

**Presentation
Apartment Owners Network
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Property Management Company and the Auditor

**Presented by
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Important Notice

Disclaimer

- This presentation is intended to summarize some idea and issues relevant to auditing, accounting and tax matters affecting Property Management Companies
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Overview

1. Structure of Management Companies
2. Roles & Responsibilities
3. Why limited by guarantee?
4. Role of the auditor – what does he do?
5. Other obligations of the auditor
6. Dealing with Receivers / Liquidators
7. Reinstatement of Struck-off companies



STRUCTURE OF MANAGEMENT COMPANIES

- Limited by Shares or by Guarantee
- Shareholders / Members
- Directors
- Company Secretary
- Executives
- Consultants: Managing Agent
Lawyers
Accountant
Auditor



STRUCTURE OF MANAGEMENT COMPANIES

1. Governed ultimately by
 - Articles of Association
 - Memorandum of Association
 - Lease with Owners/Developer
2. Limited by Shares
 - Just like a normal trading company
 - Shares can be purchased/sold more easily
 - Company law operates to give shareholders more rights
 - Limited liability applies
3. Limited by Guarantee
 - Has 'members' (rather than shareholders)
 - More flexible voting and control procedures
 - Limited liability applies



WHY 'LIMITED BY GUARANTEE'

Limited by Shares

- Companies Act
 - Need to keep registry of Shareholders
 - Restriction on the number of members
 - Change of owner may result in legal complications
- Private Limited Company
 - Legally a private limited company
 - Restrictions apply on transfer of shares
 - Can cause difficulty in transfer of ownership
- Special reporting requirements
 - Not required by companies Act to have an audit (but articles or lease will usually require an audit)
 - May be entitled to file 'abridged accounts' with CRO
 - no P&L or cash flow or directors report required



WHY 'LIMITED BY GUARANTEE'

Limited by Guarantee

- Ease and flexibility
 - No need for share registry
 - No restriction on the number of members
 - Change of owner does not result in legal delays
- Public company
 - Legally a public company
 - Liability of members limited to the extent of the guarantee (usually €1)
- Special reporting requirements
 - Required to have an audit
 - Not allowed to file 'abridged accounts' with CRO
 - Must publicly file
 - Directors report
 - Profit and loss account
 - Balance Sheet
 - Cash Flow



ROLES & RESPONSIBILITIES – Shareholders/Members

Shareholders / Members

- Ultimate owners of the company
 - Usually all unit-owners are automatically members of the company
 - Can approve changes to the governing statutes of the company (Articles, Memorandum, Lease Agreement)
- Usually decisions made by majority vote
 - although exceptions can exist
- Make decisions in general meeting
 - Must have at least one annual meeting per year
- The members elect the directors and secretary
- Rules may exist as per the governing statutes
 - (e.g. directors must be unit owners; directors must be residents)



ROLES & RESPONSIBILITIES – Directors

Directors

- Elected / Appointed by the members
 - Usually elected/re-elected at annual meeting of members
 - Can only be fired in exceptional circumstances
 - MUD Act (s.16) requires that directors must be re-elected after 3 years
 - Co-opted directors must resign and stand for re-election at next AGM
- Directors decisions are legally binding on the company
- Roles & responsibilities on directors are legal, non-delegable and personal
 - Personal liability
 - Good faith
 - Directors & Officers insurance
- Can appoint consultants to act as their agents



ROLES & RESPONSIBILITIES – Executives/Employees

Executives & Employees

- More appropriate to large management companies
 - Most Irish companies too small to justify a full-time CEO or finance director
 - Can be appropriate for smaller roles (caretaker/janitor)

- Appointed by the directors
 - Usually a paid role
 - Directors responsible for any actions of employees
 - Need clear division of duties between managing agent and executives/employees to avoid overlap

- Points to Note
 - Employees require additional PAYE reporting
 - Employee vs. consultant is a matter of fact
 - Employees have legal rights to be respected



ROLES & RESPONSIBILITIES – Company Secretary

Company Secretary

- Elected / Appointed by the members
 - Usually appointed at AGM and remains in office until retires/removed
 - Can only be fired in exceptional circumstances
- Limited Duties
 - Ensure meetings of shareholders/members are properly held and minuted
 - Keep a formal record of members & directors
 - Make annual filings to Companies Office
 - Receive and issue formal notices to members and/or legal representatives
- Who can be secretary
 - Often a Board member but can be 3rd party (watch for conflicts!)
 - Restrictions may exist in Statutes
 - The secretary may be a limited company
 - For convenience, a Managing Agent is often appointed secretary
 - Auditor may not be company secretary



ROLES & RESPONSIBILITIES – Auditor

Auditor

- Elected / Appointed by the members
 - Usually elected/re-elected at annual meeting of members
 - Can only be fired in exceptional circumstances
 - Must be notified in advance of AGM
 - Has a right to address members at AGM if he wishes

- Statutory Role
 - Company law and statutes regulate the roles & responsibilities of the auditor
 - Auditor is ‘independent’ and has a legal right to communicate with and report to the members
 - Cannot be ‘controlled’ by the directors

- Who can be auditor
 - Must be a registered auditor
 - Usually a Chartered Accountant with an auditing licence



ROLES & RESPONSIBILITIES – Other Consultants

Other Consultants

- Elected / Appointed by the directors
 - Directors usually have full authority to appoint consultants
 - May have to be ratified by the members
- Managing Agents
 - Appointed to execute the wishes of the directors
 - May provide assistance and guidance to the directors
 - Have no independent authority
- Accountants
 - Directors may appoint independent accountants to keep records of receipts and expenditure
 - This task usually (but not always) performed by managing agent
- Directors and/or member can also act
 - Usually no restriction on director/member acting as accountant, legal advisor or other consultant
 - Can be paid or voluntary
 - Full disclosure recommended to avoid conflicts



ROLE OF THE AUDITOR

Legal Responsibilities

- Governed by Statute
 - 1963 Companies Act
 - Obligation to report to members on statutory accounts
 - Unrestricted right to speak to members at AGM
- Governed by Case Law
 - Liability of auditor is unlimited
- Governed by Company Statutes
 - Additional reporting obligations can arise from lease agreement, e.g.:
 - Report on allocation of costs and charges between sinking funds
 - Calculation of service charges
 - Allocation of costs between different categories of units (houses vs. apartments vs. blocks)
 - Resolution of disputes



ROLE OF THE AUDITOR

Auditing the Accounts

- Not the accountant
 - Auditor cannot prepare the books and records of the company
 - Independence may be compromised
 - In practice he often assists and advises
- Verify all income and expenditure
 - Has all income earned by the company been recorded
 - Does it belong to the company ?
 - Is there income that should be collected but is not (e.g. from the developer)
 - Be satisfied that all expenditure is proper to this company
 - Separate companies for different phases of development but with similar names may lead to confusion (XYZ Phase I, XYZ Phase II)



ROLE OF THE AUDITOR

Auditing the Accounts (contd.)

- Verify assets and liabilities
 - Are assets recoverable (i.e. value can ultimately be received in cash)
 - Verify that all liabilities are included (no unreported or unrecorded liabilities)
- Related Party Transactions
 - Report on related party transactions, e.g.
 - Payments to directors for work performed
 - Discounts offered to certain members
 - Ensure these are properly approved and disclosed



ROLE OF THE AUDITOR

Auditing the Accounts (contd.)

- Sinking Funds
 - Must be set-up in accordance with MUD Act (Section 19)
 - Should be in accordance with lease
 - Transfers from general reserves to Sinking Funds (or other special reserves should be formally agreed

- Multiple Sinking Funds
 - Ensure apportionment of income and expenses is in accordance with the original leases
 - Fertile ground for disputes and ‘fairness’ as final build is often different from projected build in original lease
 - Impact of facilities taken over by local council



ROLE OF THE AUDITOR

Auditing the Accounts (contd.)

- Interest
 - Interest on late payments can only be charged in accordance with the terms of the lease
 - Often difficult to collect
 - Should be approved by members in general meeting if possible

- Rebates/Discounts
 - Must be approved by the Board
 - Should be approved in general meeting be members
 - Equity, fairness and full disclosure are paramount
 - Suspicion of ‘special deals’



ROLE OF THE AUDITOR

Service Charge Summary

- Best Practice
 - Show movement on each members account
 - Useful for directors to check on managing agents and spot anomalies in service charges
 - Should it be distributed to all members (or approved in AGM)?
 - Question arise re data protection
- Disclosure of Service Charge Arrears
 - Should it be circulated to members? Or included in annual accounts?
 - It must be 100% correct!
 - Many directors now reluctant to include in published accounts in case of error
 - Information re service charge arrears should be available on members' request



ROLE OF THE AUDITOR

**XYZ Management Limited
 Year Ended 31-Dec-2010**

Service Charges

	Jan-10		Service Charges in 2010						Total	Payment Received	Dec-10 Arrears/ (Advance)
	Arrears/ (Advance)	1,000	Annual	Car Park	Lift	Rebate	Interest	Other			
Apt 1	1,000	1,000	1,000	400	-	-	75	-	1,475	2,650	(175)
Apt 2	(500)	1,000	1,000	-	-	500	-	50	1,550	1,250	(200)
Apt 3	750	1,000	1,000	400	-	-	-	-	1,400	2,000	150
House 1	500	800	800	-	-	-	-	-	800	1,200	100
House 2	-	800	800	-	-	-	-	-	800	1,200	(400)
House 3	-	800	800	-	-	-	-	-	800	1,200	(400)
Duplex 1	(100)	1,200	1,200	400	100	-	-	-	1,700	1,600	-
Duplex 2	-	1,200	1,200	-	100	-	-	-	1,300	-	1,300
Duplex 3	800	1,200	1,200	-	100	-	70	-	1,370	2,170	-
		<u>2,450</u>	<u>9,000</u>	<u>1,200</u>	<u>300</u>	<u>500</u>	<u>145</u>	<u>50</u>	<u>11,195</u>	<u>13,270</u>	<u>375</u>

On behalf of the board of directors we approve the above service charge schedule

Director _____ Date: _____

Director _____ Date: _____



ROLE OF THE AUDITOR

Budgets

- Review of budgeting process
 - Who is responsible
 - Ground up – line by line (not just % increase on last year)
 - Managing agents often do the work on behalf of directors
 - What is the historical accuracy of prior budgets
 - Must be approved by members in AGM (s.18 MUD Act)

- Approval of next years budget
 - Explain changes from current year actual costs and justify cost increases
 - Show how cost controls are operating
 - Explain how operation of Sinking Funds will work
 - Is it OK to provide a sinking fund for cash flow problems caused by unpaid service charges?



ROLE OF THE AUDITOR

Secretarial & Tax

- CRO returns
 - Annual return and accounts (9 months after year-end & 28 days)
 - Limited by guarantee cannot file unaudited or abridged accounts
 - Limited by shares not obliged by law to file audited accounts but company statutes usually require it
 - B10 for change of directors
 - Responsibility of company secretary but often delegated to managing agent or auditor
- Tax Returns
 - Required if liability is more than €35 – otherwise letter stating ‘no liability’
 - Generally no liability on deposit income subject to DIRT as tax already paid
 - In practice. tax return required if other 3rd party income (rental, carpark, & investment income) is greater than €150
 - Revenue were lax in chasing delinquents but stricter now



RECEIVER / LIQUIDATOR

- **Receiver as Developer**
 - Receiver effectively ‘stands in shoes’ of Developer
 - Same rights and obligations as before
 - Receiver is responsible to carry out all the duties in the master lease from the time of his appointment only
 - Receiver is not responsible for liabilities prior to his appointment
 - If surplus funds available at end of receivership – should be split pro-rata with creditors (including management company if applicable)
- **Liquidator**
 - As above but in practice, the liquidator will have limited (or no) funds to undertake any future obligations
 - Personal guarantees/obligation on insolvent developer may be worthless
- **Outstanding Service Charges**
 - Effectively a secured charge against the property as no buyer will purchase until outstanding service charges are cleared

Always consider whether you need legal advice!



RE-INSTATEMENT OF STRUCK-OFF COMPANY

- **Strike-off Process**
 - Most common reason for strike-off is non-filing of annual return
 - Usually struck off if no filings for 2-3 years (can be shorter)
 - Breach of Company Law if directors do not file accounts
 - Directors responsible for ensuring company complies with CRO requirements
 - Transactions that occur while company is struck off may not be legally valid
 - Service charges not property levied
 - No changes in directors allowed
 - Limited liability may be temporarily suspended while struck off
 - Directors can be personally liable for actions of the company while it is struck off



RE-INSTATEMENT OF STRUCK-OFF COMPANY

- **Re-instatement**
 - Usually a High Court application if struck-off more than 12 months
 - required solicitor, barrister and affidavits
 - can cost up to €10k
 - MUD act now allows reinstatement through CRO only (no High Court) for up to 6 years after strike-off
 - Need audited accounts, annual returns, tax clearance and directors affidavits
 - CRO may accept a ‘package deal’ if new directors are appointed
 - Arrears of filing fees to CRO can be up to €3,700 but usually no legal costs
 - Accounting & audit fees only