Multi-Unit Developments – Problems in Practice and Proposals for Reform

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Abstract: The Multi-Unit Developments Act 2011 established a regime for the management and governance of multi-unit developments. Fourteen years on, some of the problems in the apartment sector that prompted law reform persist, such as difficulties in securing the transfer of common areas of developments from developers. In addition, problems arising from construction defects are so widespread in Irish multi-unit developments that the Irish Government has established a national apartment defects remediation scheme which is currently the subject of draft legislation. This article considers these issues in the context of the relevant legislation and recent case law, and presents proposals for reform.

Keywords: Multi-Unit Developments; Common Areas; Apartment Defects.

Introduction

This article considers two areas that present particular problems for owners and management companies of multi-unit developments ('MUDs').

The first is the transfer of 'common areas' of multi-unit developments from landowners and developers to owners' management companies ('OMCs') in accordance with the statutory requirements established by the Multi-Unit Developments Act 2011 ('the 2011 Act').

The second is the remedies available in the event that construction defects are discovered in multi-unit developments; this issue is considered both from the point of view of apartment owners and of OMCs. The Working Group to Examine Defects in Housing established by the Department of Housing, Local Government and Heritage estimated in its 2022 Report that the prevalence of defects in apartments in Ireland was likely to be between 50% and 80%, equating to 62,500-

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100,000 of apartments or duplexes constructed between 1991 and 2013, and would likely cost between €1.56 to €2.5 billion to rectify.[1]

Throughout the discussion, there is reference to the dispute resolution and rehabilitation procedure available pursuant to section 24 of the 2011 Act by application to the Circuit Court. There is no detailed treatment of the procedure, however, as it is not possible to access any reported Circuit Court decisions via any publicly available database, and very little literature and commentary has been generated in relation to the process since its introduction.

The case is made for reform of the 2011 Act to facilitate the transfer of common areas and consequently the completion of the title to multi-unit developments. It is also submitted that a specialist tribunal ought to be established to deal with the various disputes that can arise in multi-unit developments.

Background and legal context

Ireland has gone from being a country with very few apartments at the beginning of the 1990s, to a situation where they have increased in number by 85 per cent since 2002, accounting for 12.0 per cent of all household types in 2016, compared with 11.1 per cent in 2011."[2] Despite a recent decrease in the number of apartments being built in Ireland, a long-term policy of successive governments has been to encourage increased density of housing, particularly around urban centres and transport hubs, which will require a significant proportion of housing stock to consist of apartments. Guidelines issued to planning authorities in 2024 by the Department of Housing, Planning and Local Government emphasised the necessity to increase the scale of new buildings in cities and towns, and to encourage higher densities and taller buildings.[3]

MUDs call for regulation because they are, in essence, single buildings, including groups of single buildings, containing numerous separate units each occupied separately and often owned separately. All developments (except for

[1] Working Group to Examine Defects in Housing, *Defects in Apartments Report of the Working Group to Examine Defects in Housing* (Department of Housing, Local Government and Heritage July 2022) viii-ix.
[2] Central Statistics Office, *Census 2016 Profile 1 Housing in Ireland* (Central Statistics Office 2017).
[3] Department of Housing, Planning and Local Government, *Sustainable Residential Development and Compact Settlements Guidelines for Planning Authorities* (2024) 5.

developments comprising between 2 and 5 units, exempted by section 2(1) of the 2011 Act) require management companies to be established to undertake the duties set out in the 2011 Act,[4] and to be managed in compliance with the 2011 Act. Section 17 of the 2011 Act imposes various obligations on OMCs with regard to the preparation and distribution of annual reports to members of the OMC, and the convening of a meeting at least once a year for purposes which include the consideration of the annual report.[5]

The 2011 Act was preceded by a Law Reform Commission ('the Commission') report published in 2008.[6] The report identified particular difficulties arising with regard to ownership of MUDs, title and conveyancing matters, the regulation of managing agents, consumer protection and service charges, and what was described in the report as the need for the '[r]escue and rehabilitation of multi-unit developments'.[7] The report recommended primary legislation to address a number of issues. The Commission recommended that developers of MUDs should be required to incorporate a management company before the conveyance of any unit in a MUD is completed,[8] and that the legal title to the development should vest in an OMC which would become compulsorily registrable with the Land Registry, with the developer retaining the beneficial interest in each unit.[9] As noted by the Commission, '[t]he effect of these recommendations is that unit purchasers will be guaranteed that there is a corporate management structure in place as soon as the conveyance of a unit is completed.'[10]

The Commission further recommended that the OMC should retain records of service contracts, warranties, guarantees, fire safety certificates, and certificates of compliance with planning permission and Building Regulations.[11] It also

[4] s 3(1)(a) of the 2011 Act provides: 'A person to whom this section applies shall not, after the coming into operation of this section, transfer his or her interest in a residential unit in a multi-unit development to which this section applies unless – (a) an owners' management company has been established at the expense of the developer of the multi-unit development concerned'.
[5] s 17(1)(a) and (b) of the 2011 Act.
[6] Law Reform Commission, *Multi-Unit Developments* (LRC 90—2008).
[7] ibid 10.
[8] ibid [2.15].
[9] ibid [2.22].
[10] ibid [2.23].
[11] ibid [2.28] and [8.09].

recommended that completion should be defined by law as requiring compliance with planning conditions and the statutory building code, as certified by a professional person in accordance with the building control legislation,[12] and that service charges should not be used to pay for snagging problems or other expenses incurred by the developer.[13]

The Commission considered that an OMC would be the preferred legal structure for large MUDs of five units or more and that co-ownership was the more appropriate legal structure for developments of five or fewer units.[14] With regard to the establishment and management of the proposed OMC, the Commission was of the view that the cost of incorporation of the OMC should be borne by the developer[15] and that the objects of the OMC after the development stage should be to ensure the management and maintenance of the common areas of the MUD and otherwise to comply with the obligations imposed on the company.[16] The Commission also recommended that the Memorandum and Articles of Association of an OMC should contain a number of specified provisions in relation to voting rights, service charges, and the holding of AGMs.[17]

The report went on to recommend that a directors' report should be prepared annually,[18] to include a list of the OMC's assets, its insurance details, and whether the development was fully compliant with fire and safety legislation; that a building investment fund be established as a mandatory statutory requirement for all larger MUDs; that all MUDs must maintain a scheme of annual service charges;[19] and that the Circuit Court should have jurisdiction to make a remedial order to enable the rescue and rehabilitation of existing or future MUDs (with the court to be given a wide discretion as to the remedial orders it could make).[20]

[12] ibid [2.28] and [8.09].
[13] ibid [2.39] and [8.11].
[14] ibid [3.18] and [8.14].
[15] ibid [3.39] and [8.17].
[16] ibid [3.46] and [8.20].
[17] ibid [3.50] and [8.21].
[18] ibid [3.69] and [8.28].
[19] ibid [3.107] and [8.32].
[20] ibid [7.37] and [8.66].

The report contained a Draft Multi-Unit Developments Bill[21] that was substantially adopted in the form of the 2011 Act.

A MUD is defined in section 1(1) of the 2011 Act as:

> a development being land on which there stands erected a building or buildings comprising a unit or units and that—
>
> (a) as respects such units it is intended that amenities, facilities and services are to be shared, and
>
> (b) subject to section 2(1), the development contains not less than 5 residential units.

Many apartment developments in Ireland constitute MUDs. Apartments within MUDs are typically sold subject to long leaseholds, essentially equivalent to ownership. In *Re Orlington Company Ltd by Guarantee and Re an Application by Ossory Road Enterprise Park Ltd*,[22] Stack J described the effect of section 1 of the 2011 Act as follows:

> While it does not apply to this Estate, it is notable that s. 1 of the Multi Unit Developments Act, 2011, defines 'unit owner' as the person, other than the Management Company, 'who holds the highest freehold or leasehold estate or interest in respect of a unit in a multi-unit development', thereby reflecting the general understanding of conveyancers and lending institutions, that a lengthy leasehold interest constitutes ownership.[23]

As will be seen, the established contractual models used in the arrangement of construction and ownership of apartments operate in conjunction with the statutory regime applicable to the ownership and management of apartment developments established by the 2011 Act.

[21] ibid 193-206.
[22] [2023] IEHC 34.
[23] ibid [37]. This case was upheld on appeal [2023] IECA 256.

Common Areas

Sections 4 and 5 of the 2011 Act require common areas in existing MUDs, as defined in section 1(1), to be transferred to OMCs within 6 months of the coming into operation of section 4.[24] Section 4(1) provides as follows:

> Where, before the coming into operation of this section, the ownership of a residential unit in a multi-unit development has been the subject of a transfer by or on behalf of a developer to a purchaser, and the ownership of the relevant parts of the common areas and in the reversion relating to the residential units has not been transferred to the relevant owners' management company, the developer shall, subject to subsection (2), arrange for the transfer of the ownership of the relevant parts of the common areas of the multi-unit development concerned together with the reversion to the relevant owners' management company within 6 months of the coming into operation of this section.

Section 5(1) of the 2011 Act imposes a similar obligation on developers in relation to MUDs substantially completed before the coming into operation of section 4(1).

The requirement to transfer common areas of MUDs constitutes a significant incursion into the property rights of developers and landowners. In effect, the 2011 Act renders it impermissible for common areas to be owned by any party other than the OMC established for the management of that MUD.

An OMC is defined in section 1(1) of the 2011 Act as 'a company established for the purposes of becoming the owner of the common areas of a multi-unit development and the management, maintenance and repair of such areas and which is a company registered under the Companies Acts'.

However, in the fourteen years since the coming into operation of the relevant sections of the 2011 Act, difficulties have arisen for apartment owners and OMCs where common areas have not been transferred in accordance with the

[24] Regulation 2 of the Multi-Unit Developments Act 2011 (Commencement) Order 2011, SI 2011/95 fixed 1 April 2011 as the day on which sections 1 to 13, 15 to 31, 33 and 34 of the 2011 Act came into operation.

requirements of sections 4 and 5 of the 2011 Act. Laffoy J in *Re Heidelstone Company Ltd* (‘*Re Heidelstone*’)[25] characterised the title to apartments in a MUD where the common areas had not been transferred as ‘incomplete’. She pointed out:

> In such developments the full implementation of the scheme of disposal by the apartment or house owners assuming control of the management company and by the common areas being conveyed to the management company is an essential element in completing the title of each apartment owner and house owner. If this becomes impossible because of the dissolution of the vendor company or the management company, or both, the title of each apartment owner and house owner remains incomplete.[26]

A difficulty that arises in relation to the legal analysis of this field is that the dispute resolution mechanism provided by sections 24 and 25 of the 2011 Act requires that a party seeking to invoke that mechanism must make its application in the Circuit Court. Section 26(1) of the 2011 provides: ‘The Circuit Court shall have exclusive jurisdiction to hear and determine applications under section 24 and such applications shall not be made to the High Court.’ Conferring exclusive jurisdiction on the Circuit Court to deal with such applications means that there is no database of written judgments on section 24 applications. As Dowling and Martin in *Civil Procedure in the Circuit Court*[27] have commented, ‘[a]t the end of the trial of an action, the court will more often than not deliver an ex tempore judgment if it has made a final decision. However, in circumstances where the court requires time to deliberate on the matter, it will reserve its judgment to be delivered at a later date.’[28]

The land ownership model established in the 2011 Act envisages the original freehold owner of the development land transferring that freehold, together with title to the common areas of the development to the OMC on completion of the development, and that each of the individual apartments is held under a long lease.

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[25] [2007] 4 IR 175.
[26] ibid [4].
[27] Karl Dowling and Susan Martin, *Civil Procedure in the Circuit Court* (3rd edn, Round Hall 2018).
[28] ibid [17.02].

It is therefore a statutory requirement that the freehold in a MUD can only be owned by an OMC and should not be sold to any other party. The 2011 Act ensures this outcome by requiring the common areas to be transferred by developers on completion of the development and by requiring the transfer by the original developer[29] of the freehold of the development to the OMC.

An OMC, following completion of this process, should therefore own the entire freehold and become the landlord of the individual apartment owners as holder of the reversionary interest in each of those units. Typically, apartment units are sold on leases of 500 years or so.[30]

The situation can arise where the common areas have been transferred to a management company, but the management company is subsequently struck off. This can arise due to default on the part of the management company directors in complying with company law requirements following the transfer of control of the management company to the unit owners within the development. It can also occur where the original developer has retained control of the OMC and has failed to file appropriate returns with the Companies Registration Office so that the OMC has been struck off the Register of Companies.

Consequently, the common areas of the development may be vested in the State by virtue of section 28(2) of the State Property Act 1954, which provides as follows:

> (2) Where a body corporate is dissolved, either before, on or after the operative date, the following provisions shall apply and have effect and, in the case of a body corporate dissolved before the operative date, be deemed to have applied and to have had effect as from such dissolution, that is to say:—

[29] Or the landowner, in cases where the developer does not own the land.

[30] *Re Orlington Company Ltd. by Guarantee and Re an Application by Ossory Road Enterprise Park Ltd.* [2023] IEHC 34 [38], Stack J commented with regard to the practice: 'I also think those members of the public who have purchased apartments in this country would rightly regard as absurd any suggestion that the fact that they are nominally tenants of very long leases, such that they and their successors-in-title are entitled to remain in possession for periods of hundreds (or even thousands) of years, means they are not owners of them.'

> (*a*) all land which was vested in or held in trust for such body corporate immediately before its dissolution (other than land held by such body corporate upon trust for another person) shall, immediately upon such dissolution, become and be the property of the State, subject however to any incumbrances or charges affecting the land immediately before such dissolution,
>
> (*b*) all personal property (excluding chattels real but including choses-in-action) which is vested in or held in trust for such body corporate immediately before its dissolution (other than personal property held by such body corporate upon trust for another person) shall, immediately upon such dissolution become and be State property.

Therefore, the common areas may not be under the control of the apartment owners, even when they have been transferred to the OMC.

Another issue that can arise is that the common areas may continue to vest in the original developer or landowner, notwithstanding the fact that 14 years have now passed since the date on which the 2011 Act required all common areas to be transferred in all relevant developments to the OMCs for those developments. In those circumstances, if the original developer has itself been struck off the Register of Companies or cannot be found, an application may be necessary under the Trustee Act 1893 using the method adopted in *Re Heidelstone* by Laffoy J, which allows the OMC to be appointed as trustee for the purposes of taking ownership of the common areas.[31]

The Companies Act 2014 ('the 2014 Act') provides a method by which an application can be made to the High Court for the restoration of an OMC to the Register where it has been struck off. Section 738 of the 2014 Act provides that an application for restoration of a company to the Register may be made during the period of 20 years from the date of its dissolution. There is a similar provision in section 30 of the 2011 Act, but the application process under section 30 can only be made during the period of six years from dissolution of the company.

[31] *Re Heidelstone* (n 25).

The criteria to be satisfied before the company may be restored on an application are set out in section 738(1) as follows:

> (a) the striking off of the company has disadvantaged the applicant,
>
> (b) the application is made within the period of 20 years after the date of dissolution of the company; and
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> (c) it is just and equitable to do so.

Pursuant to subsection 2, the application may be made by the company, a member or an officer or director of the company at the date of its dissolution, a creditor of the company, or by:

> (d) a person who, at the date of its dissolution, had an entitlement (disregarding any right of the directors to decline to register the person as such) to be registered as a member of the company by virtue of—
>
> > (i) the execution, in the person's favour, of an instrument of transfer of a share; or
> >
> > (ii) the transmission, by operation of law, to the person of a right to a share.

It is possible, therefore, that there may be a number of parties *prima facie* entitled to bring an application for restoration.

It is possible for the members of the company to seek the costs of the application against the former directors of the company on the basis of section 742(2) of the 2014 Act which entitles the court to:

> (c) if and to the extent that it thinks fit, order that the officers of the company, or any one or more of them as specified in the order, shall be liable for a debt or liability incurred by or on behalf of the company during the period when it stood struck off the register;

As a consequence of the strike-off, however, the property of the management company would have become vested in the Minister for Public Expenditure and Reform pursuant to section 28 of the State Property Act 1954.

Courtney explains the effect of the section as follows:

> Section 28 of the State Property Act 1954 provides that where a company is dissolved all of its property, both realty and personalty, including *choses in action*, automatically vests in the State and is held by the Minister of Finance on behalf of the State.[32]

Courtney further notes that property held in trust is not vested automatically in the Minister, as the company itself holds the property on trust for a third party:

> Property that is held in trust by the company is expressly stated not to vest in the State, because the company is not the beneficial owner of that property. An alternative to applying for restoration of a company that was the trustee of property before it was dissolved might be to apply for the appointment of a new trustee under s 25 or for a vesting order under s 26 of the Trustee Act 1893.[33]

Where the legal interest in a MUD vested in the OMC directly prior to its dissolution, upon its dissolution, the legal interest is vested in the Minister for Public Expenditure and Reform by operation of law.

The scheme of disposal for the development typically provides for a Management Company Agreement that in turn provides for completion of transfer of common areas on completion of the development. If the developer company itself is struck off the Register of Companies before the transfer of the common areas has been completed, an application to the High Court may be necessary pursuant to section 26 of the Trustee Act 1893. Section 26(ii) provides as follows:

> (ii) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—
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> …
>
> (*c*) cannot be found;
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> …

[32] Thomas B. Courtney, *The Law of Companies* (4th edn, Bloomsbury 2016) [27.035].
[33] ibid [27.039].

> the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.
>
> Provided that—
>
> (a) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and
>
> (b) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.

In *Re Heidelstone*, Laffoy J considered the situation where the common areas of a development were vested in a company that had been struck off the Register of Companies for a failure to file annual returns. The original vendor of the common areas of a residential development, and the management company to which the vendor was to transfer the common areas pursuant to the scheme of disposal for the development, had both been struck off on this basis. An application was made by the majority of the owners of apartments and townhouses in the development for an order pursuant to section 26 of the Trustee Act 1893 vesting the common areas in a new management company which had been incorporated by the applicants.

A management agreement had been executed by the vendor company by which it covenanted to transfer the common areas to an OMC that had been established in order to maintain the estate in question. Laffoy J held that from the date of its dissolution, the vendor company held the relevant part of the estate in fee simple upon trust for the management company by virtue of the management company agreement, and that the management company, in turn, held its beneficial interest in the relevant part of the estate for the benefit of the unit owners.[34] Laffoy J held that it was an appropriate case for the exercise of the powers of the Court under the Trustee Act 1893 to vest the property in the new management

[34] *Re Heidelstone* (n 25) [19].

company established for that purpose, and commented that the original management company held the beneficial interest on trust for the members:

> at and immediately before the date of its dissolution, the second company held its beneficial interest in the varied estate for the benefit of the lessees of the apartments in No. 52 holding under the leases created by the first company in 1986 carved out of the fee simple. Those lessees or their successors, who are applicants on this application, are the ultimate beneficiaries of the varied estate.[35]

Laffoy J acknowledged that a company restoration of the original developer might also have been initiated but she was satisfied that the Trustee Act 1893 was the more expedient route in the circumstances of the case where the transfer of the common areas had not been completed, and the legal and beneficial interests were held in separate, dissolved companies, which might both have required restoration.[36]

Where, however, the transfer of the common areas to the OMC has been completed, it is arguable that no trust arises in favour of the unit owners that requires the intervention of the court for appointment of a trustee, but an application may nonetheless be required for restoration of the company if it has been struck off.

It is necessary in either scenario to seek a waiver from the Department of Public Expenditure and Reform by means of the procedure adopted by the Department for disclaiming property pursuant to the State Property Act, and to have the waiver available for the purposes of the court application, since the property may be vested in the State pursuant to section 28(2)(a) of the State Property Act 1954 as land that is vested in, or held in trust for the vendor company or OMC immediately prior to its dissolution.

Where the property owned by the OMC vests in the Minister for Public Expenditure and Reform by virtue of section 28 of the State Property Act 1954, and where the company was dissolved following the transfer of the common areas to the OMC, the Minister acquires the legal and beneficial interest in the

[35] ibid [19].
[36] ibid [21].

common areas. The procedure available pursuant to the Trustee Act 1893 for vesting of land held in trust would not, therefore, apply, as the Minister would not be holding the lands on trust.

It is to be noted that the decision in *Re Heidelstone* was followed in various authorities since, including in *Re Bárr na Farraige Owner's Management CLG*[37] and *Re Joe Miley and Partners.*[38]

Apartment defects

The land ownership model used for the development and sale of apartments presents considerable difficulties when defects emerge in apartments. An apartment block or development is a building or series of buildings, sometimes with commercial units (typically in ground floor units), often with underground car parks, and featuring common areas inside and surrounding the buildings. The 2011 Act defines a MUD as follows:

> a development being land on which there stands erected a building or buildings comprising a unit or units and that—
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> (*a*) as respects such units it is intended that amenities, facilities and services are to be shared, and
>
> (*b*) subject to *section 2 (1)*, the development contains not less than 5 residential units.[39]

The separation of legal title between the common areas and overall structure of the buildings (held by the original developer, landowners, and ultimately the OMC) and the individual apartments (held under leasehold by unit owners or institutional owners) presents complications in pursuing contractual and other legal remedies in respect of defects.

The sale of individual apartments will usually feature a long leasehold and a building contract, but the building contract will apply to the apartment and not to the entire building. The contract also cannot be relied upon by second and

[37] [2021] IEHC 71.
[38] [2025] IECA 25.
[39] s 1 (1) of the 2011 Act.

subsequent purchasers in an action against the original signatory to the building contract. That signatory may be a special purpose vehicle incorporated by the developer for the purpose of acting as the main contractor for the development, but which will likely have no assets and no insurance in respect of defects, and will thus not be a mark for litigation following completion. The OMC may seek to rely on the Management Company Agreement which should provide an indemnity in respect of defects, and/or on the provisions of the 2011 Act itself which oblige a developer to complete the development in accordance with planning legislation and Building Regulations.[40] However, the developer company may itself be a special purpose vehicle, dissolved or otherwise, not a mark for litigation when defects emerge.

The ownership structure means that the unit owners have no standing to bring actions in respect of the common parts or common areas of a development. Britton and Bell comment in this regard:

> Complications flow from the fact that the structure and 'common parts' are necessarily in different ownership (or at least management) from any individual flat. Residents' concerns about defects may therefore centre on part of the development which they have no right even to inspect, let alone repair or improve, even at their own expense.[41]

In the decision of *Re Lance Investments Ltd. (in liquidation)* ('*Re Lance Investments*'),[42] the OMC was held to be entitled to an order for the rectification of defects in a MUD, but such an order could not be enforced against the liquidator of the original developer, such that the order was essentially treated as an unsecured liability of the developer company. The remedial works orders that had been made by the Circuit Court in the case were overturned on appeal to the High Court on the basis that the Circuit Court had jurisdiction to award damages in lieu of the orders (as they were effectively mandatory injunctions) and that, as

[40] The Building Regulations are made pursuant to the Building Control Act 1990, as amended.
[41] Philip Britton and Matthew Bell, *Residential Construction Law* (2nd edn, Hart Publishing 2025) 591. The author of this paper was the specialist contributor to both the first and second editions of the work on the subject of Irish law.
[42] [2020] 1 IR 260.

such, the orders were to be regarded as unsecured debts in the liquidation of the developer.

There is a provision in section 24 of the 2011 Act whereby a 'developer' as defined in the Act may be required to complete a MUD (usually an apartment complex, with or without commercial units) in accordance with the planning and building control legislation. This is a potentially useful remedy which is available against developers by home owners and by OMCs, and could potentially be used to overcome the (usual) lack of a remedy in contract by an OMC against the original builder/developer. As the 2011 Act confers exclusive jurisdiction on the Circuit Court for the area in which the MUD is located in respect of such applications, there is little jurisprudence on how these orders work in practice.

As an OMC of an Irish apartment development will typically not be party to the original building contract for the development, it may be limited to an action in breach of contract against the original developer or to an application under section 24 of the 2011 Act.

An action for breach of contract will only be available where the developer has contracted with the OMC to complete the development (usually as part of an agreement for transfer of the common areas of the development to the OMC). Section 24 empowers the Circuit Court to direct the developer of a MUD to complete the development in accordance with the terms of any contract, the conditions of a planning permission, and/or the Building Control Acts 1990 and 2007.[43] The limitation of this remedy is apparent from the High Court decision in *Re Lance Investments*, in which the Court acknowledged the entitlement of an OMC to an order for the rectification of defects in a MUD, but held that such an order could not be enforced against the liquidator of the original developer, and that the order essentially ranked as an unsecured debt. Baker J commented in the decision:

> Section 24 of the 2011 Act permits the making of an order by the court for the enforcement of an obligation with a view to ensuring the effective enforcement of a right or the effective discharge of an obligation relating to a multi-unit development. I accept that, *prima facie* at least, the

[43] Multi-Unit Developments Act 2011, s 24(5)(l).

> Companies did have an obligation to complete the works to the common areas in accordance with the development agreement, and that the application before the Circuit Court was for the purposes of enforcing pre-existing rights. Counsel for Lee Towers makes the argument that the liquidator must comply with these statutory obligations and it is argued, therefore, that the liquidator can be compelled to perform a remedial order under the 2011 Act as part of the function of calling in and realising the assets of the Companies in the liquidation… The 2011 Act creates a form of statutory injunction by which a developer can be compelled to carry out works of repair to comply with planning and building regulations requirements. That is, in effect, a statutory form of specific performance. But the availability of the remedy does not mean that a person seeking an order under s. 24 of the 2011 Act has, on account of the statutory entitlement to seek a remedy, an entitlement which is akin to a trust or which creates a proprietary interest which might give rise to an argument that the remedy lies *in rem*.[44]

Baker J made similar comments in relation to section 7 of the 2011 Act, which provides as follows:

> The transfer of the ownership of an interest in the relevant parts of the common areas of a multi-unit development shall not relieve the person who would otherwise have been responsible from the duty, obligation or responsibility to ensure completion of the development, including—
>
> > (a) compliance with the requirements or conditions of a planning permission under the Planning and Development Acts 2000 to 2009 which relates to the development concerned, and
> >
> > (b) compliance with the Building Control Acts 1990 and 2007.

Baker J commented with regard to section 7: '[t]he section, in its plain language, suggests that a transfer of the common areas and reversions does not relieve a person from any existing obligations, but does not create new obligations.'[45] In

[44] *Re Lance Investments* (n 42) [68], [72].
[45] ibid [62].

Clarion Quay Management CLG v Dublin City Council & Ors (‘*Clarion Quay*’),[46] Barniville J (as he then was) stated that Baker J was making clear in this regard that what was at issue with respect to the order that might be made pursuant to the 2011 Act was the enforcement of pre-existing obligations and rights in the relevant management company agreement. Barniville J agreed with Baker J that section 7 did not create any new obligations.[47]

Regulation and legal structures used in other jurisdictions

There are examples from other common law jurisdictions that offer models for mitigating the impact of conventional ownership structures on the availability of remedies for defects. One such example is the Domestic Building Contracts Act 1995 (‘the 1995 Act’), which is the principal source of home buyer protection in the Australian State of Victoria. Section 8 of the 1995 Act implies a number of warranties into contracts for the construction of domestic buildings; section 9 provides that such warranties may be enforced by subsequent owners of the unit as if they had been a party to the original building contract. The warranties must be specifically included in any domestic building contract but apply whether or not they are so included and any attempted limit or waiver of those warranties is void save in limited circumstances.[48] The 1995 Act also provides that warnings must be given to domestic employers with regard to cost escalation clauses, and a copy of the building contract must be furnished to the employer.[49]

The 1995 Act applies to ‘domestic building work’, which includes most forms of building work concerning the construction, renovation or alteration of a home, including the preparation of plans or specifications for that work.[50]

The warranties in section 8 are a central part of the 1995 Act. Six warranties are set out, which are deemed by the section to be part of every domestic building contract. According to section 8, a builder engaged in domestic building work warrants that the work will be carried out in a ‘proper and workmanlike manner’ and in accordance with the contractual plans and specifications and all legal

[46] [2021] IEHC 811.
[47] ibid [317].
[48] Domestic Building Contracts Act 1995 s 10.
[49] ibid ss 15 and 25.
[50] ibid s 3.

requirements, that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used, and that (if a house) it will be suitable for occupation. Warranties extend to successors in title,[51] and cannot be excluded.[52]

Domestic building work is defective for the purposes of the 1995 Act where the work includes a breach of any of the section 8 warranties, and/or a failure to maintain a standard or quality of building work specified in the contract.[53]

The concept of ‘fitness for occupation’ is used in a number of the Australian states as part of the duty imposed (generally by means of implied warranties) on builders. In *Braham v Evans*,[54] the Supreme Court of Western Australia endorsed the finding of the State Administrative Tribunal that a house was not fit for occupation where the house lacked footings (foundations), a waterproof membrane, had inadequate roof framing and construction causing water ingress and ceiling deflection, inadequate joists under an upper floor and a defective balcony.[55]

Returning to the discussion of the position in Ireland, section 24 of the 2011 Act whereby a ‘developer’, as defined in the Act, may be required to complete a MUD (usually an apartment complex, with or without commercial units) in accordance with the planning and building control legislation is a potentially useful remedy which is available against developers by unit owners and OMCs, and could potentially be used to overcome the (usual) absence of a remedy in contract by an OMC against the original builder/developer. The fact that the common areas may have already been transferred at the point at which defects emerge does not relieve the developer of liability in this regard, by reason of section 7 of the 2011 Act, which provides as follows:

> The transfer of the ownership of an interest in the relevant parts of the common areas of a multi-unit development shall not relieve the person

[51] ibid s 9.
[52] ibid s 10.
[53] ibid s 3.
[54] [2008] WASC 274.
[55] ibid [33].

who would otherwise have been responsible from the duty, obligation or responsibility to ensure completion of the development, including—

(*a*) compliance with the requirements or conditions of a planning permission under the Planning and Development Acts 2000 to 2009 which relates to the development concerned, and

(*b*) compliance with the Building Control Acts 1990 and 2007.

The definition of 'developer' in the 2011 Act itself is not particularly helpful in terms of identifying the appropriate respondent to an application for an order pursuant to section 24, as it defines the 'developer' as 'the person who carries out or arranges for the development or construction of a multi-unit development'[56]

In effect, as is apparent from the *Re Lance Investments*[57] decision, an order made under section 24 creates a statutory form of specific performance, albeit one which ranks (in the event of developer insolvency) as unsecured debt, which is not enforceable against the liquidators of the developer.[58]

In the same vein, albeit with regard to a development that was not a MUD for the purposes of the 2011 Act, in *Grehan & Ors v Maynooth Business Campus Owners' Management CLG*[59] the Court of Appeal held that a management agreement that provided for the transfer of the common area after completion of the development had not been adopted by the receiver of the development, such that the receiver was not legally responsible for the cost of remedial works to the development's car park.

The Law Society of Ireland's practice note on precedent pre-contract enquiries in relation to units within MUDs seeks confirmation of whether 'the Vendor of the OMC [owners' management company] is aware of any proposal by the OMC to

[56] ibid s 1 (1).
[57] *Re Lance Investments* (n 42). The remedial works orders that had been made by the Circuit Court in the case were overturned on the basis that it the Circuit Court had jurisdiction to award damages in lieu of the orders (as they were effectively mandatory injunctions) and that, as such, the orders were to be regarded as unsecured debts in the liquidation of the developer.
[58] This suggests that the cost of compliance with remedial works orders should be treated as preferential debts in a liquidation of a developer.
[59] [2020] IECA 213.

carry out any repair work or incur other expenditure which would substantially affect the service charge payable at present', which would require the vendor/OMC to furnish information of any proposed repair works if there was a proposal to carry them out. However, if the OMC had commissioned a survey to determine the extent of known defects, but did not have a proposal to carry out repairs, this query would not require disclosure of such a survey.[60]

In *Clarion Quay*, Barniville J held that the plaintiff OMC was required to bring any application relating to a breach of the 2011 Act in the Circuit Court:

> Insofar as Clarion seeks to rely on the MUDs Act in respect of a claim against DCC it must make that case in the Circuit Court which, by virtue of s. 26, has exclusive jurisdiction. As I have already concluded, it is not open to Clarion to frame such a case by reference to a claim for a declaration as to the effects of the MUDs Act on the relevant contracts or as a claim for damages for breach of statutory duty. In my view, the Oireachtas clearly intended such claims to be brought in the Circuit Court.[61]

Canny comments that the holding in *Clarion Quay* may result in OMCs having to bring proceedings in the High Court in respect of any cause of action in tort or contract, and to bring separate proceedings in the Circuit Court in respect of any breach of the 2011 Act:

> While the MUDs Act 2011 may have been enacted with the laudable goal of limiting legal costs for all parties involved with MUDs Act litigation, regrettably it is likely to have the opposite effect given the lack of discretion in permitting parties to pursue a statutory claim in the High Court.[62]

[60] Law Society of Ireland Precedent Pre-Contract Enquiries, June 2015
[61] *Clarion Quay* (n 46) [279].
[62] Martin Canny, 'Claims against Developers by Owners' Management Companies at Common Law and under the Multi-Unit Developments Act 2011 after Clarion Quay Management CLG v Dublin City Council and I.E.G.P Management CLG v Cosgrave' (2022) 2 CPLJ 30, 31.

Proposals for reform

It is submitted that in light of the foregoing difficulties in the management and remediation of MUDs, a number of areas could be considered for reform.

First, the 2011 Act could be amended to provide for a transfer by statute of all common areas yet to be transferred, with a corresponding administrative procedure established by which Tailte Éireann could specify the proofs and mapping requirements applicable to such transfers. OMCs could be given the entitlement to apply for registration of the common areas in the name of the OMC subject to delivery of the requisite proofs and appropriate maps. An analogous scheme was used for the transfer of the entirety of the land and related property of London Underground to infrastructure companies established for the purpose of the upgrade and operation of the London Underground network by public-private partnership in 1999.[63]

Second, to take account of the difficulty in litigating disputes by means of the procedure established under section 24 of the 2011 Act, a specialist regulatory and administrative tribunal for MUDs could be established. An example of such a model is the Canadian Condominium Authority Tribunal established pursuant to Ontario Regulation 179/17 made under the Condominium Act 1998, which is Canada's first fully online tribunal.

The Condominium Act 1998 sets out various requirements in relation to the establishment, duties and governance of condominium corporations, which are analogous to OMCs under Irish law. The Condominium Authority Tribunal deals with a variety of disputes relating to nuisances, abandoned vehicles, pets, infestation, and failure to comply with settlement agreements arising pursuant to previous disputes. The tribunal operates a three-stage procedure consisting of negotiation, mediation by a tribunal member, which can be followed by adjudication and a tribunal decision if the dispute is not resolved at mediation, and the decision is binding subject to appeal. There is a fee of $25 for filing an application to the tribunal, a fee of $50 if the matter proceeds to mediation and $125 if adjudication is necessary, and it is designed to be user-friendly for self-represented parties.

[63] Greater London Authority Act 1999 s 165 and sch 12.

Another model can be found in New South Wales, where a public body, NSW Fair Trading, provides a free mediation service in relation to disputes relating to MUDs (known as 'strata disputes'), including disputes relating to repairs, maintenance, renovations to common property, owners' corporation governance, nuisance, and fire safety.

In the event that disputes are not resolved by mediation, parties have the option to apply to the New South Wales Civil and Administrative Tribunal (known as 'NCAT'), which is empowered by legislation to make a variety of orders in relation to both 'strata schemes' (analogous to MUDs in Irish law) and 'community schemes' (which can include mixed-use development lots such as recreational, commercial and residential lots).[64] NCAT has broad powers to make orders to settle a complaint or dispute about *inter alia* the operation, administration and management of a strata scheme and the exercise by an owners' corporation of its legal obligations.

Third, a statutory duty to construct and complete developments in accordance with all applicable laws could be enacted by primary legislation and be enforceable by OMCs and unit owners against developers, associated companies and builders. The Commission's 1982 Report on Defective Premises[65] included the scheme of a Defective Premises Bill, which was not introduced into Irish law following the Report. The Bill included a statutory duty on a person undertaking or executing work, in favour of the person who commissioned the work and any person who acquired an interest in it, to see that the work was undertaken in a good and workmanlike manner with suitable and proper materials. The Bill provided that damages recoverable for breach of the duty should include an amount for economic loss (if any) suffered by the plaintiff. The author of this article was one of the authors of the Defective Dwellings Bill 2021, initiated as a Private Members' Bill in September 2021 and which reached the third stage of the legislative process during the lifetime of the previous Government.[66] It is to be hoped that it, or a future improved version of the proposal, may yet be introduced

[64] NCAT was established pursuant to the Civil and Administrative Tribunal Act 2013 which consolidated numerous tribunals into a single body.
[65] Law Reform Commission, *Report Defective Premises* (LRC 3–1982).
[66] Defective Dwellings Bill 2021, No. 121 of 2021.

by primary legislation to provide improved remedies in respect of construction defects.