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AN OVERVIEW OF THE MULTI-UNIT DEVELOPMENT (MUD) ACT 2011

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1. INTRODUCTION

The focus of this paper is an examination of the provisions of the Multi-Units Development Act, 2011 and the Court rules applicable for bringing an application to Court under the Act.

The 2011 Act applies where there a building or buildings erected comprising of units that:

(a) have facilities, amenities or services that are intended to be shared and the development contains not less than 5 residential units¹ **or**

(b) the development has more than 2 but less than 5 residential units where²:

- all the units are residential units and
- the structure in which the residential units are situate doesn't form part of the common areas of the development.

¹ S.1

² S.2

the provisions of Schedule 2 shall apply as respects the common areas of the development.

In terms of the types of development covered by the Act (a) above described an apartment block type situation and a mixed-use development as long as there are 5 or more residential units and (b) describes a very small residential development of between 2-4 units. Practitioners should note that where a multiunit development falls into the definition contained in (b) above not all the provisions of the Act apply, only those provisions set out in Schedule 1 of the Act apply, and only the provisions set out in Schedule 2 apply to the management of the common areas in a development where all the units are residential and the structure in which the units are situated does not form part of the common areas e.g. a gated housing development.

While the Act does not apply to purely commercial developments it does apply to mixed use developments, to the extent that amenities, facilities and services are shared by the residential and commercial units³. The obligations imposed on an OMC in relation to a commercial unit are regarded as being complied with where there is a fair and equitable apportionment of the costs and expenses (annual service charge and sinking fund charges) and voting rights attributable to the different classes of units.⁴ Under the Act “fair and equitable apportionment of the costs and expenses” means that account is taken of all relevant matters including the respective level of use of any common areas by the owners of different classes of units and their servants, agents and invitees; and a reference to costs and expenses shall be taken to be a reference to the matters referred to in sections 18 & 19 of the Act (these sections list the matters that go to make up the annual service charge and the sinking fund)⁵.

The Act comprises of 34 sections. Where the 2011 Act applies, there is an obligation on a developer to establish an OMC to become the owner of the common areas, and thereafter manage, maintain and repair the common areas. The Act sets out how and when the OMC is to be established, what matters/areas of the development it must manage and how the OMC is to be run (in terms of holding meetings etc.). The Act also provides for dispute resolution and mediation. A notable feature of the Act is that

³ S.2(3)

⁴ S.2(4)

⁵ S.2(5)

there are no sanctions for non-compliance with the provisions of the Act. While the definition of an OMC is a company registered under the Companies Acts the Act also provides that the OMC (other than one to which s.3 and s.14 apply) may include an industrial and provident society or a partnership or an unincorporated body or group of persons owning the common areas of a multi-unit development. It is also possible to establish different OMCs in respect of different parts of the multi-unit development.

2. DEFINITIONS

Section 1 is the definitions section of the Act. Importantly it defines “Common Areas” as those parts of a multi-unit development designated, or intended to be designated, as common areas and including where relevant all structural parts of a building and shall include in particular—

- (a) the external walls, foundations and roofs and internal load bearing walls;
- (b) the entrance halls, landings, lifts, lift shafts, staircases and passages;
- (c) the access roads, footpaths, kerbs, paved, planted and landscaped areas, and boundary walls;
- (d) architectural and water features;
- (e) such other areas which are from time to time provided for common use and enjoyment by the owners of the units, their servants, agents, tenants and licensees;
- (f) all ducts and conduits, other than such ducts and conduits within and serving only one unit in the development;
- (g) cisterns, tanks, sewers, drains, pipes, wires, central heating boilers, other than such items within and serving only one unit in the development;

The foregoing list is not a conclusive list as the developer may designate what areas are to be common areas. The common areas are the areas that are transferred to the OMC and for which the OMC is responsible for maintaining. From the foregoing list it is clear that structural elements of a building are “common areas” such as external

walls, the roof, or load bearing walls; as are internal areas such as landings and hallways; and external areas and features such as landscaped areas and water features; and common machinery such as lifts and boilers.

“development stage” means the period which begins when the first unit to be made available for sale is so made available and ends after all construction works and ancillary works (including works on the common areas), for the multi-unit development have been completed in accordance with-

(a) all relevant planning permissions under the Planning and Development Acts 2000 to 2009,

(b) the requirements arising under the Building Control Acts 1990 and 2007, and

(c) in a case where section 3 applies, the contract referred to in section 3(1)(d);

In *Fitzpatrick (Liquidator of Bohergar Developments Ltd) v Cuir Monard Management Co. Ltd* [2014] IEHC 136 a liquidator brought an application to disclaim onerous property pursuant to s.290 of the Companies Act 1963 (this section is now s.615 of the Companies Act 2014). The liquidator sought to disclaim the operation and maintenance of a sewage treatment plant and pumping station and sought an order vesting his estate and maintenance obligations in the Respondent management company. The Court distinguished between works undertaken to comply with conditions of planning permission on which the development was predicated- and works which could be classed as “ongoing maintenance”. The Court refused the application.

“residential unit” includes a unit “designed and used as a childcare facility and such facility is not intended to primarily share amenities, services and facilities with commercial units in the development”.

3. OBLIGATIONS ON DEVELOPERS/OWNERS

(a) To Form an OMC

S.3 of the 2001 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.

The section applies to:

- (a) a multi-unit development in which a residential unit has not previously been sold; and
- (b) a person, other than the owners’ management company concerned, who is the owner⁶ of relevant parts of the common areas of a multi-unit development.

While the Act prohibits the transfer of an interest in a unit to which the Act applies unless an OMC has been established, practitioners should not that the Act does not apply to conventional housing estates that has common areas. The Conveyancing Committee of the Law Society has stated that non-compliance with the Act does not necessarily make the property unsaleable⁷. VAT is not normally payable on the transfer of the common areas. In addition to requiring the establishment of an OMC, s.3 goes on to list a number of other obligations on the developer which are preconditions to the sale of a unit including:

- Ownership of the relevant parts of the commons areas and any reversion of the residential unit being transferred to the OMC.
- Obtaining a certificate from a suitably qualified person⁸ confirming that the relevant parts of the multi-unit development have been constructed in compliance with the relevant fire safety certificate.

⁶ In *O'Donnell v Ryan* [2017] IEHC 607 the first named defendant sought to have proceedings against him struck out on the basis that he had handed over all legal and de facto possession of the land to the developer. The Court struck out some of the proceedings allowing some of the claim to continue on the basis that there may be a residual claim in negligence against the first named defendant based on the degree of control he exercised over the land. The court found that he did not come within the definition of “Developer”.

⁷ See practice note published in *Law Society Gazette*, June 2013.

⁸ Power pursuant to section exercised by Multi-Unit Developments Act 2011 (Section 3) (Prescribed Persons) Regulations 2011 (S.I. No. 96 of 2011).

- A contract in writing has been entered into between the developer and the OMC prior to any transfer setting out the rights and obligations of each person relating to the completion of the development including particulars of:
 - (a) Confirmation of compliance with all relevant statutory requirements
 - (b) Completion of the works on the common areas
 - (c) The release of monies to the developer by the OMC where the contract provides for monies to be held by the OMC pending the completion of the common areas
 - (d) The process for resolving disputes between the parties to the contract as respects the completion of the development.

The obligation, to transfer ownership of the relevant parts of the common areas includes an obligation to transfer⁹:

- (a) any right of way or access and
- (b) any other easements appurtenant to the land or necessary for the reasonable use and enjoyment of the land
- (c) all rights necessary to enable the owner of each residential unit to enjoy the quiet and peaceful occupation of the **residential** unit of which he or she is the owner, and
- (d) all necessary amenities intended to be available for use in conjunction with the ownership and occupation of the **residential** units in the multi-unit development.

Practitioners should note that all easements and rights of way are transferred to the OMC with the common areas. In *Palaceanne Management Ltd v Allied Irish Bank Plc* [2017] IECA 141 AIB obtained an order for possession in the circuit court of 2 units in a development on foot of a charge. The units were effectively landlocked unless the bank had a right of way over the common areas. The common areas had been transferred to the OMC by court order on the 22nd January 2009. In the Court of Appeal Ryan J. held that the bank had a right of way prior to the execution of the court ordered deed of transfer and the transfer deed could not affect that right.

In *O'Donnell v Ryan* [2017] IEHC 607 a side issue that arose was that the management company, aware that there were defects with some of the units, did not

⁹ S.3(3)

want the reversion in the units transferred to it. It was argued that the management company had no obligation to take the reversions in the units until the litigation relating to the defects had determined. That matter is an issue that could be dealt with by way of a s.24 application under the Act.

Only residential units are entitled to have all rights necessary to enable the owner enjoy quiet and peaceful occupation and all amenities intended to be available for use in conjunction with the ownership of the residential units transferred. Therefore, it is possible that in a mixed use development only residential owners would be given the code to a certain gate or the right to use a children's play area- while the commercial units would not be entitled to the same amenities. The developer or other person who is the owner of the common areas shall ensure that the OMC has all the powers necessary to perform functions conferred or imposed by the Act. In respect of the contract to be entered into prior to the transfer the commons areas the Act requires the OMC to have separate legal representation (not to be represented by the same firm) to the developer or other person who is the owner of the common areas, and the reasonable costs of such representation shall be discharged by the developer or other person who is the owner of the common areas concerned¹⁰.

(b) Obligations to complete the Development

Section 7 provides that the transfer of the relevant parts of the common areas shall not relieve the person who would otherwise have been responsible from the duty, obligation or responsibility to ensure completion of the development, including compliance with the requirements or conditions of a planning permission; and compliance with the Building Control Acts 1990 and 2007.

In *Fitzpatrick (Liquidator of Bohergar Developments Ltd) v Cuir Monard Management Co. Ltd* [2014] IEHC 136 the applicant sought to disclaim its obligations in relation to the operation and maintenance of a sewage treatment plant related to a development. The Court acknowledged that where there were little or no assets there may be in practice problems- but that that alone was not reason enough to allow the liquidator to disclaim the property.

¹⁰ S.3(6)

Following a transfer the developer retains the right to pass and re-pass and have access to such parts of the common areas as is reasonably necessary to enable the multi-unit development to be completed¹¹. The developer must effect a policy of insurance in respect of all risks associated with the developer's use of the development and shall indemnify the OMC in respect of all claims made against the company of whatever nature or kind in respect of acts or omissions by the developer in the course of works connected with the completion of the multi-unit development¹². The developer must ensure that access to the transferred common areas by unit owners and their servants and agents, tenants and licensees, is maintained at all reasonable times, and that such access is maintained in a clean and safe fashion. The OMC and unit owners shall not obstruct the developer¹³.

4. THE CONVEYANCE OF UNITS

S. 6 of the Act provides that the OMC shall where requested by the developer to do so, to join in a deed of conveyance or transfer relating to a residential unit to purchasers, and take such other steps as are reasonably requested of it to enable a good marketable title vest in the purchaser.

When transferring the common areas and the reversion relating to the residential units to the OMC the transferor shall reserve the beneficial interest therein to himself/herself. Pursuant to s.11 when the development stage has ended¹⁴, the Developer shall as soon as practicable thereafter make a statutory declaration for the benefit of the OMC that the beneficial interest held stands transferred to the OMC, and the effect of the making of such declaration is that the beneficial interest and legal interest stand merged. A declaration under *s.11 (1)* shall be made with the consent of each mortgagee or owner of a charge, which consent shall not be unreasonably withheld. A mortgagee's consent shall not be treated as being unreasonably withheld where the mortgagee or owner of the charge makes the giving of such consent subject to a condition that the developer's interest in any residential unit which remains unsold be made subject to the granting of a mortgage or charge in favour of the mortgagee or owner of the charge.

¹¹ S.9(1)

¹² S.9(2) and S.9(3)

¹³ S.9(6)

¹⁴ And either section 3(7) or 4(2) applies reserving the beneficial interest to the to the transferor of the common areas.

(a) Determination of certain beneficial interests in common areas in certain cases.

Where the development stage has not ended¹⁵, but 60% or more of the residential unit owners request the developer to transfer the beneficial interest in the development to the OMC, unless “good and sufficient cause” is shown, as soon as practicable thereafter the developer must make a statutory declaration for the benefit of the OMC that the beneficial interests concerned stand transferred to the OMC, and the effect of the making of such declaration is that the beneficial interest and legal interest in the common areas concerned and in the reversion in the residential units concerned stand merged. Again, a declaration must be made with the consent of each mortgagee or owner of a charge in relation to the interest of the beneficial owner of the common areas concerned or reversion concerned which consent shall not be unreasonably withheld. “Good and sufficient cause” includes the reason that to do so would interfere in a material manner with the completion of the entire multi-unit development and that the interference could not be removed, overcome or resolved in any other effective manner than by the beneficial interest in the development or relevant part of the development continuing to be retained by the developer. Where the unit owners do not accept that good and sufficient cause has been shown as to why a declaration should not be made the owners may make application to the Circuit Court under s.24 of the Act for an order directing that a declaration be made.

Section 8 provides for the automatic transfer of membership of OMC on sale of a residential unit. Without the need to execute a transfer or have it approved by the directors of the company. The new member is entitled to exercise the powers, rights and entitlement of a member in the company concerned, and obliged to perform all the obligations (including the payment of service charges) pertaining to the membership of the OMC. The OMC must take all steps necessary to ensure that the share certificate or membership certificate, is issued to the member concerned as soon as practicable following notification of the change of ownership¹⁶; that the register of members of the company is altered accordingly, and that there is compliance with all other relevant requirements under the Companies Acts.

¹⁵ And either section 3(7) or 4(2) applies reserving the beneficial interest to the transferor of the common areas.

¹⁶ S.8(2)(a)

A unit owner (whether the owner of a residential unit or a commercial unit) shall be under an obligation to furnish to the relevant OMC—particulars of his or her name, particulars of his or her address, particulars of the names of the tenants in the unit, particulars of any habitual occupiers of the unit other than tenants, and such other contact particulars as the OMC may reasonably request, and shall promptly notify the OMC of any change in such particulars.

(b) Transfer of ownership of parts of a multi-unit development.

Pursuant to s. 10 if ownership of an interest in part of a multi-unit development is vested in a unit owner and such part of the development is one which is commonly held by an OMC, or comes within the definition of common areas, the unit owner may by agreement transfer and the OMC may by agreement accept, or vice versa, the transfer of the ownership of the interest in, the part concerned. The OMC must obtain approval for such agreement at a general meeting of the members of the company. Where either the unit owner or the management company considers the other has unreasonably withheld consent to such agreement the aggrieved party may apply to Court pursuant to s.24 of the 2011 Act.

RIGHTS OF THE OMC

(a) Right to effect essential repairs.

Where the effective maintenance of the common areas requires, the OMC shall have a right to carry out repairs or maintenance on a part of a relevant multi-unit development which is not in their ownership or control where such repairs are reasonably necessary to ensure the safe and effective occupation or the peaceful enjoyment of occupation of any unit(s) in the development, and such right shall include the right of access for such purposes to or through any part of the multi-unit development not in common ownership. Prior to carrying out repairs on a part of the development not in its control the OMC must:

(a) requested the person who had responsibility for carrying out such repairs or maintenance to do so, and

(b) afford such person a reasonable opportunity to carry out the repairs or maintenance.

However such a request is not a prerequisite where it is essential that the repairs be carried out in the shortest possible period, so as to reduce or minimise any loss to the OMC or the owner or occupier of a unit in the development. The OMC may recover such expenditure from any person (including the developer) who had responsibility for incurring such expenditure or carrying out the repairs and maintenance concerned.

MEETINGS

A member of an OMC may appoint a proxy to attend at meetings and will be regarded as present at the meeting and may vote at a meeting through that proxy, where the appointment of proxies by members is permitted under the articles of association or other document which regulates the operation of the OMC concerned. Pursuant to s.24(9) Where the Court on application to it, is satisfied that the structure of the voting rights of members in an OMC is not established on a fair and equitable basis, the court may, where it is satisfied that it is necessary in the interests of justice to do so, make an order altering the voting rights of members in the OMC concerned.

(a) Structure of OMC where no contract of sale was entered into prior to commencement of the Act

Where no contract of sale was entered into prior to the commencement of the 2011 Act each residential unit is afforded one vote in the OMC, and each vote shall be of equal value. The words “OMC” must be included in the name of every OMC. A person shall not be appointed as a director of an OMC for a term greater than 3 years.

(b) Structure of OMCs where there are 2-4 units.

One vote shall attach to each residential unit in the multi-unit development. Section 15(3) provides:

“Where the voting rights of members of an owners’ management company to which this section applies are allocated on a basis other than that specified in subsection (2) a person who, but for this section, would be entitled to exercise such voting rights, shall not exercise such rights unless that person has applied for and has been granted

an authorisation to exercise those rights by the Circuit Court which application shall be made under section 24”.

The Court shall not make an order authorising the exercise of voting rights referred to in subsection (3) unless it is satisfied—

(a) that the person concerned has an essential economic interest in the development concerned or a part of the development concerned (other than as the owner of a residential unit in the development) and that in order to adequately protect such interest it is necessary to authorise that person to exercise such voting rights, or

(b) that, for any other reason, it is necessary in the interests of fairness and justice to authorise that person to exercise such voting rights.

If a person has been appointed a director for life or for a term of greater than 3 years they shall have been deemed to vacate the office on the 3rd anniversary after the coming into operation of s.16 of the Act or if for a period over 3 years on the day on the day of the expiry of the term concerned or the day which is 3 years after the coming into operation of this section whichever is the earlier. A director however may be reappointed at the AGM unless this is prohibited by the articles of association or other governing document of the company.

(c) AGMs and Reports of OMC

Section 17 requires an OMC to prepare and furnish to each member an annual report which complies with the provisions of *s.17 (2)* and to hold a meeting at least once in each year for purposes which include the consideration of the annual report. Section 17(2) requires the annual report to include:

(a) a statement of income and expenditure relating to the period covered by the report;

(b) a statement of the assets and liabilities of the company;

(c) where the OMC is required to establish and maintain a sinking fund—

(i) a statement of the funds standing to the credit of the sinking fund, and

(ii) details of the amount of the annual contribution to the fund and the basis on which such contribution is calculated;

(d) a statement of the amount of the annual service charge and the basis of such charge in respect of the period covered by the report;

(e) a statement of the projected or agreed annual service charge relating to the current period;

(f) a statement of any planned expenditure on the refurbishment, improvement or maintenance of a non-recurring nature which it is intended to carry out in the current period;

(g) a statement of the insured value of the development, the amount of the premium charged, the name of the insurance company with which the policy of insurance is held and a summary of the principal risks covered;

(h) a statement setting out, in general terms, the fire safety equipment installed and the arrangements in place for the maintenance of such equipment; and

(i) a statement fully disclosing any contracts entered into or in force between the OMC and a director or shadow director of the company or a person who is a connected person as respects that director or shadow director.

(3) At least 21 days notice of the meeting to consider the annual report shall be given to each member.

(4) A copy of the annual report shall be furnished to each member at least 10 days before the meeting

(5) The meeting shall take place within reasonable proximity to the multi-unit development and at a reasonable time (unless otherwise agreed in writing by a 75 per cent majority vote of the members).

CHARGES

(a) The Service Charge

An OMC must establish and maintain a scheme in respect of annual service charges from which the OMC may discharge ongoing expenditure reasonably incurred on the insurance, maintenance (including cleaning and waste management services) and repair of the common areas of the development and on the provision of common or shared services to the owners and occupiers of the units in the development. Section 18 of the Act governs the annual service charges.

The service charge must not be levied unless it has been considered by a general meeting of the members concerned called for purposes which include the consideration of an estimate of the expenditure it is anticipated will be incurred by the company in that period. Prior to the completion of the sale of the first unit in a development, the OMC may set the annual service charge to be levied on unit owners in the development without holding a meeting. Prior to levying the annual service charge the OMC must prepare an estimate. The estimate must be broken down into the following categories:

- (a) insurance;
- (b) general maintenance;
- (c) repairs;
- (d) waste management;
- (e) cleaning;
- (f) gardening and landscaping;
- (g) concierge and security services;
- (h) legal services and accounts preparation; and
- (i) other expenditure arising in connection with the maintenance, repair and management of the common areas anticipated to arise.

The proposal in relation to the setting of an annual service charge may be amended at the meeting with the approval of 60 per cent of those present and voting at the

meeting. Where the proposed service charge is disapproved by not less than 75 per cent of the persons present and voting, the proposed service charge shall not take effect but the charge applying to the previous period shall continue to apply pending the adoption of a service charge in respect of the period concerned. If no service charge applied in the previous period the directors of the OMC may determine a scheme to operate for a period of 4 months from the date of the meeting. Service charges levied may not be used to defray expense on matters which are or were the responsibility of the developer or builder of the multi-unit development concerned unless such expenditure is approved in writing by 75 per cent of the OMC. Such an approval, to use service charges levied to defray expenses which are the responsibility of the developer shall not have effect unless at least 65 per cent of the units in the development have been transferred to a person who is not a “connected person” to the developer or builder; or to a director or shadow director of a company which was the developer or builder of the development; and at least 3 years have elapsed since the transfer of the ownership of the relevant parts of the common areas of the multi-unit development concerned. Where the OMC agree to spend money on something that was the responsibility of the developer the OMC may recover such expenditure from any person who had responsibility for incurring such expenditure or carrying out the works concerned. The owner of each unit in a multi-unit development shall be under an obligation to pay all service charges levied under s.18 of the Act.

A developer or building contractor, shall be regarded to be the owner of an unsold unit. A unit owner may seek reimbursement of service charges from a tenant where so provided by agreement. The annual service charge shall be calculated on a transparent basis and shall be equitably apportioned between unit owners.

In setting the annual service charge the OMC shall reference the actual or projected expenditure for the year in respect of which the same is levied. where any part of the service charge levied is not required/ there is a shortfall for the year concerned any excess/ shortfall shall be taken account of in setting the service charge for the following year. An OMC must maintain sufficient and proper records of expenditure incurred by it to enable appropriate verification and audits to be undertaken. S.18(16) provides that any excess may be applied on expenditure which may be incurred by the sinking fund.

(b) The Sinking Fund

Like the service charge the Act sets out what the sinking fund should be spent on. Section 19 provides that the OMC establish a “building investment fund” for the purpose of discharging expenditure reasonably incurred on—

(a) the refurbishment,

(b) improvement,

(c) maintenance of a non-recurring nature, or

(d) advice from a suitably qualified person relating to *paragraphs (a) to (c)*,

of the multi-unit development in respect of which the OMC stands established.

The owner of each unit is obliged to make payment to the sinking fund. A developer is regarded as the owner of a unit after the sale of the first unit. The amount of the contribution to be paid as by each unit owner to the sinking fund in respect of a particular year shall be the amount of €200 or such other amount as may be agreed by a meeting of the members as the contribution in respect of the year concerned. The OMC is obliged to establish a sinking fund within 3 years from the first transfer of a unit in the development concerned. Contributions made to the sinking fund must be held in a separate account and in a manner which identifies these funds as belonging to the sinking fund and such funds shall not be used for matters other than those set out in s.19(1). Where a dispute arises in relation to whether assets of an OMC should properly be applied to the sinking fund account or the annual service charges account the dispute may be the subject of an application under section 24.

(c) Request for payment and recovery of annual charges.

An OMC may issue a single request for payment of the aggregate of the service charge and the sinking fund payment (together referred to as annual charges) and every request for payment, shall set out the basis of the calculation of the charge and contribution, a breakdown of how it is calculated and the amount payable in respect of

the unit concerned. Annual charges may be recovered by the OMC concerned as a simple contract debt in a court of competent jurisdiction.

HOUSE RULES

An OMC may make house rules in respect of a development relating to the effective operation and maintenance of the development and with the objective of enhancing the quiet and peaceable occupation of units generally in the development, and such house rules are binding on—

(a) unit owners,

(b) tenants of unit owners, and

(c) servants, agents and licensees of persons referred to in *paragraphs (a) and (b)*

House rules must be considered and approved by a meeting of the unit owners. Each unit owner is entitled to 21 days notice of a meeting in respect of house rules, the Notice of the meeting must be accompanied by a draft of the proposed rules. Following the approval of rules under this section the OMC must furnish a copy of the rules to each unit owner and shall also send a copy to each unit in the development. House rules may be made by the OMC before the completion of the sale of the first unit, and in such event the first purchaser of each unit in the relevant part of the development shall be given a copy of such house rules on or prior to the completion of the sale of the unit.

It must be a term of every letting of a unit that the letting is subject to the observance by all those occupying the property the conditions and covenants in the title documents relating to the use and enjoyment of the property, and the house rules, and a summary of the conditions and covenants together with a copy of any house rules must be incorporated into the letting agreement relating to the unit concerned.

Where a person, who is obliged to comply with house rules, commits a material breach of the rules, the OMC may recover the reasonable costs of remedying such breach from such person which costs may be recovered as a simple contract debt in a court of competent jurisdiction.

DISPUTE RESOLUTION

(a) Court Applications

Section 25 of the act sets out who may make an application to court, namely:

- (a) the OMC
- (b) any member of such an OMC;
- (c) any trustee under a will, settlement or other disposition of land by such member;
- (d) the personal representative of a member of an OMC;
- (e) the developer of the multi-unit development;
- (f) with the permission of the court, such other person as the court sees fit.

A person referred to in (f) above must apply for permission to make an application, or to appear and be heard at an application under section 24. Such an application must be in a summary manner and shall include the reasons why such permission should be granted.

Application for relief under the 2011 Act should be brought in the Circuit Court on the circuit in which the relevant multi-unit development or any part thereof is situated. Section 24 sets out the relief that may be granted by the Circuit Court, namely:

- (a) for an order to enforce any rights conferred, or obligation imposed, by the 2011 Act or any rule of law, or
- (b) for an order relating to any matter to which reference to making an application under s.24 is made in the Act.¹⁷

An Order of the Court may include but is not limited to an order:

- (a) that the legal documentation relating to the OMC be amended;

¹⁷ i.e. An application under s.25 to be heard in any application or to bring an application to Court; An application under section 10(3) to compel a transfer of ownership of part of the development; An application under s.12(5) to determine certain beneficial interests; An application under s.15(3) to be authorised to exercise voting rights; An application under s.19(8) to determine whether assets of an OMC should properly be applied to the sinking fund account or the annual service charges account.

(b) in the case of a multi-unit development consisting of more than one structure, to provide that, where an issue relating to one structure only in the multi-unit development arises, only the unit owners in that structure shall have the right to be consulted and vote on the issue;

(c) in the case of a multi-unit development with more than one OMC, that a single OMC be formed to replace the existing owners' management companies;

(d) directing the establishment of an additional OMC in respect of a multi-unit development;

(e) apportioning the funds of an OMC as between its sinking fund and its service charges;

(f) determining the extent to which a part of the common areas of a multi-unit development forms part of the relevant parts of the common areas of the development;

(g) amending the covenants contained in an agreement (including a lease) between the developer, OMC and the unit owners;

(h) approving a proposal to enable an OMC—

(i) deal with a debt, whether caused by an inadequacy in, or the absence of, a sinking fund, and

(ii) any issues arising therefrom in relation to the future management of the OMC;

(i) transferring control of an OMC from a developer to the unit owners, where the court is satisfied the developer has unreasonably refused to effect such transfer, or the unit owners have unreasonably refused to accept such transfer;

(j) determining whether the management structure of an OMC in a mixed use multi-unit development complies with the provisions of this Act, and if not the order may direct that such steps as the court considers necessary to ensure that the arrangements concerned do so comply, be taken;

(k) determining whether a proposal to materially alter the physical character of a multi-unit development would disproportionately or inequitably affect any class of unit owners;

(l) directing the developer of a multi-unit development to complete the multi-unit development in accordance with—

(i) the terms of any contract,

(ii) the conditions of a relevant planning permission under the Planning and Development Acts 2000 to 2009, or

(iii) the Building Control Acts 1990 and 2007;

(m) directing a unit owner or a minority of unit owners to co-operate with decisions made by a majority of the unit owners in the development.

Before making an order pursuant to s.24 the court must be satisfied that all parties likely to be affected by the making of the order have received notice of the making of the application (unless the court has dispensed with the giving of such notice or deemed service of the notice good) and the court shall be satisfied that in all the circumstances, it is just to do so.

The court may also make such ancillary orders as it considers necessary in order to give effect to any order or orders made by it under s.24(3) of the Act, including an order directing the registration in the appropriate manner of any deed required to be executed in compliance with the order, and the service of a certified copy of the deed on each unit owner in the relevant development.

Where a person is directed by an order under s.24(3) to execute a deed or other instrument in relation to land, and

(ii) such person refuses or neglects to comply with the direction, or

(iii) for any other reason, the court considers it necessary to do so,

the court may order another person to execute the deed or instrument in the name of the first-mentioned person and a deed or other instrument executed by a person in the name of another person pursuant to such an order shall be as valid as if it had been executed by that other person.

When any deed required to be executed by reason of an order under s.24 and such order has been registered in the appropriate manner, each unit owner in the relevant part of the multi-unit development shall without charge to such unit owner be furnished with a duly certified copy of such deed by the OMC concerned.

Where the court is satisfied that the structure of the voting rights of members in an OMC is not established on a fair and equitable basis, it may the court may make an order altering the voting rights of members in the OMC concerned.

(b) Mediation Conferences

The Court may upon its own motion or upon the request of any party to an application under s.24, direct that the parties to the application meet to discuss and attempt to settle the matter, referred to as a “mediation conference” in s.27.

A mediation conference must take place at a time and place agreed by the parties and in default of agreement at a time and place specified by the court.

The Mediator will be appointed by agreement of the parties, or in default of agreement be appointed by the court, and must be:

- (i) a practising barrister or practising solicitor of not less than 5 years standing, or
- (ii) a person nominated by a prescribed body

The Court in its discretion will direct which party is to pay the costs incurred in the holding of a mediation conference shall be paid by such party to the application concerned as the court hearing the action shall direct. Subject to s.28, the notes of the chairperson of a mediation conference and all communications during a mediation conference or any records or other evidence thereof shall be confidential and shall not be used in evidence in any proceedings whether civil or criminal.

The Mediator shall prepare and submit to the court a report, which shall set out—

(a) where the mediation conference did not take place, a statement of the reasons as to why it did not take place, or

(b) where the mediation conference did take place—

(i) a statement as to whether or not a settlement has been reached in respect of the application, and

(ii) where a settlement has been entered into, a statement of the terms of the settlement signed by the parties thereto,

or

(c) where the mediation conference did take place and no settlement has been entered into, a statement as to whether such outcome is substantially due to the conduct of one or more than one of the parties, and in that case specifying the identity of such party or parties.

A copy of a report prepared under *subsection (1)* shall be given to each party to the application at the same time as it is submitted to the court under that subsection. At the conclusion of the hearing of an application under s.24, having considered the report submitted and having heard the submissions of the parties, the court may make an order directing that one party to pay the costs of the application, or such part of the costs of the application as the court directs, if satisfied that a party to the application—failed to comply with a direction by the Court in relation to mediation, or that such person is substantially the cause of the failure to reach a settlement.

Section 29 provides that “Nothing in this Act shall be taken to derogate from any right or power which may, whether before or after the passing of this Act, be vested in any person or court, by statute or otherwise, and the powers conferred by this Act shall be in addition to, and not in substitution for, such other rights or powers’.

(c) Restoration of companies to register.

Section 30 provides that where a management company which has the common areas vested in it has been struck off the register for failing to file annual returns or for being a defunct company then, if a member or officer of the company is aggrieved by the fact of the company having been struck off the register, then the registrar of companies, on an application made in the prescribed form by the member or officer before the expiration of 6 years from the publication in *Iris Oifigiúil* or, as the case may be, the Companies Registration Office Gazette of the notice that the company was struck off the register, provided that the registrar has received all annual returns outstanding, if any, from the company, may restore the name of the company to the register.

Upon the registration of an application under in the form found in S.I. No. 579/2016 - Multi-Unit Developments Act 2011 (Prescribed Form and Fee) Regulations 2016, the company shall be deemed to have continued in existence as if its name had not been struck off. Each application pursuant to s.30 must be accompanied by a certificate from a solicitor or an accountant certifying that the company is an OMC operating as such.

GUARANTEES AND WARRANTIES

Where a person develops a multi-unit development the benefit of any warranty or guarantee relating to any materials used in the construction, repair or improvement or equipment installed in the multi-unit development shall stand transferred to the OMC without any requirement for the giving of a notice of assignment to any person for the benefit of the unit owners in the development. Where the development stage of a multi-unit development has ended, a developer shall furnish to each OMC concerned the documentation specified in Schedule 3 relating to the development concerned.

RESTRICTION ON OMCS ENTERING INTO CERTAIN CONTRACTS

An OMC must not, enter into a contract for the provision of a service or the purchase of goods which would run for a period in excess of 3 years from the date the contract is entered into by the OMC, or which provides for a penalty to be imposed on the OMC if the contract is terminated by it after a period of 3 years from the date the contract is entered into by the OMC.

PLEADINGS AND PROCEEDINGS

As the Court may of its own volition request the parties to engage in mediation, and it is requirement under the Act to state in an application whether mediation or any other dispute resolution has been attempted it is recommended that the Plaintiff request the Defendant to engage in mediation prior to instituting proceedings. Such a request should be done in an open letter. Where a person mentioned in section 25(1)(f) wishes to apply to the Court for permission to make an application for an order under section 24, that person may apply to the Court for such permission ex parte, grounded upon an affidavit. Where permission is granted, the Plaintiff shall then proceed by Civil Bill to which shall be attached the order made under section 25(1)(f) granting such permission. Proceedings must be brought in the Circuit Court in the County in which the development is situate.

Rule 46B of the CCR governs applications pursuant to the 2011 Act, Rule 46B provides that:

1. Proceedings for relief under s.24 shall be by Ordinary Civil Bill in accordance with Order 1, rule 2, in which the applicant for relief shall be named as plaintiff and every person against whom relief is sought shall be named as a defendant.

2. The indorsement of claim in the Civil Bill shall:

(i) specify the capacity mentioned in paragraphs (a) to (e) of section 25(1) in which the plaintiff makes the application, or give particulars of any order made giving to a person referred to in paragraph (f) of section 25(1) the permission to make an application under section 24 referred to in that paragraph;

(ii) contain the name, address and description of each plaintiff and each defendant and identify with sufficient particularity the relevant multi-unit development or part thereof;

(iii) state the circumstances giving rise to the application;

(iv) specify any of the orders mentioned in section 24(5) and any other orders referred to in section 24 that the applicant requests the Court to make;

(v) specify each right conferred on the plaintiff by the Act or any rule of law which it is alleged has been infringed;

(vi) specify each obligation imposed on each defendant by the Act or any rule of law which it is alleged has not been discharged;

(vii) state whether or not mediation or other dispute resolution process has been attempted;

(viii) state whether or not any proceedings for any remedy preserved by section 29 have been notified by the parties to the proceedings in relation to the multi-unit development concerned.

3. Applications for the following reliefs in proceedings under the Act may be brought by motion on notice in the proceedings before the Court to which the application relates, grounded upon an affidavit sworn by or on behalf of the moving party:

(a) any interlocutory order;

(b) any ancillary order under section 24(7)(a) sought following the trial of the proceedings;

(c) any order under section 24(7)(b);

(d) an order under section 25 granting permission to appear and be heard at an application for an order under section 24;

(e) an order directing a mediation conference, in accordance with section 27(1);

(f) an order directing service of the proceedings on any other person or directing the giving of notice in lieu of service;

(g) any order sought on consent.

4. (1) Where an order directing a mediation conference is made–

(a) the Judge or the County Registrar, as the case may be, may extend the time for compliance by any party with any provision of these Rules;

(b) the Judge may extend the time for compliance by any party with any order made by the Judge in the proceedings and

(c) the Judge or the County Registrar, as the case may be, may adjourn the proceedings pending receipt of the report mentioned in section 28.

(2) Where, at any time, Order 19A (Case Progression) applies to proceedings under the Act, the provisions of section 27 and section 28 shall prevail over any provision of Order 19A, rule 7.”