and other standard risks. This addresses the problem of non-insurance, on the part of one party causing serious problems for other owners who are properly insured. While this is currently proposed as an individual requirement, in that each individual owner within the block will be legally obliged to be properly insured, there was a strongly expressed opinion that there would be major advantages in making this matter a scheme decision, given the wide variation in insurance products. As well as achieving better economy, such uniformity of cover would perhaps act as the stimulus to establish a block management scheme.

The clarification of scheme property and having common responsibilities clearly laid

down is a major advance on the previous common law. It is also helpful to have 'common interest' obligations build into a statutory default system, as is proposed. Where deeds are silent on particular matters, this should provide a solution in areas that were previously contested by owners. However, what these proposals fail to do is resolve the problem of deficient deeds through the introduction of a statutory default system for all existing tenement properties. Apparent nervousness about the implications of the ECHR on individual property rights has produced a set of proposals which are more timid than most housing practitioners and consumers had hoped for. Most people voiced a desire to see the new common law override poor title conditions. That said, when these recommendations are taken in conjunction with those envisaged under the Title Conditions (Scotland) Bill, it will be possible for owners, under a majority vote, to extinguish unworkable deeds and either introduce new real burdens better suited to their needs, or merely opt to rely on the new default system. The only problem here is such an arrangement will always prove to be partial, in that many flat owners may not find it easy to get their neighbours to agree to changes that will expose them to costs which they have previously managed to avoid paying. It will also still ensure a continuation of the infinite variety in deed provisions, something which most participants felt only solicitors would benefit from.

Whether the default provisions will work, in practice, was also another issue which exercised housing professionals and consumers alike. The practicalities of implementing these new powers has never been properly discussed. For example, while there may be a majority agreement for a particular course of action, what exactly can neighbours do about a minority who not only refuse to participate, but critically refuse to pay? If individuals can't, or won't pay their share of the associated costs, being able to pursue such costs via the Sheriff Court rarely resolves anything. Firstly, such action can be costly and time consuming to pursue, while the result cannot be guaranteed. Secondly, securing a Court Order to enforce payment does not always produce the desired result. Overall, while the proposed law reforms may look good on paper, many felt they still failed to resolve this long-standing problem. Without being able to access the required cash, fabric problems within a building can never be resolved. The lien powers that operate in both the Australia and the United States were seen by property interests to be essential, but this may not be something neighbours would be entirely comfortable with. Placing a charge on the property to recoup money was all very well, but forcing a sale if that money was not forthcoming was more contentious. This was felt to be a critical, if not the critical issue. How exactly do you ensure people pay their share of costs once a binding majority decision has been taken? And should the actions of one individual be allowed to jeopardise the quality of life of their neighbours? So, in general, while most people thought these common law changes will help to tidy up a number of loose ends, they fail to address certain basic problems.

Summary

These proposed reforms, taken as a package, could have a major bearing on multi-owned

private property, in both an ownership and governance sense. With the reform of real burdens the rights and responsibilities which flow from ownership could become more transparent. Crucially, there will also now be an ability, on a majority vote, to reform existing title conditions. Obsolete or unworkable burdens could be extinguished and new community burdens introduced, thus creating a workable governance regime for the ongoing management and maintenance of multi-owned property. Then by adopting the model management scheme, an arrangement broadly similar to that which operates both in Australian and American common interest communities would be set in place. For this to happen, however, a group of highly motivated and determined owners would be required. Such owners would not only need to be fully aware of the various legal possibilities, but in addition would be well able to convince their neighbours about the worth of such changes.

A more likely outcome is that more and more owners will find themselves subject to certain default positions established by the reformed 'Law of Tenement'. By acting collectively, to extinguish certain problematic burdens, again certain motivated owners will be able access better default provisions. Others, and perhaps the majority, will find even this basic exercise hard to accomplish, given the long standing resistance on the part of many owners to pay any contribution for ongoing maintenance. So access to what, in effect, will prove to be a very partial default system will await most flat owners. The actual common law provisions to which they will be subject will continue to be determined by the current conveyancing lottery which delivers highly variable title conditions. The Scottish Law Commission's concerns about altering individual property rights, in light of ECHR considerations, has made this outcome inevitable. Those most likely to benefit from the common law aspect of reform were thought to be residents of Georgian tenements, characterised in the public mind by Edinburgh's New Town. This is because their title deeds are limited and, as a consequence they rely heavily upon the common law. What most participants felt was that if a standard default system was good enough for this group of owners, why can it not be made to apply to the rest?

In light of this there was a strong desire to have a basic statutory system in place for all future multi-owned developments. Given the complexity of title conditions that currently prevail, and the clear legal difficulties in implementing retrospective legislation to address this difficulty, most participants were surprised that a basic statutory system was not to be introduced for all new multi-ownership developments. Given that the ground work has been completed, best illustrated by the model management scheme, there was felt to be a case to make this basic and workable governance regime statutory for all future multi-ownership developments. Having such a system in place was also felt to have advantages for existing tenement flat owners, as they could easily adopt this system by amending their present title provisions to those of the statutory system. This type of parallel arrangement mirrors closely what is being proposed for England and Wales, with leasehold and commonhold companies operating to a broadly similar set of arrangements. While this view was supported by most participants, whether property

professionals or consumers, it failed to find favour amongst legal interests. They continued to support infinite developer flexibility in such matters. This difference represents a significant division of opinion, in that those who either reside in the multi-owned property, or make their living from this type of housing, view matters differently from those charged with reforming property law.

Part of this problem arises from the way in which the Scottish Law Commission consults, in regard to any legal reform. While property interests were undoubtedly considered, as is evident from the central role to be played by managers in the model management scheme, the prime focus was on the legal considerations of reform, rather than on how the law could, for example, ensure better consumer rights, or a practical management system for multi-owned property. If these issues arose they were afterthoughts, if thoughts at all. More worrying, however, is that specific consumer interests have, as yet, not featured in this reform exercise. These failings, in part, reflect the long dominance of legal interests in Scottish policy-making, and the lack of any real policy-making tradition within Scotland, given previous constitutional arrangements. This was well illustrated by this study in that legal interests well understood how to influence this particular policy process, whereas property professionals, despite having the resources to pursue such matters, felt detached. Consumer interests were weak on both fronts, given that they had only come together in response to this change.

With the establishment of the Scottish Parliament this situation is likely to change, as a proper political culture develops and matures. In this regard, the recently announced establishment of the Housing Improvement Task Force is to be welcomed, especially given its clear remit to examine this particular policy area. Hopefully this report will assist them in their deliberations, and also ensure other relevant perspectives are drawn into the forthcoming debate about property law reform. It will also be interesting to see whether the particular set of interests brought together by this study will see merit in working together to ensure their collective perspective is brought to bear on the policy process. To a degree, this proved to be very fruitful and successful when adopted in England and Wales.

With the imminent demise of the improvement grant subsidy regime, to be heralded in by the Housing (Scotland) Act, 2001, there will no longer be the means to patch over the very obvious cracks in the system. It is, therefore, critical to get this package of property reforms right, for all interested parties. It is also important to see this issue not solely as a tenement issue, not just for the 'Right to Buy' owners' issue, but one which is central to a growing and very significant part of the Scottish housing market. For without proper governance arrangements in place, and operating effectively, the popularity of flats will continue to fall well below that of suburban detached houses with their own front and back door, and garden. This of course is not, and should not be the case.

5 Reflecting on reform

Reform context

The broad thrust of housing policy over the past 30 years has been to encourage the growth of home ownership, with individuals taking responsibility for their own housing. What has not been adequately acknowledged, or appreciated is that with these individual rights of home ownership come specific responsibilities. Nowhere is this more evident than in multi-owned property, where individual ownership rights must interface with certain common responsibilities for maintenance, management and the general use of the building. Less well appreciated, but equally important, is the need to ensure effective decision making in residential housing estates. Here, although the homes are individually owned, there are nonetheless issues like covenant enforcement and maintenance of common parts that require collective governance.

Up until now the legal and resulting governance arrangements adopted in Britain to accommodate individual home ownership within multi-owned dwellings have proved highly problematic. Rather than develop a new type of ownership arrangement, capable of accommodating the ownership complexities presented by such properties, both legal jurisdictions opted to retain their existing models of property ownership. This has not proved to be a sustainable option.

Freehold ownership of individual flats was not possible in England and Wales because legally, affirmative covenants could not be enforced against subsequent purchasers of that property. This made it impossible to make adequate provisions for the long-term maintenance of the building. By sticking with leasehold these difficulties were initially overcome because leasehold is not ownership *per se*. Thus, responsibility for the management and maintenance continued to lie with the landlord. Unfortunately, this feudal model has not been capable of resisting the marked cultural shift demanded by individual home ownership. Leaseholders view themselves not as tenants, but as owners, and as such want ownership and control over what goes on in their building. Leasehold reforms over the years have not been able to extinguish these demands. The imminent enactment of commonhold law thus marks an acceptance of the inevitable, namely that an entirely new property law arrangement was required.

The different legal tradition in Scotland meant that certain maintenance and management responsibilities could be made binding on future owners. Individual ownership of flats was, therefore, possible. Individual flats were sold with title deeds that set down the common responsibilities and obligations that come with ownership. Unfortunately, these responsibilities were far from standard, and varied over time and from place to place. While this arrangement was better able to accommodate the cultural desire for individual home ownership within multi-owned property, it was still a partial solution given the wide variation in individual rights and responsibilities. Scotland, in currently trying to address these issues, is still hoping that further incremental reform of existing property and common law will largely resolve these problems. Unfortunately, as this study shows, these legal reforms fail to meet the desires of those who either live, or make their living from, such multi-owned property. The reform process is, therefore, still incomplete.

The British experience is in marked contrast to the approaches adopted in other countries.

Under these arrangements in other countries the unit is owned in freehold, while the common parts of the building are either owned by all the owners, or are owned by an association, whose membership is composed of all owners. These arrangements are set down in statute and regulations, and thus provide a degree of uniformity across all types of multi-owned dwellings. Having such a statutory management system in place has a number of benefits. Purchasers of this type of housing are more likely to understand, right from the start, exactly what they have purchased. Their role in the decision-making process is clearly set out as is their responsibility for paying the monthly management costs. Ongoing property maintenance issues are, therefore, set within the wider realm of property governance. This arrangement also helps improve consumer confidence within this important and growing segment of the housing market. Further, this system of property ownership has spawned a range of new business opportunities for professional property managers, a range of service suppliers, solicitors, accountants, lenders and insurers. Having a clear and predictable commercial environment in which to operate is a critical component in running any successful business.

What this study managed to do was illustrate to both policy makers and practitioners the merits of introducing such an arrangement to Britain. Given the common features of the ownership and governance issues, within multi-owned property, the study was able to bring to the attention of this receptive audience a number of significant lessons from the Australian and American experience, which assisted the actual reform process.

The project has made a valuable contribution to the reform process within England and Wales, as a close reading of the Commonhold and Leasehold Bill reveals. Commonhold, when enacted, will establish a new home ownership system, which will mirror very closely systems operating in the various states of Australia and the United States. Individual ownership, collective governance and the associated financial arrangements to ensure proper ongoing management and maintenance will be put in place. Ensuring a good information and advice service as well as a responsive and inexpensive dispute resolution system will be core to the success of these reforms. A basic regulatory system for property managers will also be of assistance in developing consumer confidence in this new ownership system. Setting in place mechanisms to debate, discuss, then decide upon what needs to be refined or reformed will also be critical, over the long term. This project has hopefully helped lay the foundation for these and other approaches that closely link housing research and policy decisions.

Within Scotland, given the markedly different starting point for reform, namely that individual ownership of multi-owned properties was already possible, and consequently the significantly different reform environment, the debate to date has largely focused on legal concerns around title provisions and the common law. The study did manage to widen the reform debate so that it now encompasses both professional property and, critically, a consumer interest. If this work also encourages legal interests to adopt a broader canvas in their deliberations on these matters it will have achieved much. In this

regard it is also worth noting that this issue is one of three core considerations set for the recently created Scottish Executive Housing Improvement Task Force. So although this work has fostered much debate in Scotland, it has yet to deliver a tangible policy response as it has in England and Wales. Scotland's legal establishment still appears strongly resistant to the idea of introducing a statutory management system for multi-owned property, preferring instead to stick with retaining infinite flexibility in these matters. Such a one-sided response is not likely to produce a satisfactory solution to this major pressing problem.

This work advocates an approach that encourages law makers to have both a practical understanding of the problems raised in multi-owned housing and knowledge of how other countries solve these problems. It represents a blended understanding based on the perspective of a lawyer with a specialist knowledge of this topic area, and that of a social scientist conversant in British housing and public policy. The work also benefited greatly from the significant body of previous work, funded by the Joseph Rowntree Foundation, on ownership and governance, property maintenance and flat development issues (see Bailey and Robertson, 1997a, 1997b, 1998; Barlow and Gans, 1993; Bramley and Watkins, 1994; Cole and Smith, 1994; Leather *et al*., 1998; Pawson *et al*., 1997; Pethrick, 1990; Robertson and Rosenberry, 1999; Rosenberry, 2000b; Sopp, 1992). Thus, overall, the Foundation's long-standing commitment to providing research on a broad range of housing policy issues has contributed significantly to the introduction of commonhold legislation.

Policy process

Through this work a unique insight has been gained into the actual dynamics of the policy process, during what was a brief and dramatic window of policy formulation and refinement. The supposed normal course of events is for a considered evaluation of the operation of policy to date to be undertaken, followed by consultation on a considered set of reform suggestions, before finally coming forward with legislative change. This did not apply in this instance, if indeed it ever does. Changed political priorities brought commonhold back onto the policy agenda after languishing in the shadows for a number of years. The resulting development and consultation time frames were dramatically shortened, which contributed to the policy makers being receptive to the ideas and arguments that emerged from this project. Clearly there is a lot to be said for the old adage of being in the right place at the right time.

It was also interesting to note the desire in England and Wales to promote and foster an inclusive process for policy formulation, where the Civil Service and interested parties worked together to produce acceptable and workable solutions. This type of policy-making environment has not developed to the same degree, even in the new Scotland. A combination of coming to terms with a new legislature and a degree of defensiveness about the ownership of the policy process has hindered the emergence of such an inclusive approach. Policy-making as a result still draws from too narrow a base, but that pattern is now under pressure to change.

In relation to the actual responses generated from the Scottish component of the work it was

evident that while legal interests were well versed in the law, they were not particularly knowledgeable about the practical day-to-day problems created by the current arrangements. They also had even less of a grasp of the issues that could emerge from current reform proposals. Legal interests did, however, know how to influence the reform process. Property professionals, on the other hand, while fully versed in dealing with the current operating difficulties, found it hard to see beyond the current legal arrangements. They also felt somewhat detached from the process of reforming property law. Consumer interests were weak on both fronts, given that they had just come together in response to the prospect of change. It was, however, the politicians who had the weakest grasp of the issues involved. Their preoccupation with what is happening here and now, rather than some months down the line, ensured they had a very limited contribution to make in setting the reform agenda. That said, it will be the politicians who will make the final decisions on these significant reform matters.

The study also revealed a marked difference in the role played by practising lawyers in the process of policy reform. In the United States and Australia, private lawyers are advocates and problem solvers as they are in Britain. However, private lawyers in both the United States and Australia are also designers of legislation. This does not appear to be a British legal tradition. From the evidence provided by this study, practising solicitors in both England and Wales, and Scotland, do not actively engage in the reform process to the extent their counterparts do in other countries. There does not appear to be the same commercial drive on the part of solicitors to generate new business opportunities through the development of new areas of practice.

This difference in approach raises a core question, namely how does society ensure the law it creates is best suited to the specific needs and requirements of society. Although the Law Society does review legislation, it does not play the active role that private lawyers in other countries do. This is unfortunate because it is often the private lawyers, rather than the government lawyers, who understand the practical issues involved in the creation of particular legislation. Of course, this assumes that the private lawyers will play a constructive, rather than obstructive, role in the creation of legislation.

It is not only the practising lawyers who should be more actively involved in the legislative process. This study demonstrates that all interest groups which will be affected by legislation should play a role in its creation. The advantage of having consumer and professional interests play an active role was demonstrated by the interactive process used in England and Wales to create the proposed Commonhold and Leasehold Reform Bill. Hopefully this study, which drew on the contribution of social science as well as legal skill, will stimulate debate and encourage other ways of broadening the policy-making process to ensure that it becomes more inclusive and participatory.

Consumer context

Consumers should know before they purchase what rights and responsibilities they will have if they purchase a particular home. With commonhold law they will have a better

understanding of their rights and obligations.

The parallel development of a Seller's Pack will also contribute to their understanding by producing a culture of transparency in the home buying process. A full house condition report, all relevant legal documentation, and a disclosure of the property management system should be provided at the marketing stage. This information is currently required in other jurisdictions.

The underlying theme in this work has been the ability of existing power structures to resist or accommodate change. Consumer power continues to grow and challenge old power relationships. Popular expectations about what constitutes home ownership have changed significantly over the past 40 years. Only now have the legal arrangements for property ownership begun to catch up and reflect that. Popular expectations about the role people should play in the legislative process are also changing. Hopefully, this study will encourage all groups affected by legislation to play a more active role in its creation.

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