

Launch of ODCE Consultation Paper on the Governance of Property Management Companies

“Guidance will help overcome the Governance Vacuum in Many Management Companies”

Mr Paul Appleby, the Director of Corporate Enforcement, has today (Tuesday, 12 December 2006) launched a public consultation process on the Governance of Property Management Companies.

The particular focus of the ODCE Consultation Paper is detailed draft Guidance which has been produced by the Office on the governance of the management companies which are associated with apartment developments. The Director is seeking public comment by 30 March next.

In his accompanying statement at the launch, Mr Appleby said:

“The governance of apartment owners’ management companies has been a frequent source of complaint to my Office in recent years. The phenomenon of management companies has also been the subject of increasing policy attention by State agencies and expert groups. It is clear therefore that there are substantial problems in the area which require to be addressed.

Issues of property law and contract are at the heart of apartment developments. It is however critical to the future value of an apartment development that it has an effective management structure. The typical management company owns and controls common areas in the development (such as gardens, car parks, entrances, corridors and stairways) and arranges for the provision of common services to the apartment owners (such as insurance, waste disposal, security, building maintenance, etc.). Usually, a managing agent is contracted by the company to provide these services.

If the management company does not maintain the property to a high standard, the resale value of every apartment in that development will suffer in the future. Maintaining the standards of an apartment development requires collective co-operation and investment by the apartment owners who are the members of their management company. Company law is accordingly relevant to the operation of the management companies.

In our experience, some apartment owners are unaware of the existence of a management company within their development, while others have an inadequate understanding of its proper role and of the part which they themselves can play in contributing to its success. Similarly, the directors of management companies (whether they be nominees of a developer or volunteer directors on behalf of the members) are frequently ill-informed of the tasks which must be discharged by an effective management company.

As Director, I have been anxious for some time to address the lack of information which is partially responsible for this governance deficit.

Following some months of preparation, my Office is publishing today in draft form Guidance which will provide a valuable information resource for the directors and members of management companies. The draft Guidance discusses many of the issues and requirements which need attention in such companies in the short and longer terms. The Guidance will, I believe, help overcome the governance vacuum which exists in many management companies.

I also appeal to the members of management companies to involve themselves more in company operations and supervision. Every apartment owner has made a substantial investment, and the future return on that investment is critically dependent on how well the management company maintains the complex as a whole. This Guidance will help to fill the void of knowledge which is contributing to the lack of participation by members in management company affairs.

I am anxious to receive feedback on the content of this draft Guidance, as I am conscious that it deals with a number of governance issues which extend beyond the specific company law remit of my Office. For instance, it discusses company relationships with bankers, managing agents and solicitors. That is why I am open to considering all suggestions for improvement of the present material and will take these suggestions into account after the consultation period closes on 30 March next. This relatively lengthy consultation period is being provided in order to allow the many individual and commercial interests who are associated with apartment developments the opportunity to consider this draft Guidance in detail.

Later in 2007, I plan to publish a formal Governance Handbook for Management Companies which should allow the directors and members of management companies to manage company affairs better. I believe that this Guidance, even in its present draft form, will also help to clarify the legal and other issues which require policy attention if the reputation and prospects of this key accommodation sector is to be maintained for the future.”

12 December 2006

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Editor's Note

ODCE Draft Guidance – Summary

A summary of the Draft Guidance is contained in the table associated with this Note.

Problems with Apartment and Estate Management Companies – Company Law

The ODCE has received in recent years a regular stream of complaints from apartment owners who are members of management companies about their inability to secure compliance with basic company law obligations. Typical defaults have included:

- the failure of management companies to account to apartment owners/members for company expenditure of the monies collected by way of service charges for the upkeep of the development. This is particularly evident when statutory financial and other information on the company's performance is not available;
- the failure of management companies to call general meetings of the apartment owners/members, so that important decisions for the future of the management company and the apartment development can be regularly made;
- the neglect by management companies of their annual return filing obligations which can give rise to the company being dissolved and to apartment owners being unable to sell their property.

In many cases, the ODCE has successfully secured administrative rectification of these types of default. On one occasion however, the Office found it necessary to initiate High Court proceedings before the failure to hold an annual general meeting was remedied.

However, many issues with respect to apartment developments (e.g., types of lease conditions, the failure of owners to abide by covenants with respect to the use of their apartment, delays by developers in ceding control of the management company to the apartment owners) have their origins in property law or contract and are beyond the remit of the ODCE.

Problems with Apartment and Estate Management Companies - General

Problems with management companies have been attracting increasing attention recently. Some of the recent publications in the area include:

- the Report of the Auctioneering/Estate Agency Review Group (July 2005), chapter 13 of which deals with the subject of management companies¹. This Report noted that problems in the area were being examined by the Law Reform Commission. However, the Report did recommend that managing agents which act on behalf of management companies to provide the common services (e.g., security, insurance and building maintenance) required by an apartment development be licensed and regulated by a new Auctioneers and Estate Agents Regulatory Authority;

¹ This Report is available at <http://www.justice.ie/80256E010039C5AF/vWeb/pcJUSQ6HADNE-en>.

- “Successful Apartment Living – A Role for Local Authorities in Private Residential Management Companies” (June 2006), published by Dublin City Council². This Report recommended that Dublin City Council register management companies and license managing agents as an agent of the new Regulatory Authority;
- the National Consumer Agency publication entitled “Property Management Companies and You” and the related Report entitled “Management Fees and Service Charges Levied on Owners of Property in Multi-Unit Dwellings” by DKM Consultants Ltd. in association with Kevin O’Higgins Solicitors (October 2006)³. The latter Report made 25 recommendations urging more consumer information and the regulation of management companies.

The Law Reform Commission (<http://www.lawreform.ie/>) is also preparing a Consultation Paper on Apartment Complexes and Multi-Unit Developments for publication before the end of 2006. The Paper will examine:

- whether there is a need for statutory regulation of such developments or whether ‘default’ or ‘rescue’ provisions would be sufficient;
- the problem areas of management structures and
- consumer protection.

The Commission intends to publish this Paper before the end of 2006. It is expected that the outcome of the Commission’s work will inform Government deliberations on the need for legislative change in the area.

ODCE Consultation Paper and Draft Guidance

The ODCE is seeking feedback on the present content of the Draft Guidance and on a number of related issues by 30 March 2007. Having reflected on the comments and suggestions received, the Director of Corporate Enforcement intends to publish a Governance Handbook for Management Companies later in 2007.

Copies of the Consultation Paper and Draft Guidance are available from the ODCE website, www.odce.ie, as well as in printed form from the Office. Please contact info@odce.ie or Maria Leavy, Compliance Unit, at (01) 8585833 for a hard copy.

Press Queries

Press queries on the Consultation Paper and Draft Guidance may be addressed to:

- Paul Appleby, Director of Corporate Enforcement, at (01) 8585820,
- Kevin O’Connell, Legal Adviser, at (01) 8585838, or
- Kevin Prendergast, Corporate Compliance Manager, at (01) 8585844.

Office of the Director of Corporate Enforcement
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² This Report is available at http://www.dublincity.ie/press_news/news/successful_apartment_living.asp.

³ A copy of both publications is available at http://www.consumerconnect.ie/eng/Hot_Topics/Campaigns/Property_Management_Companies/.

Summary of Draft ODCE Guidance on Apartment Owners' Management Companies

In line with its general compliance remit, the ODCE has prepared in draft form a Corporate Governance Handbook in order to support directors and members in the effective running of their management company's affairs and in protecting the very valuable assets which comprise most apartment developments. (Chapter 1).

The Draft Guidance explains the separate roles of the management company (i.e., as the owner of a development's common areas and as the party responsible for its upkeep) and the managing agent (who is contracted by the management company to provide the required building maintenance, insurance, security and other services). Reference is made to the three phases of a management company, namely the 'developer only', the 'developer and members' and the 'members only' phases. The Draft Guidance indicates that the framework of law governing management companies combines elements of public law (i.e., statute) and private law (i.e., the property leases and the company's internal governance rules). (Chapters 2 to 5).

The Draft Guidance notes that an apartment owner becomes a member of the property's management company on purchase of the apartment. It explains the privileges of membership, including the right to participate in the company's decision-making at its annual general meeting or otherwise. It discusses the duties and responsibilities of the directors and helpfully identifies the tasks to which they should be giving regular attention (e.g., maintaining safe custody of the property's title deeds and the company's other assets, supervising the managing agent's performance of its contractual obligations, securing the payment of service charges, considering the future refurbishment needs of the property, etc.). The distinct roles of the company secretary and auditors are also explained. (Chapters 6 to 11).

The Draft Guidance outlines the nature and purpose of the records to be kept of company activity and their accessibility to company stakeholders. It suggests some options for the management of the company's bank account(s) and discusses the preparation of the company's audited annual accounts and the filing of the annual return in the Companies Registration Office. (Chapters 12 to 15).

The Draft Guidance explains the critical importance of adequate service charges not only to meet the ongoing needs of the apartment development but also to create a reserve fund for the future replacement of items of major expense (e.g., lifts). The contractual relationship between the management company and its managing agent is also discussed and the desirability of having a clear written contract and ideally one based on standard terms of engagement. The advantages of the company having a separate legal adviser or solicitor are also outlined. (Chapters 16 to 18).

The Draft Guidance indicates how the company's articles of association (or internal governance rules) can be changed, and it proposes a number of issues for particular consideration by management companies. It identifies a number of other legal obligations to which management companies must have regard, and it explains the consequences of any failure of the company for the apartment owners. Finally, the Draft Guidance indicates that every effort should be made by apartment owners to resolve their own difficulties while highlighting the types of issue which might, as a last resort, be referred for ODCE attention. (Chapters 19 to 22).

