

**Law Society of Ireland**

**Submission on Consultation Paper C/2006/2  
Draft ODCE Guidance on  
Governance of Apartment Owners'  
Management Companies**

**LAW SOCIETY SUBMISSION ON CONSULTATION PAPER C/2006/2**  
**DRAFT ODCE GUIDANCE ON GOVERNANCE OF APARTMENT OWNERS'**  
**MANAGEMENT COMPANIES**

***Introduction***

The Law Society commends this consultation paper, which is a welcome contribution by the ODCE to the governance of Apartment Owners' Management Companies and will no doubt be of assistance to apartment owners, developers, managing agents and their advisers.

It is apparent from the document that a large amount of work and effort has been expended on this document and the efforts of the ODCE in this regard are greatly appreciated by the Law Society.

Solicitors frequently have to advise on AOMCs and on the particular issues and difficulties associated with them and, as a consequence, this paper will be very useful to legal advisers as well.

***General Comments***

In response to your invitation to comment on the draft document, the Society would make the following general observations on the Guidance and then some suggestions which it is hoped will be of assistance to the ODCE. The general points are as follows:-

1. This is a lengthy document, and its length is a result of the complexity involved in this area of law and, of course, the fact that the entire body of company law applies as much to an AOMC as it does for any other company. However, it is considered that the length of the document may be off-putting, particularly for apartment owners and Managing Agents who perhaps are not familiar with dealing with such complexities. Consideration might be given to the production, as a complement to this document, of some kind of executive summary or a 'key issues' document which might deal with the most important points and issues. In particular such a document might deal with the following:-
  - a. Summarising exactly what an AOMC is, why they are normally set up as companies limited by guarantee and the distinction between a company limited by guarantee and a company limited by shares and the important distinction between an AOMC and a Managing Agent.
  - b. Explaining the process whereby the common areas and developers' superior title is transferred to an AOMC.

- c. Explaining the status of members of an AOMC, their right to annual accounts and the distinction between AGMs and EGMs.
  - d. Explaining the distinction between a director and a member and noting the particular responsibilities that directors have.
  - e. Noting the main statutory records which an AOMC must keep.
  - f. Setting out the main annual filings which an AOMC must make.
  - g. Explaining the relationship between an AOMC and a Managing Agent and the calculation of service charges.
  - h. Explaining that there is a myriad of legal issues, financial reporting and the like which apply to AOMCs some of which are outlined in the consultation paper and that it is important that they take appropriate advice and that the cost of this is reflected in their budgets.
2. In a number of instances in the document the ODCE comments on what would be good practice or good advice, paragraph 14.8 is an example of that. There can be very complex issues involved in making any particular decision and the Society would have concerns that individuals might rely solely on the contents of this paper in making a decision rather than actually taking specific advice themselves. It would be helpful if the paper indicated the importance of obtaining advice that is tailored to the particular facts of the situation.
3. In certain sections of the paper (for example paragraph 4.19) the distinction between the roles of the directors of the AOMC and the apartment owners who are the members of the AOMC is not entirely clear. Ultimately it is the directors who should independently manage the AOMC and the members' rights are limited to their rights at company law (which rights are fairly limited and generally exercisable at general meeting) unless varied by the Articles of Association. For instance in the fourth bullet point of paragraph 4.19 it is questionable whether the paper should advise that a director's primary role is to procure and monitor the implementation of the wishes of the members, as the directors ultimately must act on what they believe is the best interests of the company.
4. There are a number of references to the Companies Acts, 1963-2005 which should now be to the Companies Act, 1963-2006 (e.g. paragraph 5.3).

### ***Specific Comments***

The Society wishes to make a number of specific comments by reference to the Chapters in the consultation paper.

## **CHAPTER 2**

It is suggested that there might be benefit in providing some detail on why AOMCs are generally formed as companies limited by guarantee (which essentially is so they aren't restricted by the limit on the number of members for a private company and to allow for seamless transfers of membership). In some developments, particularly smaller ones, the apartment owners may decide that a private company limited by shares is in fact the more appropriate vehicle (particularly now that the limit on membership for a private company has increased to 99) and it would be helpful if the differences and the advantages and disadvantages of each were understood.

Also at paragraph 2.3, the paper uses the scenario of construction of a number of apartment blocks as a model and it is suggested that it might have been simpler to use the building of a single apartment block as a model. It might also be worth clarifying that the structural parts of the building including the roof, any structural walls (whether internal or external), and the horizontal floor slabs in the apartments actually belong to the AOMC and in fact the apartment buyer simply acquires "a cube of air".

At page 11 paragraph (o), in the sixth sub-bullet you have underlined that, when the apartment complex is finished, the developer will transfer ownership of the estate to the AOMC. In practice this does not happen when the apartment complex is finished, but when the last apartment is sold.

Paragraph 3.2, there can be some variations on the scenario stated here. For instance, in a complex, where there are a number of blocks or where there is a mixed use development such as residential, retail etc, there could be a separate management company for each block, which owns the common areas of that block, together with an overall management company which owns the services which are common to the whole development or, alternatively, there could be one management company for the entire development.

## **CHAPTER 4**

Clause 4.4 – the management company agreement is executed between the AOMC and the developer.

Clause 4.6 – The statement that the contract for the sale of the common areas is typically written with the interest of the developer in mind is questionable.

The clauses that are inserted in such an agreement are usually a result of the current legal framework in which the parties are forced to operate and, indeed, without these clauses the development could be quite difficult.

## **CHAPTER FIVE**

There are a number of references to the Companies Act 1963-2005 which should now be 1963-2006 (e.g. paragraph 5.3).

In paragraph 5.5 you might want to address the obligation on public companies to have their accounts audited and the fact that the small company exemptions are not available to companies limited by guarantee. In relation to the last bullet point here, it is questionable whether it is correct to say that members are entitled to timely information in relation to the company's operations and its finances - their information entitlements are those set out in the Companies Acts which, by and large, relate to the right to receive the annual accounts.

Paragraph 5.10 - it might be helpful to indicate that there can be variances and alterations to any matter provided they are in compliance with law and that the variations are not necessarily limited to the matters stated here.

## **CHAPTER SIX**

Paragraph 6.7, it is questionable whether it is the case in every instance that the obligation to pay service charges never arises by virtue of the membership of the company. Depending on how it is structured, it may well be a requirement in the Articles of the Company for continuance as a member that the service charge is paid. However, the point is well made in the paper that, as an apartment owner, service charges are essential, as is membership of the AOMC.

Paragraph 6.16, it is not necessarily the case that all members must be allowed to participate in an annual general meeting, this is a matter that can be regulated by the Articles of Association and it is possible that a class of membership could be created which did not carry these rights.

Paragraph 6.19, it is suggested that rather than trying to summarise the relevance of the "oppression remedy" or even to indicate that it is not likely to be brought in relation to a AOMC, it might be far more beneficial to simply note that the procedure exists and that advice should be taken if any member feels that the affairs of the AOMC are being conducted in an oppressive manner or in disregard of the members' interests.

## **CHAPTER SEVEN**

Paragraph 7.18, it is suggested that it should be stated that, under Section 141(2) of the 1963 Act, where an EGM is convened for the purpose of considering a special resolution, the short notice requirement is a majority of members holding not less than 90% of the nominal value of the shares in issue or the available voting rights.

In relation to Paragraphs 7.20-7.22, these are standard provisions of Table C rather than provisions which AOMCs necessarily choose themselves to adopt and it might be helpful to clarify this point.

## **CHAPTER EIGHT**

In relation to paragraph 8.4, the last bullet point, the comment is made that only a small number of people are willing to give up their time to become Directors of an AOMC. In fact, a potentially much more difficult issue is whether they are willing to take on the responsibilities and potential liabilities involved in serving on the Board of Directors. The Society believes that the paper should not overstate the responsibilities involved or make the responsibilities sound more onerous than they actually are, but there is no doubt that there is a significant degree of responsibility involved, which is often a reason that individuals are not prepared to serve on Boards.

Paragraph 8.9, again these are provisions of Table C and it is the Society's view that the obligation in Table C is to disclose interests in contracts rather than conflicts of interest.

## **CHAPTER TWELVE**

Paragraph 12.6, The Society is unconvinced that a provision allowing members to permit an inspection of Directors' minutes is necessarily beneficial. This could become quite unwieldy and impede the operation of the Board..

The Society has similar concerns in relation to Paragraph 12.14 and would query whether members should be entitled as of right to inspect accounting records. It is suggested that the appropriateness of such an entitlement should be determined on a case-by-case basis with appropriate advice.

The Society agrees, however, that it is open to an AOMC to allow for these entitlements.

Paragraph 12.28, the Society believes that this is an important point and suggests that it should be highlighted in an executive summary that, once you become a member of a management company, that fact is effectively a matter of public record.

## **CHAPTER SEVENTEEN**

Clause 17.5, the Society supports the suggestion of standard terms of engagement for a managing agent and this is a proposal that the Society would be happy to explore further.

## **CHAPTER EIGHTEEN**

The Society submits that this chapter understates the role of solicitors in relation to an AOMC. The document management role of solicitors in relation to the title deeds is emphasised, but there is little mention of the more wide-ranging importance of independent and expert legal advice. The complexities in this area of law which are evidenced in the paper underline the importance for AOMCs to secure independent expert legal advice in relation to the myriad of legal issues that affect these companies

and their directors. This would include not only company and property law but also legal issues arising in the context of the supply of goods and services, liability issues, and issues relating to claims. It is suggested that this point should be emphasised and that the Board of an AOMC should be urged to ensure that their chosen solicitor has the necessary competencies to deal with the myriad of legal issues likely to affect the AOMC.

## **CHAPTER NINETEEN**

Paragraph 19.4(c) addresses a complex legal area. It is not entirely clear-cut that the object of any alteration to Articles must not be to secure some ulterior advantage for certain members. While this should probably not be stated in absolute terms, the point should be made that advice should be taken in each case.

In relation to paragraph 19.8, it should be emphasised that any changes to Articles should be tailored to the particular circumstances. Some of the suggestions might end up being rather impractical, for instance in regulation 4 it might be difficult for a location to be agreed which is convenient for a maximum number of the members of the company, given that many apartments could be owned by investors and the like. Again, it may not be practical to prevent Directors from being able to vote on contracts in which they are interested, as in some cases the interest may not be all that material. A Director for instance may have a small shareholding in a company which is going to provide services to the AOMC. It is suggested that it is better for the Director to disclose the interest and for the Board as a whole to decide whether he or she should participate.

Clause 19.9, in relation to the discussion forum suggestion, it is suggested that advice should be taken on whether the members of this forum could be deemed to be shadow directors?

## **CHAPTER TWENTY ONE**

In relation to paragraph 21.11, the second bullet point, it is suggested that the paper should not comment definitively on whether the Directors should bear the costs of any application to seek to have the company restored. We submit that it is a matter which should be determined purely on the facts. While there is the risk of Directors being sued in relation to any aspect of Directors' responsibilities, it might be preferable to avoid the minutiae on this point and to emphasise the general point that Directors have responsibilities and that they should take appropriate advice if there is an issue.

## **CHAPTER TWENTY TWO**

In relation to paragraph 22.10, the Society suggests that the point needs to be emphasised that, quite apart from legal responsibilities, if proper procedures are not followed and an AOMC is struck off or faces legal or enforcement proceedings, the apartments could

become unmarketable. This would be a significant deterrent to Directors adopting a lax attitude in relation to such matters.

**Business Law Committee**  
**Law Society of Ireland**  
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