

# Covid-19 – Briefing Note on OMC AGMS and Service Charges

Mar 30, 2020 | Uncategorized

## Briefing Note on OMC AGMS and Service Charges – Challenges Presented by Covid-19

The Covid 19 pandemic touches society in many ways. No group or activity escapes its effects. The purpose of this briefing note is to explore one particular issue of practical importance which is affected by the present crisis namely, service charges and how an OMC can protect its source of funds for the benefit of its membership generally.

Issues arise not only by complications arising from AGMs not proceeding but the implications for service charges generally and their recovery to enable the continuing provision of much needed services in particular.

### **AGM**

An AGM must be held once in each year and not more than 15 months may elapse between two AGMs. Financial statements and reports must be presented at the AGM, not later than 9 months after the OMC's financial year end.

Business cannot be transacted at an AGM unless a quorum of members is present in person at the venue specified in the notice. Unless the company's constitution states otherwise, the quorum required is two members present in person or by proxy.

An OMC's constitution should always be checked to ascertain the relevant quorum for that OMC.

### **Notice of AGM- to give or not to give**

Where notice has already issued convening a general meeting of the OMC, it cannot unilaterally postpone that meeting, in the absence of an express power to do so under its constitution.

While a general meeting can be adjourned, generally the power to do so is vested in the Chairperson of the meeting and is invariably exercised where there is an insufficient

quorum but can with the consent of the members be adjourned (again subject to the constitution).

Accordingly, where a convened general meeting cannot proceed because of the Covid 19 crisis, the directors should communicate with the members in advance, outline their intentions concerning an adjournment and the (obvious) reasons why, namely public health, notify the members of an intention to adjourn the meeting immediately upon its opening, do so and notify the members of the adjourned date.

Where notice has not yet been given, the holding of the general meeting can be delayed, bearing in mind the time constraints outlined at the start of this note.

### Service Charges

If the AGM is delayed, what implications will this have for service charges?

Section 18 of the Multi Unit Developments Act 2011 (“the MUDS Act”) provides that the annual service charge in respect of a multi-unit development relating to a particular period **shall not be levied** unless it has been considered by a general meeting of the members concerned.

Section 18(4)(b) provides that where the service charge proposed to the general meeting 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.

Section 18(5) provides that where the proposed service charge is **disapproved** and no service charge applied in the previous period, the directors of the OMC may determine a scheme to operate for a period of four months from the date of the meeting, and such charges may be levied and recovered as if such scheme had been approved by the members.

In view of the wording used, there are certain minimum steps that must unfold for the statutory scheme regulating service charges to come into being: –

- The annual charge must have been considered; to be considered, the general meeting must have been convened and proceeded. If the general meeting cannot proceed because of the current crisis, it follows the service charge has not been considered;
- If considered, it must be disapproved by 75% or more of those attending and voting and, in that event, the preceding year’s service charge applies;
- If disapproved and where there was no previous service charge, the directors can set one for four months;
- The proposed service charge must therefore be expressly “disapproved” in order for the service charge relating to the previous period to apply or for the directors to determine a scheme which would operate for four months;
- In order for it to be “disapproved”, members need to vote at the meeting;
- Members cannot vote if the meeting does not convene or is adjourned.

Accordingly, absent approval or disapproval (which obviously requires a vote) the statutory scheme envisaged by the MUDs Act cannot be invoked. This means the OMC has no statutory entitlement to levy a service charge based on the charges which applied in the previous period. If it did there would be a question mark over their validity and hence over their lawful enforcement, based on a statutory claim (see further).

The predicament for the OMC is obvious; it cannot charge based on its budget as it has not been approved because no vote has taken place but equally it cannot base its charge on the previous year's budget as no vote (disapproving the intended charge) has taken place.

### **Alternative Grounds; the Scheme of the Development**

Practically speaking, this makes no sense, but only if considered solely in a statutory framework. While the MUDs Act creates a helpful statutory framework, importantly it does not (nor could it) dispense with the pre-existing and continuing (alongside the statutory framework) scheme of the development ("the Scheme").

The Scheme is the legal framework created by the Scheme documents, typically the Lease, the Management Company Agreement (i.e. the agreement to transfer the common areas) and the Deed of Transfer of the common areas. These documents, in particular the Lease, not only create an interest in property but as importantly create mutually binding covenants on the part of the owner and the OMC. In summary, the unit owner covenants to pay service charges and the OMC covenants to provide management services.

It is for this reason namely, there being both a statutory framework and the Scheme, that it is prudent when pursuing arrears of service charges that the legal claim is framed by reference to both.

For present purposes, this dual entitlement gives an OMC some comfort that if being unable to raise service charges demands based on a statutory entitlement as no vote has taken place, the OMC is still entitled to raise service charge demands based on the Scheme and to rely on the Scheme if forced to pursue such charges through the court process.

It is also open to an OMC to pursue arrears (which lack a statutory framework or in rare cases where the Scheme is not applicable to the unit owner in question) based on a claim in "quantum meruit" ie a claim for the value of the services supplied. While more involved in terms of the proofs which must be produced in court, it offers a "braces and belt" approach where an OMC may be understandably concerned for the underlying validity of its charges in these uncertain times.

### **Summary**

- If the OMC cannot consider (and hence vote) on the service charge budget, continue to invoice on the basis of the preceding year's budget;
- Given the consequent question mark over its statutory basis, when raising demands, refer to the scheme of the development in your demands;
- If challenged by an owner, explain the OMC's entitlements under the Scheme;

- If unpaid by the owner and the OMC is obliged to issue court proceedings, ensure the claim is drafted to include alternative claims under the statutory framework created by the MUDs Act, the Scheme of the development and in quantum meruit.

Kane Tuohy LLP,

**This Briefing Note is not intended as legal advice. For specific queries, please liaise with your usual contact in Kane Tuohy or with [Cómhnall Tuohy](mailto:ctuohy@kanetuohy.ie) ([ctuohy@kanetuohy.ie](mailto:ctuohy@kanetuohy.ie) / 087 2194782)**

## Recent Posts

The Courts' Warning to those Financial Institutions who delay in Progressing Court Proceedings

Covid-19 – Emergency Legislation

Force Majeure

Covid-19 – Briefing Note on OMC AGMS and Service Charges

James Latham acquisition of Abbey Wood Agencies Ltd

## Archives

April 2020

March 2020

May 2019

February 2019

December 2018

June 2018

April 2018

January 2018

December 2017

October 2017

April 2017

June 2015

October 2014

September 2013