ANNEX 1 to C/2006/2

DRAFT ODCE GUIDANCE

THE GOVERNANCE OF APARTMENT OWNERS' MANAGEMENT COMPANIES (AOMCS)

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Contents

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Glossary

This Section will be inserted after conclusion of the Consultation Process, when the final text of the Guidance Booklet is settled

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Chapter 1: The aim of this booklet

1.1 The aim of this booklet is to provide an introductory guide to "Apartment Owners' Management Companies" (AOMCs) from the perspective of the Office of the Director of Corporate Enforcement (ODCE): a statutory agency whose remit includes that of encouraging of compliance with company law.[1]

1.2 The ODCE hopes that this guide will be a useful resource for a variety of persons concerned with these companies and, in particular—

- the owners of apartments situated within complexes where an AOMC is involved in issues such as:-

  (i) the ownership and control of common areas, and

  (ii) the provision of common services;

- persons contemplating the purchase of apartments;

- persons connected with the governance of AOMCs, e.g., their directors, and

- persons involved in the day-to-day management of apartment developments, such as Managing Agents.

1.3 The ODCE is conscious also of many calls that have been made for law reform in this area. This is an issue which is largely outside the scope of this booklet. Even more fundamentally, law reform is not something which comes directly within the ODCE's statutory remit, although we are always willing to lend our insight and assistance to any process of law reform being considered or implemented by those specifically charged with that task. However we would hope that by clarifying what we believe to be some of the relevant company law dimensions which currently apply, it may assist in identifying at least some reforms which are or might be desirable.

1.4 The booklet does not set out to be an exhaustive guide to *all* issues that may arise in relation to AOMCs or which may be relevant to their needs. As already stated it is written primarily from a company law perspective – rather than, for example, from the perspective which might be taken by someone concerned mainly with issues of housing policy, neighbourhood development, property law or the principles of good estate management. However in order that the booklet will be of most use to readers, and will allow for the relevance of the company law issues to be apparent, it will occasionally be necessary for us to refer to matters from the spheres of property law, principles of good estate management etc. Put simply, issues in relation to AOMCs seldom exist in the sphere of company law alone: without having at least *some* overlap with issues which exist also in another sphere (such as that of good estate management or property law).

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[1] Section 12(1)(b) of the Company Law Enforcement Act 2001.

Chapter 2: What are AOMCs and why do we have them?

2.1 The question of *what is an AOMC?* is one which is surprisingly difficult to answer concisely. This stems from the fact that, as we understand it, the concept and structure of the AOMC both originated and has been allowed to develop mainly within the sphere of private law. When apartment complexes first started to be developed in Ireland, developers and their lawyers identified that there was a need for some sort of a vehicle through which the common areas of the complex could be managed. However the scale of apartment development in those days was very small and it does not seem that anyone ever considered that there was a need for detailed consideration in the public sphere of questions such as *what do we want of AOMCs?* and *how do we want to shape and structure them?* Accordingly no new statute was enacted seeking to specifically regulate AOMCs. Instead developers and their lawyers turned to and adopted a pre-existing legal form, that of the company limited by guarantee formed under the Companies Acts. In the circumstances this was indeed a sensible and understandable decision on their part.

2.2 Accordingly, rather than seeking to define an AOMC at the outset, we propose instead to outline the context out of which they typically arise.

2.3 We begin with a simplified outline of the circumstances of a typical apartment complex.

(a) In general this is developed from what, immediately prior to the commencement of development, was a vacant site owned in its entirety by a single person or company. For convenience we will assume that it is a company and will call it Developer Limited.

(b) Developer Limited causes apartment blocks to be built on the site. It will also usually do some or all of the following matters—

- erect security gates;
- lay car parks;
- put up lighting in the outdoor areas of the complex;
- provide a shared refuse-disposal area;
- install closed circuit television (CCTV) facilities;
- landscape the complex.

The apartment blocks themselves will, by definition, contain a number of separate and self-contained apartment units. However in general these will share a number of common services or benefits such as the following—

- common stairwells and staircases;
- common hallways and landings;
- lifts;
- common water and waste pipes: into which, or out of which, there are connections to each of the separate apartments;
- common electricity, television and telephone cabling: out of which there are connections into each of the separate apartments.

In addition common facilities may possibly be developed: such as facilities for a caretaker or concierge, or possibly even a private gym or swimming pool within the complex.

(c) Developer Limited then proceeds to market the complex. However all that it is put up for sale are the apartments themselves: not the hallways and the staircases and the bin-areas etc.

(d) For reasons of property law, these apartments will usually be conveyed by way of *long leases* for a period of, say, 999 years.

(e) Typically long leases of this sort will include provisions of the following sort:-

- an entitlement for the purchaser to possession of the *apartment itself* during the entire period of the lease;
- rights of way for the purchaser to/from the apartment over the *common areas* of the complex;
- rights for the purchaser to use one identified car-parking space within the complex (and no others);
- rights to connect to, and avail of, the pipes, drains, sewers, cables and other conduits which have been placed in the common areas to service all of the individual apartments;
- rights to use the common areas (e.g., lifts, refuse disposal areas) in common with all other apartment owners - subject to reasonable rules and regulations for the common enjoyment thereof;
- rights to benefit from any restrictions which, by virtue of the conveyancing documents, are imposed on each and every one of the apartment owners: e.g.,
    - covenants by apartment owners that they will use their apartments only for the purpose of single private residences;
    - covenants to keep the apartments and the common areas in good order;
    - controls on what sorts of pets may be kept within the complex;
    - controls on the amount of noise which will be permitted to escape from any apartments;
    - covenants not to hang advertising signs or laundry from balconies;
    - covenants not to do any other acts or things that may be or become a nuisance to other apartment owners;
- rights to benefit from insurance policies which will be put in place in respect of the complex as a whole, against hazards such as fire, flooding, explosion, subsidence, etc;
- rights to have the common areas (e.g., hallways, staircases) maintained in a good state of repair and decoration and for common facilities (e.g., lifts, intercoms,

security gates etc) to be kept in good working order and for common amenities (e.g., gardens, shrubberies etc) to be kept well tended;

- rights to enjoy the services of a caretaker, concierge, security guard, CCTV monitoring service etc;

- rights to benefit from reserve funds or contingency funds which are intended to be established to meet future expenditures incurred in the maintenance and/or repair of the complex;

(f) on reading the list, it should be immediately obvious that all of these matters are not simply desirable, but are essential to the enjoyment of an apartment. Indeed, without them, it is difficult to imagine that any individual owner's apartment would even continue to hold its value, still less to *increase* in value. To take an extreme example, an apartment would almost certainly begin to lose value if, for example, it was on the third floor of a building where the lifts had ceased to function properly, the carpets on the stairs were torn and dirty, the intercom was broken, the sewerage outlets blocked up, and there were persistent instances of noisy businesses being carried on from adjoining apartments;

(g) however it should equally be obvious that it is not enough for these rights to be merely *stated* in the written conveyancing documents. If those rights and benefits are to be effective two additional factors are essential. *Firstly* someone has to ensure that they become a practical reality and someone, on an ongoing basis, has to provide the money to ensure—for example—that lifts are serviced, carpets cleaned, electricity cables renewed and action is taken against noisy and inconsiderate apartment owners;

(h) identifying who ought to be the second of those someones is fairly easy. Since the services and amenities are provided almost exclusively for the benefit of the apartment owners (together with their tenants, visitors, etc), it follows that it is the owners who have to pay for them. Accordingly the conveyancing documents will usually provide that each apartment owner must contribute to these overall costs. The question of how much each owner should separately contribute is one which can be answered in different ways so the lease will usually stipulate what is to be the basis. Sometimes it may be provided that each of the (say) 20 apartment owners should contribute equally. In other cases a more sophisticated approach is taken under which—for example—owners will contribute on a basis determined by reference to the varying size of their apartments. Such a formula will lead to (say) the owners of a large three bedroom penthouse paying a proportionately higher share than (say) the owner of a ground-floor studio;

(i) having resolved the question of who is to pay for the provision of the common services, we return now to the question of identifying the someone who is to be charged with ensuring that they are actually provided;

(j) as we understand it, there is no reason why Developer Limited could not undertake that it will do so indefinitely. Neither is there any reason why the task could not be undertaken by (say) a firm specialising in providing services of that sort. However obviously Developer Limited or such a specialist firm will only be willing to do so if it is able to obtain a worthwhile profit, and the only way such a profit can be obtained is by all the apartment owners paying amounts which exceed the basic cost of obtaining the essential services and benefits which they are collectively seeking. A further disadvantage is that it

is readily conceivable that if Developer Limited or a specialist firm undertook the task, the apartment owners might collectively feel that they had no real power or influence in determining basic questions which may be of considerable importance to them such as—

- *what type and quantity of insurance should protect the property against fire and other risks?*
- *are we willing to pay for an on-site caretaker?*
- *are we willing to grant a right-of-way through our car park to facilitate the development of that derelict adjoining site?*

(k) for these reasons, the ODCE's understanding is that the view which is conventionally taken within the Irish apartment market is that the best way of ensuring that apartment owners should—

(i) maintain a real input into decision-making as regards their complex, and

(ii) be in a position to best control the costs of having common services provided for their collective benefit,

is for the ongoing management functions connected with the complex to be vested in a *limited liability company* owned and controlled by all of the apartment owners;

(l) the advantage of using a company are that, in law, *a company is a legal entity separate and distinct from its members.* This means that it is what is sometimes called a *vehicle* by which *a potentially large number of people* may *combine for the pursuit of a common objective*. Once they do so, and go through certain formalities associated with the *incorporation* of the company, they bring into being a *new legal person* which *in its own corporate name* can hold land, enter into contracts, embark on legal proceedings etc. Although the company is *owned and largely controlled* by its members, they do not personally need to put their names to any contracts or arrangements entered into by the company. Moreover if the company is *incorporated with limited liability* the members have only a limited obligation to contribute to any deficiency in the assets of the company in the event that it becomes *insolvent*. In the case of a *company limited by guarantee* that liability is usually limited to a token amount such as €1. Furthermore *company law* contains a well-developed body of rules and principles which assist in bringing about *fair and transparent decision making*, appropriate *dissemination and circulation of information*, the *protection of minority interests* and the enforcement *of certain fiduciary obligations* which are owed to those in whom the members place their trust as regards the management and control of their collective interests, and their company's business and assets. In making these comments, the ODCE does not seek to suggest that company law, as it currently stands, represents the perfect way through which to organise the tasks currently organised through AOMCs. However were any alternative corporate structure to AOMCs to be considered at any stage, the same types of issues would have to be provided for in facilitating participation by apartment owners in the management of their development's common areas and services;

(m) the advantages of choosing *a corporate structure* through which to manage the complex can also be seen when one looks at the alternative. It would be extremely difficult to

operate that function if all the apartment owners had to *individually* participate in all decision making, and each of them had to join in all resulting contracts (e.g., hiring caretakers, lift replacement agreements, etc.) and had to become jointly and severally liable personally under all such contracts and obligations;

(n) accordingly since apartment complexes first started being developed in Ireland, it has been usual that, at some time prior to the completion of the apartment blocks, for Developer Limited to bring about the incorporation of a company limited by guarantee which is intended to serve as the management company for the complex;

(o) certain legal arrangements concerning the development and sale of the apartment complex will then be put in place. Typically these will consist of the following:-

- as already stated Developer Limited will have caused a company limited by guarantee to be incorporated. For convenience we will call this company Management Company Limited;

- the initial members of Management Company Limited will be nominees of Developer Limited and those persons, or other nominees of Developer Limited, will serve also as the directors of Management Company Limited;

- a legally binding agreement will be entered into between Developer Limited and Management Company Limited recording—

    - the fact that Developer Limited currently owns all the land on which the apartment complex is intended to be developed;

    - that when the apartments are completed it is the intention of Developer Limited to sell them off to a number of separate purchasers;

    - that, in conjunction with the sale of the apartments, it will be necessary for rights (of the sort described above) to be bestowed on all the apartment owners;

    - that giving effect to those rights requires the involvement of a management company which, it is intended, should ultimately be owned and controlled by all of the apartment owners;

    - that, accordingly, Management Company Limited has been incorporated for the purpose of taking over the management functions in relation to the complex;

    - that, in conjunction with taking over those functions, Developer Limited will, when the apartment complex is finished, transfer ownership of the estate to Management Company Limited subject to:-

        - all the leasehold titles which exist in relation to each of the apartments and

- all the ongoing management obligations which have been provided for in each of the individual leases

with the benefit, however, of all the covenants given by each of the apartment owners, including each apartment owner's covenant that he or she will pay all service charges due by them in connection with Management Company Limited's provision of the agreed common services.

- that, when selling off each of the individual apartment units, Developer Limited will ensure that the legal documentation is such as ensures that:-

  (i) each apartment owner will give covenants and obligations that are owed also to the Management Company and can be enforced by it and

  (ii) that whoever at any time happens to be the owner of an apartment will be obliged to simultaneously be a member of the Management Company.

2.4 Accordingly, returning to our original question of what is an AOMC, the characteristics we would identify is that usually (though not necessarily always)—

- it is a company limited by guarantee
- the members of which are (or are ultimately intended to be) the owners of apartments
- all of which are located within the same complex
- where the common enjoyment of each individual owner's apartment
- depends, at least in part,
- on the provision of certain common services or amenities
- or the common use of certain shared property
- and where it is intended
- that either now, or in the future,
- the provision of those services or amenities
- and the ownership of that shared property
- should be organised and controlled
- by the members/apartment-owners
- acting collectively through their own company
- through the expenditure of money
- which is collected by the company
- from all the members/apartment owners.

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Chapter 3: A critical distinction: AOMCs vs. Managing Agents

3.1 Before proceeding further, we think it important at this point to emphasise one critical distinction which, in our experience, is not always fully appreciated – even by apartment owners themselves and by others concerned with issues relating to the management of apartment complexes.

3.2 An AOMC is a company which exists only in relation to, and for the benefit, of one individual apartment complex. It is structured so that ultimately it is to be exclusively owned and controlled by all the owners of the apartments within that complex. In general it is established on a not-for-profit basis.

3.3 As a matter of property law, the AOMC has (through the leases under which each apartment owner holds his/her apartment) taken on an obligation to provide services to the apartment complexes – such as those described above. Similarly as a matter of property law, the apartment owners (through those same leases) have each assumed an obligation to pay service charges **to the AOMC** to fund the provision of those services.

3.4 It would be possible for the AOMC to collect those service charges and to use them directly in the provision of management services. For example the AOMC could recruit employees such as painters, cleaners, gardeners, etc. and pay them wages in return for their work. Alternatively the AOMC could enter into one contract with a firm of cleaners, another contract with a firm of painters, another contract with a firm of gardeners, etc., and each of those contracts would provide that—in return for periodic payments—*the employees of those firms* would do various acts of painting, cleaning, gardening, etc., as the case may be.

3.5 The members and directors of AOMCs do not usually, however, want to take on the time-consuming and somewhat inefficient tasks of making arrangements with, and having to supervise, the scores of different employees or service providers who are needed for painting, cleaning, gardening, fixing security gates, clearing drains, etc. Instead they will typically opt to avail of the services of a so-called Managing Agent.

3.6 A Managing Agent is usually a firm, or a self-employed individual, who holds themselves out as having the ability and expertise to co-ordinate the procurement and provision of almost all the services which are needed by AOMCs on a day-to-day basis. Managing Agents are businesses which are established on a for profit basis, the profit being derived from the fee which the Managing Agent will charge the AOMC for making his/her services available to the AOMC. Typically the Managing Agent will be concerned in the management of several different complexes – and, in the case of some of the larger firms, their portfolio of complexes under management may amount to several dozens.

3.7 Ordinarily the legal basis which underpins the role of the Managing Agent is one of contract. A contract exists between the AOMC and the Managing Agent – and not between any individual apartment owner(s) and the Managing Agent. That contract alone determines what are the obligations of the Managing Agent and, unless it provides otherwise, his/her obligations are owed to the AOMC – not to the individual apartment owners. However in practice most Managing Agents recognise the good sense of being receptive to communications from individual apartment owners and of endeavouring to deal with any of their reasonable requests which come within the scope of what is provided for under their contract with the AOMC. Common sense suggests that practices of this sort are beneficial for everyone because they minimise the need for duplicitous communications (owner to AOMC, AOMC to Managing Agent).

3.8 In short—

- where an apartment complex is located at 16 Parnell Square,
- it will usually be found that the AOMC of such a complex has a name such as "Sixteen Parnell Square Management Company Limited",
- which is a not-for-profit company limited by guarantee, the members of which are all of the apartment owners located in the complex;
- Sixteen Parnell Square Management Company Limited will have a contract with a firm of Managing Agents who, for the sake of example, we will refer to us "Dublin One Property Services Limited".

3.9 It is not unusual in a situation like this for people to mistakenly think that Dublin One Property Services Limited is *"the management company"* for the apartment complex at 16 Parnell Square. They may complain, for example, that they have not been invited to the AGM of Dublin One Property Services Limited, and/or that they have not been given its accounts. They may feel aggrieved, for example, with the poor quality of the services which are being provided by Dublin One Property Services Limited, or feel that those services are being charged for at an excessive rate.

3.10 In situations of this sort, it is usually inappropriate for individual apartment owners to look to company law as a means of seeking address grievances of this sort. The individual apartment owners in 16 Parnell Square are neither members nor creditors of Dublin One Property Services Limited. Instead they are members of Sixteen Parnell Square Management Company Limited and it is that company which has a contractual relationship with Dublin One Property Services Limited. Accordingly any grievances which an individual apartment owner has in relation to Dublin One Property Services Limited, needs properly to be addressed by them raising the issue with their own AOMC, Sixteen Parnell Square Management Company Limited. They need to use their position as a member of the AOMC, to seek to persuade it to exercise whatever rights it has under its contract with Dublin One Property Services Limited, or—in an ultimate situation—to consider moving the contract to another firm of Managing Agents.

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Chapter 4: The key phases in the evolution of an AOMC: *(i)* The Developer-Only Phase; *(ii)* The Developer-and-Owners Phase; *(iii)* The Owners-Only Phase

4.1 We now turn to what we see as the three major phases in the evolution of the typical AOMC. For convenience we have labelled them as appears above. However it should be noted that these are not technical terms, nor—so far as we are aware—have they ever had any usage prior to this publication.

The Developer–Only Phase

4.2 What we are calling the Developer-Only Phase is one which begins with the formal incorporation of the AOMC. This usually happens some time after the developer has begun to build the apartment complex but before any apartments have yet been offered for sale.

4.3 The Companies Acts require that a company limited by guarantee not having a share capital must be formed with at least seven members[2] and it must have at least two directors[3] and a secretary.[4] In general the developer will nominate some of his associates to fill these roles. The sorts of persons typically nominated are (i) directors or employees of the development company or (ii) employees of the solicitors' firm which represents the developer. The ODCE understands that the developer will often have an understanding (formal or informal) with those persons that they will exercise their powers in accordance with the directions of or wishes of the developer. In the ODCE's view, arrangements of this sort *may* have the effect of constituting the developer a shadow director of the company, i.e., a person in accordance with whose directions or instructions the directors of a company are accustomed to act.[5]

4.4 During this phase the company is relatively inactive. However two events occur which are of considerable medium to long-term significance for those who will eventually be its future members, i.e., the future apartment owners. Firstly a so-called *Management Company Agreement* is executed between the AOMC. Secondly the Developer, with the assistance of his lawyers, draws up the lease under which each of the apartments will be sold. From the perspective of property law, this lease lays down the principal rights and obligations of the AOMC and the apartment owners vis-à-vis each other.

4.5 The Management Company Agreement is a document which is sometimes also known as the Contract for the Sale of the Common Areas. As that name suggests, it is a contract under which, amongst other things, it is provided that, for a nominal consideration, the Developer will sell the entire estate to the Management Company subject to and with the benefit of the leases of the apartments. By reason of the terms of the leases, this means that the Management Company will ultimately become responsible for the overall management of the estate, with the benefit of the provisions in the leases under which each of the apartment owners covenant to pay appropriate service charges to enable such management to take place.

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2 Section 5 of the Companies Act 1963. All of the identified statutory provisions are available on the ODCE's website at www.odce.ie

3 Section 174 of the Companies Act 1963.

4 Section 175(1) of the Companies Act 1963.

5 Section 27(1) of the Companies Act 1990.

4.6 As the ODCE understands it, this contract for the sale of the common areas is typically a document written with the interest of the developer in mind rather than the interests of the AOMC or its future members. Usually it will contain provisions along these lines:-

(a) a clause to the effect that the transfer of the common areas will not occur until after the completion of the sale of the last apartment in the complex;

(b) a clause which is drafted so as to maximise the developers' freedom to deal with the estate or complex as they think best in the period prior to the transfer of the common areas. For example we are aware of clauses such as the following—

> "Notwithstanding the stated intention of Developer Limited to develop the lands delineated on the accompanying map as a residential development of Apartment Blocks, Developer Limited shall not be under any obligation to complete or cause to be completed such development and may alter such development as it may wish and the Management Company hereby agrees and confirms that it has not been induced to enter into this agreement by reason of the fact that any plan has thereon the present intended development of the Estate or any part thereof or by any representation by any person acting or purporting to act on behalf of Developer Limited that the development shall conform in all respects with any plan. There is reserved to Developer Limited full right and liberty to alter such development or to discontinue developing the said Estate and to execute such works and erections thereon or any part thereof as Developer Limited may think fit and notwithstanding anything contained in this agreement or in any of the Leases of the Apartments, there is reserved to Developer Limited full right and liberty to vary the location layout and extent of the Estate and/or the inclusion of additional lands thereto (in which case reference to the Estate shall be modified accordingly) including the right to exclude any part or parts therefrom provided however that Developer Limited shall have obtained any necessary planning permission for any such alteration (including alteration by way of discontinuance of the development) or variation."

4.7 Clauses such as these present problems in the ODCE's view. For example clause (a) effectively means that the purchaser of an apartment is buying into a situation in which, conceivably, the transfer of the common areas to the AOMC may be deferred for a very lengthy period or even indefinitely if Developer Ltd. opts (as it is quite entitled to do) to retain one or more apartments in its own ownership. Clause (b) makes the situation even less predictable because, in effect, it says that the AOMC does not even have the power to say with precision what it is to receive whenever the contract is completed: because the contract itself reserves power to Developer Limited to vary in any way what is ultimately to pass under the contract.

4.8 The ODCE understands that the National Consumer Agency has already drawn attention to the desirability of having specified dates within which the transfer of the common areas is to be completed. From our perspective, we accept that such clauses are certainly more the concern of consumer and/or land law, than company law.

4.9 The AOMC has no duties of managing the complex during this phase. As an incorporated company, it must however comply with the minimal requirements of the Companies Acts in relation to the holding of an AGM, the preparation of audited financial statements and the filing of such documents in the CRO. In reality these are largely formalities because, for example, the company will usually have no income or expenditure, so its audited financial statements will

amount to little more than a balance sheet showing a state of dormancy and a profit and loss account showing a nil position.

The Developer-and-Owners Phase

4.10 As soon as the first apartment is sold, the company moves into a new phase. As each owner signs the conveyancing documents which give them title to their apartment, they also become a member of the management company. Accordingly, as members, they become entitled to all the rights and obligations of the members of a company although, in this case, it is a company which has almost nothing of an ongoing operational role. Their membership is of a company which on the transfer of the common areas *will* become the means through which they can have an input into the management of their complex. However pending that transfer, the company does not have that role.

4.11 Instead, during this phase, the lease will typically provide that the management of the complex, the provision of services to it and the collection of service charges to fund those services is the responsibility of the Developer. Accordingly, even though they have become members of the AOMC, the owners may have comparatively little of a role in determining what services should be provided, by whom, and at what cost.

4.12 The *property law* provisions which typically give effect to this deferment of the time at which the AOMC will become responsible for the provision of the common services are along the following lines—

> "The [Developer] hereby covenants with the [Apartment Owner] that subject to the [Apartment Owner] and all persons deriving title under him as the owner for the time being of the [Apartment] complying with the covenants obligations agreements stipulations and restrictions set out in the Fourth Schedule hereto, it the [Developer] until the completion of the Management Company Agreement will observe and perform the covenants obligations and agreements in set out the Fifth Schedule [the agreements in relation to the maintenance of the Common Areas and the provision of services to them] PROVIDED THAT on the completion of the Management Company Agreement the liability of the [Developer] under this covenant shall absolutely cease.
>
> The Management Company hereby covenants with the [Apartment Owner] that subject to the [Apartment Owner] and all persons deriving title under him as the owner for the time being of the [Apartment] complying with the covenants obligations agreements stipulations and restrictions set out in the Fourth Schedule hereto, it the Management Company on and from the completion of the Management Company Agreement will observe and perform the covenants obligations and agreements in set out the Fifth Schedule [the agreements in relation to the maintenance of the Common Areas and the provision of services to them] …"

4.13 What this means is that in the period prior to the transfer of completion of the Management Company Agreement, the AOMC has no role in the delivery of the Management Services. The services are provided by the Developer and/or through a firm of Managing Agents retained by or on behalf of the Developer.

4.14 If, during this period, property owners have concerns about the services that are (or are not) being provided to their complex, or the amount which they are being asked to pay for those services, their remedy is to examine what *property law* rights or entitlements are open to them as against the Developer under the lease they have entered into with Developer Limited. Because ownership

of the common areas and responsibility for the common services has not yet been transferred to the AOMC, the AOMC has no role in addressing any concerns which the owners may have. Likewise *company law* offers few direct remedies because the problems (if they exist) do not stem from any act or omission of the AOMC.

4.15 Apartment leases are also typically structured so as to provide that, during this period, the owner is required to pay service charges to the developer in consideration of the management of the complex and the provision of services to it. A typical charging clause will be structured along these lines:-

(a) the Owner will pay to the Developer [x]% of the costs and expenses incurred by the Developer in providing the [common services] (which aforementioned costs and expenses are hereinafter called "the service charges");

(b) the amount of the service charges for the previous year shall be ascertained and certified annually by the Auditors of the Developer as soon after the end of the financial year as shall be reasonably practicable;

(c) in ascertaining and certifying the service charges the Auditors shall act as experts and not as arbitrators and their Certificate shall be conclusive evidence that the service charges were actually incurred. A copy of the Auditors' Certificate shall be supplied by the Developer to the Owner on written request;

(d) subject to the provisions of paragraph (e) on the 1st day of April in each financial year the Owner shall pay to the Developer such sum in advance and on account of the service charge as the Developer shall in its sole discretion deem to be a fair and reasonable interim payment in respect of the year then commencing;

(e) as soon as practicable after the issue of the Auditors' Certificate, the Developer shall furnish to the Owner an account of the service charges for the year to which the Certificate relates for which the Owner shall be liable, due credit being given therein for all interim payments made by the Owner for the year in question, and thereafter the Owner shall forthwith pay to the Developer the service charges or any balance found payable in respect thereof, or there shall be allowed by the Developer and repaid to the Owner any amount which may have been overpaid by the Owner (as the case may be);

(f) notwithstanding anything in paragraphs (a) to (e) the amount payable by the Owner for [financial year 1 or part of financial year 1] shall be [€1,000] which shall be paid immediately on the signing of this document;

4.16 In some cases the Developer will deal with the provision of these services directly, but in the majority of situations, the Developer will engage the services of a Managing Agent to co-ordinate them on his/her behalf. We have already noted above that the position of the Managing Agent is primarily derived from the contract on foot of which he/she has been retained. Here that will be a contract between the Developer and the Managing Agent. Accordingly it is one into which individual apartment owners have little if any input.

4.17 A question which sometimes arises is whether the members who are apartment owners ought to seek to take control of the company during this period. Prior to the transfer of the common areas, the membership usually consists of *both* the developers' nominees and each of the property owners. It is quite possible that during this period the owners may outnumber the developers'

nominees and, in theory, it would therefore seem that they might—if they wished—be able to replace the developers' nominees as directors of the company. However the ODCE understands that this does not usually happen, for two reasons:-

(a) firstly developers often wish to remain "in control" of the AOMC up to the period when the common areas are transferred. For that reason, they will sometimes create provisions in the AOMC's Articles of Association (i.e., the company's internal governance rules) limiting the power of the owners to "take control of" the AOMC prior to the transfer of the common areas. For example it may be provided that until that transfer, the owners will not have any voting rights at general meetings of the company. Alternatively it may be provided that although they will have one vote each, the developer's nominees (of whom there are usually seven) will each have (say) 100 votes. In practice this means that the developer's nominees, though fewer in number than the owners, will almost always be able to control the outcome of any vote;

(b) secondly in the absence of the AOMC having title to the common areas, there may be little point in the members taking control of the AOMC. It will be recalled that, prior to the transfer of the common areas, the AOMC is not actually involved in the provision of management services and the setting of management charges. As outlined above, these are the responsibilities and privileges of the developer who has remained in control of the complex. Accordingly there is probably nothing that the owners could do to influence those issues, even if they were to take control of the AOMC.

The Owners-Only-Phase

4.18 After the transfer of the common areas, the developer's nominees cease to be members of the company and will typically resign forthwith as its directors. At this point the AOMC finally comes under the control of the apartment owners.

4.19 The apartment owners, operating through the AOMC, now have power to make their own decisions in relation to their complex. In particular it will be open to them—

- to hold regular meetings of all the members for the purpose not only of complying with certain formal requirements of company law but also of ensuring that there is an open and democratic forum through which the members can collectively determine how they wish to have maintained and developed the common amenities and services which exist for the benefit of all of their separate properties;

- to ensure that these meetings are conducted with an appropriate degree of formality so that people know in advance what sorts of issues may be scheduled for decision, and how they can seek to influence the determination of those questions;

- to ensure that all significant decision-making is informed by the availability of accurate information concerning both the short and long-term financial implications for the members of whatever decisions are being proposed;

- to have a competent board of directors, elected by the members, whose primary role will be to procure and monitor the implementation of the wishes of the members;

- to obtain the services of whoever the members, acting through the AOMC, consider is the Managing Agent in whose competence and expertise they have the most confidence to entrust the delivery of the services which they require;

- to ensure that the company is determining its budget at a level which guarantees the adequate maintenance of the status quo and which ensures that all repairs and improvements can be carried out to prevent the estate from falling into disrepair or disarray;

- to ensure that funds are being built up to meet the future foreseeable costs of items which, in the medium to long term, are likely to call for very expensive repairs or even total replacement: such as lifts, internal wiring, etc.

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Chapter 5: The public and private law which underpins the existence and internal governance of an AOMC

Introduction

5.1 The framework of law within which an AOMC operates comprises elements of public law (i.e., statute) and private law which allows people to agree voluntary arrangements, provided that the agreement does not conflict with public law provisions.

5.2 At the outset we wish to emphasise that we are dealing here only with the public and private law which underpins the *existence and internal governance* of an AOMC. Once an AOMC is brought into existence and starts carrying out functions, it may also be affected by several other legislative codes. This topic is dealt with further in Chapter 20.

Public Law Features of AOMCs

5.3 Companies are sometimes described as 'legal persons' in the sense that their very existence stems from the law and they have no powers other than those vested in them by law, or which the law recognises them as possessing. So far as AOMCs are concerned, the law in question is primarily found in the Companies Act 1963 to 2005 and associated statutory regulations. In parallel with those requirements a very large number of cases have arisen over the last 150 years or so, in which the courts have interpreted and clarified the scope of the law contained in the Companies Acts (and their statutory predecessors). The principles applied in those cases also form part of the public law which governs companies.

5.4 The public law elements provide for certain rights and certain obligations to be conferred. The rights include:-

- Separate legal personality: A company is a legal person that is a person separate and distinct from its members. This means that the company can hold property, embark on legal proceedings, and has its own interests which may be different from those of any particular member of the company, or even of the majority of the members. For example, in an AOMC, it is possible that individual members in 2007 may not feel especially concerned about the extent to which their complex will need to be re-wired in 2027. They may feel that they have enough other things to worry about in their own lives at present. However the AOMC, as a separate legal person, ought to be concerned about a foreseeable event of this sort (which is potentially both costly and disruptive);

- Limited Liability: This means that upon the liquidation of the company, the liability of each member is limited to the amount which he or she has pledged to the company. Members' assets cannot, save in cases of fraud, be called upon to discharge the liabilities of the company. (In most AOMCs members will usually have pledged to contribute a nominal sum only, often as little as €1, in the event of the company being wound up.)

5.5 In return for these rights under public law, a company must respect its statutory duties and obligations vis-à-vis itself and other company stakeholders, including its officers, members and creditors. These duties and obligations include:-

- a company must have a Memorandum and Articles of Association which set out what the company is or is not entitled to do and what are its primary internal governance rules. These are public documents, filed with the Companies Registration Office. This means that any persons interested in the company (including, obviously, persons contemplating dealing with the company, but also the public at large) may seek to inspect them, or to obtain copies of them;

- a company must keep proper books of account / accounting records. These help to protect the company's members and creditors, and enable also the preparation of periodic financial statements setting forth the state of the company's affairs;

- the company must maintain certain minimal statutory records, such as accurate and up-to-date registers of its members and its officers;

- the company must have a registered office. This is a location at which, ordinarily, the more important of the company's records will be maintained. In addition the law provides that documents duly sent or delivered to the company's registered offices will generally be deemed to have been validly served upon it;

- the company must once every year file an Annual Return with the Companies Registration Office which contains certain fundamental information about the company. In addition that return must usually be accompanied by up-to-date Financial Statements in relation to the company;

- the internal governance of the company must be conducted in accordance with certain basic standards. For example minutes must be kept of directors' meetings and there must also be at least one *Annual General Meeting* of the members. Likewise there are provisions which ensure that all members are entitled to be adequately notified of general meetings of the company, and to be furnished with timely information in relation both to the company's operations and its finances.

5.6 In general, these rights and obligations are the same for the majority of companies, although depending on the type of company and the level of business in which the company is involved, the obligations of the company may vary.

5.7 These protections are not intended to ensure that companies cannot fail but that persons may choose to engage with companies in a manner which should enable them to have a reasonable degree of assurance that their interests should be safeguarded at least to the minimal extent required by law. The role of the appropriate regulatory authorities, such as the ODCE, is to ensure that the law operates as intended and that persons who breach or abuse the law are brought to account in the public interest.

Private Law

5.8 As already indicated every company, including every AOMC, is required to have its own Memorandum and Articles of Association. The Articles of Association have been described as

the company's "internal rulebook"[6] and—so long as they do not adopt any rules which conflict with the minimum standards set down in the Companies Acts—the members of a company enjoy a large measure of freedom to adopt rules which suit their purposes, and facilitate the most effective management of their company.

5.9 From a legal perspective it should be noted that Section 25 of the Companies Act 1963 provides that the Memorandum and Articles of Association of a company constitute an agreement between the company and its members, and between the members themselves.

5.10 Amongst the areas of flexibility are that there may be variance in:-

- the number of members;
- the objects of the company, i.e., the reason why the company exists;
- the procedures by which members and directors' meetings are to be convened and conducted;
- the frequency with which meetings are to take place;
- the voting power of the members;
- the extent (if any) to which members will be permitted to inspect the accounting and other records of the company;
- supplementary reporting obligations, over and above the minimum required by law, which the members wish to adopt for themselves. For example the Companies Acts do not say that either the Annual Directors' Report nor the Annual Financial Statements must necessarily contain details of expected future capital expenditure, or of the extent to which provision has been made to meet such costs. However in an AOMC the members might reasonably conclude that this is information which they require on an ongoing basis. If they do so, it is open to them to alter their Articles of Association to ensure that such information is provided to them.

5.11 The other private law agreements which significantly affects the operation of an AOMC are the *property law* agreements between the AOMC and the apartment owners, principally the leases under which those apartments are held by the apartment owners. In Chapter 2 above we have outlined the sorts of issues which are usually the subject of rights or obligations in an apartment lease. Many of these are of such critical importance that, to a significant extent, they impose regular and ongoing obligations on the AOMC.

5.12 For example an apartment lease will usually contain a covenant on the part of the AOMC that it will obtain insurance cover in respect of the entire complex and, in the event of any part of the complex (including individual apartments) being destroyed or damaged (e.g., by fire) that, subject to obtaining all necessary planning permission etc, it will spend all insurance monies received in rebuilding, repairing or reinstating the relevant properties.

[6] This phrase was used by the UK Department of Trade and Industry in its Consultation Process regarding new Draft Model Articles for public companies (June 2006).

5.13 Obligations of this sort, although they do not have their origins in an Act of the Oireachtas, are obligations nonetheless. Quite apart from the fact that it is clearly essential in everyone's interests that adequate insurance should be put in place to deal with possible calamities, these obligations have a binding quality also under the private law agreements in which they are contained. For example an apartment owner could seek to sue the AOMC in the event that there was any non-compliance with its obligation under the lease to put appropriate insurance cover in place.

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Chapter 6: Membership – How it is acquired and transferred; What are its basic privileges and responsibilities

Preliminary Issue

6.1 The ODCE has already published as part of its Decision Notice D/2002/1 an Information Book entitled "The Principal Duties and Powers of Members and Shareholders under the Companies Acts 1963 to 2001".[7] Much of the material in that Book is relevant to the members of an AOMC but, to assist users of this Guidance, matters which are particularly pertinent will be repeated here (sometimes in a somewhat abridged manner, other times in a manner which is more detailed and tailored specifically to the likely circumstances of the typical AOMC).

The Inextricable Link Between Apartment Ownership and AOMC Membership

6.2 In general the membership of an AOMC is carefully linked to ownership of one of the apartments in the AOMC's complex.

6.3 When the apartments are first sold it is usually a condition of the sale that the purchaser of each apartment will become a member of the Management Company. This is often underpinned by a recital in the lease by which the apartment is sold to the effect that "The Lessee (ie, the Purchaser) is a member of the Management Company".

6.4 The interlinked nature of apartment ownership and AOMC membership is further ensured by a provision in the lease under which the apartment owner covenants that he/she will—

> "not assign or sub-let the Apartment (other than by way of sub-lease for a term not exceeding ten years or by way of mortgage) without first causing the person taking the assignment or lease to become a member of the Management Company"

6.5 Finally, from a legal perspective, the link between apartment ownership and AOMC membership is often reinforced by a provision in the AOMC's Articles of Association which indicates that membership of the company is limited to those persons who, from time to time, represent the owners of the apartments located within the complex.

6.6 Because the lease under which the apartment is held requires that the owner from time to time of the apartment should also be a member of the Management Company, a purchaser's solicitor will usually attend to the task of ensuring that his/her client does in fact become a member. The solicitor does so partly as an aspect of the composite set of tasks he/she agrees to perform when agreeing to act for a client in the context of an apartment purchase, but also to ensure that his/her client acquires "good title" to the property having regard to the underlying conveyancing documents such as the lease. In this regard ODCE understands that the standard "Requisitions on Title" commonly used by solicitors, and published by the Law Society of Ireland, contain a series of questions which are designed to assist the purchaser's solicitor in advising his/her client in relation to many issues concerning the AOMC and to ensure that the client will become a member of the AOMC on completion of the purchase.

[7] Available on request from the ODCE at info@odce.ie, or at www.odce.ie/publications/decision.asp.

6.7 Aside from these legal provisions which seek to ensure that all apartment owners will become members of the AOMC, we think it important to draw attention to one practical reality. There is every good reason why an apartment owner should want to be a member of the AOMC, and no good reason why he/she should not. ODCE's understanding is that people sometimes mistakenly think that their obligation to pay service charges arises from their membership of the AOMC. For the reasons which we are endeavouring to explain in this Booklet, that is never so. An apartment owner's liability to pay service charges arises not as a matter of company law, but under the property law obligations which are derived from the lease which regulates the conditions on which the owner holds his/her apartment. Accordingly those service charges would be payable even if the owner sought to not become a member of the AOMC, or sought to relinquish his/her membership therein. Membership of the AOMC does, however, enable the apartment owner to have a say in how well they wish their complex to be managed, and how efficiently they seek to have their service charges spent.

Cessation of Membership

6.8 It follows that, just as the property and company documentation is structured to ensure that new owners of apartments always become members of the AOMC, so too should departing owners cease to be members.

6.9 The Companies Acts do not specifically deal with the question as to how the members of a company limited by guarantee not having a share capital may relinquish their membership.

6.10 For that reason, in some instances, the AOMC will adopt Articles of Association which specifically provide for a means by which a member may relinquish membership. For example ODCE is aware of clauses such as the following—

> "Any member of the company who wishes to retire as a member shall write to the Secretary to that effect and the Secretary shall, as soon as is practicable, remove his/her name from the list of members and he/she shall thereupon be deemed to have retired".

6.11 Perhaps more commonly, however, AOMCs may adopt Articles of Association in which a regulation is included providing for automatic cessation of membership once an apartment owner sells his/her apartment. For example we have seen clauses such as the following—

> A Member … shall cease to be such on ceasing to be an owner and on the registration as a member of his/her successor in title.

Membership Certificates

6.12 In the case of companies limited by shares, the Companies Acts contain specific provisions regulating Share Certificates. However as most AOMCs are formed as companies limited by guarantee not having a share capital, these provisions do not apply.

6.13 It is obviously possible for an AOMC to provide in its Articles of Association for members being provided with Certificates of Membership. Where the company's Articles so provide, then obviously issues relating to the issue, recall and cancellation of Membership Certificates must be dealt with in accordance with those Articles.

6.14 ODCE understands that in at least some instances AOMCs have historically issued Certificates of Membership even though there appears to be no express provision in their Articles stipulating that they must do so. In ODCE's view it would be preferable if the Articles were amended to provide a structure regulating the issue etc of Membership Certificates.

The Register of Members

6.15 In Chapter 12 below we deal with the obligation of every company to maintain an accurate and up-to-date register of its members.

The Privileges of Membership

6.16 The most fundamental privilege associated with membership of an AOMC is a right to participate in its governance and decision-making. All companies must, at a minimum, hold Annual General Meetings and all members of the company must be notified of that meeting, and allowed to participate at it. The company may also hold Extraordinary General Meetings and, again, these must be notified to members. In addition there is a means (dealt with in paragraphs 7.18ff below) by which the members themselves, even if the Directors are not willing, may convene an EGM of the AOMC.

6.17 Members also have a role in the appointment and replacement of directors of the company. This is dealt with further in Chapter 8.

Members' Right to Information

6.18 A member of an AOMC has the right to certain information concerning it. Amongst other things, members are entitled to:-

- a copy of the Memorandum and Articles of Association of the company;[8]
- to inspect and obtain copies of the minutes of general meetings of the company and resolutions;[9]
- to inspect and obtain copies of the various registers kept by the company, including the register of members[10] and the register of directors and secretaries;[11]
- to obtain a copy of the periodic financial statements, directors' reports and auditors' report relating to the company.[12]

A Members' Right to Petition the High Court for Relief in Cases of Oppression

6.19 Section 205 of the Companies Act 1963 is a wide-ranging provision which—in so far as relevant—provides as follows—

8 Section 29(1) of the Companies Act 1963.
9 Section 146(2) of the Companies Act 1963.
10 Section 119(2) of the Companies Act 1963.
11 Section 195(10) of the Companies Act 1963.
12 Section 159 of the Companies Act 1963.

(1) Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are being exercised in a manner oppressive to him or any of the members (including himself), or in disregard of his or their interests as members, may apply to [the High Court] for an order under this section.

(2) …

(3) If, on any application under subsection (1) .. the court is of opinion that the company's affairs are being conducted or the directors' powers are being exercised as aforesaid, the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether directing or prohibiting any act or cancelling or varying any transaction or for regulating the conduct of the company's affairs, or for the purchase of the shares of any members of the company by other members of the company or by the company and in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

6.20 ODCE is unaware of any Section 205 proceedings having ever been taken in relation to an AOMC. We recognise also that, because such proceedings would have to be brought in the High Court, the costs of doing so are probably such as would significantly deter many people from ever embarking on such a course. However, if only from a theoretical perspective, we see no reason why such proceedings *could* not be brought in relation to an AOMC if a case were to arise in which some of the members felt that (for example) the affairs of the company were being conducted in a manner oppressive to them.

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Chapter 7: Members' Meetings

The Annual General Meeting (AGM)

7.1 The primary legal requirements in relation to the holding of an AGM are as follows:-

- as the name suggests an AGM must ordinarily be held in each *calendar* year;
- special rules apply, however, during the *calendar* year in which a company is incorporated and in the following *calendar* year. What is important as regards those two *calendar* years is that the first AGM be held within 18 months after the company is incorporated.
- This means, for example, that where a company is incorporated on 1 August 2006, there is no need for any AGM in 2006 or 2007 provided that the first AGM is held on or before 31 January 2008;
- after its first AGM, subsequent AGMs of the company must take place in each succeeding calendar year. Moreover no longer than 15 months should elapse between the date of one AGM and that of the next.
    - Accordingly where, as in the previous example, the company held its first AGM on 31 January 2008, its next AGM must be held on some date between 1 January 2009 and 30 April 2009.
    - Where, however, the company held its first AGM on 30 November 2007, it is not permissible for it to seek to take advantage of the 15-month rule to defer the holding of its next AGM until February 2009. An AGM must be held in each calendar year and, accordingly, the next AGM in this instance must be held on or before 31 December 2008.

7.2 The obligation to convene an AGM rests primarily on the company acting through its directors and secretary. Where an AGM is not held, an offence is committed both by the company and by any of its officers who is "in default".[13]

7.3 Where there has been a failure by the company to convene an AGM as required above, any member of the company may apply to the Director of Corporate Enforcement asking him to "call or direct the calling of a general meeting of the company".[14] In practice it is helpful for such an application to be accompanied by proof that the applicant is, in fact, a member of the company.

How an AGM is convened

7.4 The Articles of an AOMC usually provide that an AGM is to be called by at least 21 days' notice in writing (a longer period is permissible) – exclusive of the day on which the notice is served or deemed to be served. The notice must specify the place, the day and the time of the

[13] Section 131(6) of the Companies Act 1963.
[14] Section 131(3) of the Companies Act 1963.

meeting. The notice should also contain a clear outline of the matters intended to be dealt with at the meeting and of any ordinary or special resolutions which them members may be asked to adopt.

The business of an AGM

7.5 The matters which will routinely be dealt with, discussed or noted at an AGM are the following—

- consideration of the company's balance sheet and profit and loss account;
- consideration of the Directors' Report;
- consideration of the Auditors' Report;
- the election of directors in place of those retiring;
- the re-appointment of the retiring auditors or the appointment of new auditors;
- the fixing of the auditors' remuneration;

7.6 Obviously it is permissible for other topics to be raised and discussed at an AGM but it is important to note that limitations may exist on the extent to which the membership present at an AGM may make decisions, unless the possibility that such decisions might be made has been specifically drawn to the attention of all members by means of the Notice convening the AGM.

7.7 In this regard it is quite common to find a Regulation along the following lines in an AOMC's Articles of Association—

> "All business shall be deemed special that is transacted at an EGM, and also all that is transacted at an AGM, with the exception of the consideration of the accounts, balance sheets and the reports of the directors and auditors, the election of directors in the place of those retiring, the re-appointment of the retiring auditors, and the fixing of the remuneration of the auditors."

7.8 The consequence of a regulation along these lines is that the notice convening the AGM must state what the meeting is going to be asked to consider.

Extraordinary General Meetings (EGMs)

7.9 EGMs are all general meetings of the members of a company other than the statutory AGM.

Who can convene an EGM?

7.10 The Articles of an AOMC will usually include a provision to the effect that "the directors may, whenever they think fit, convene an EGM".

7.11 In addition Section 132 of the Companies Act 1963 provides that <u>notwithstanding anything in a company's Articles of Association</u>,

> "The Directors … shall, on the requisition of … members of the company representing not less than one-tenth of the total voting rights of all the members having [at the date of the deposit of the requisition] a right to vote at general meetings of the company, forthwith proceed duly to convene an [EGM] of the company."

Accordingly if members who, between them, hold at least one-tenth of the voting power within the company wish, they may compel the AOMC's directors to convene an EGM.

7.12 It should be noted that Section 132(2) provides that the members' requisition must—

> "state the objects of the meeting and must be signed by the requisitionists and deposited at the registered office of the company and may consist of several documents in like form each signed by one or more requisitionists".

7.13 Section 132(3) provides, in effect, that the directors should within 21 days from the date of the deposit of the requisition proceed to convene an EGM to be held within 2 months from that date. If they do not do so, the requisitionists (or any of them representing more than half of the total voting rights of all of them), may themselves convene a meeting (which must be held within 3 months from the date of deposit of the requisition).

7.14 Section 135 of the Companies Act 1963 provides a means by which the High Court may order that an EGM of the company be held. However this applies only where

> "it is impracticable to call a meeting of [the] company in any manner in which meetings of that company are to be called, or to conduct the meeting of the company in manner prescribed by the articles [of the company] or [the Companies Acts].

In those circumstances the application to the High Court may be made by any director of the company, or any member of the company who would be entitled to vote at the meeting.

7.15 It is sometimes thought that the ODCE has power to direct the holding of an EGM of a company. This is not correct.

Notice Periods for the Holding of an AGM or an EGM

7.16 In general the AOMC's Articles of Association will specify what period of notice must be given of the holding of a meeting.

7.17 However Section 133(1) of the Companies Act 1963 provides that the notice period may not—

- be any shorter than 21 days, in the case of an AGM;
- be any shorter than 14 days in the case of an EGM (assuming, as is usually the case, that it is a guarantee company not having a share capital)

7.18 There is one means, however, by which meetings may be convened at shorter notice. Section 131(3) of the Companies Act 1963 provides that—

> "A meeting of a company shall, notwithstanding that it is called by shorter notice [than is ordinarily permitted] … be deemed to have been duly called if it so agreed by the auditors of the company and by all the members entitled to attend and vote [at the meeting]."

AOMCs should be careful to note two features of this provision. Firstly it is essential that the auditors of the company agree to the meeting being held at short notice, and such agreement must be obtained even if the auditors do not propose to attend the meeting. Secondly, the

agreement of every member entitled to attend and vote at the meeting is necessary. If even one member objects the meeting cannot be validly held at short notice. Furthermore it is not sufficient for those of the members who choose to attend the meeting called at short notice to agree unanimously that they are happy to leave aside the issue of short notice. What is required is the agreement of all members entitled to attend: not simply those who opt to attend.

Failure to give notice

7.19 It is a basic principle of company law that all members of a company should be adequately notified of meetings at which decisions affecting them may be made. This is to allow them an opportunity, if they wish, to attend the meeting and vote on what decisions should, or should not, be taken.

7.20 However many AOMCs adopt a regulation in their Articles along the following lines—

> "The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings at that meeting."

It is important to note, however, that a provision such as this is not a means by which the directors or secretary of an AOMC can, with impunity, opt not to give notice of meetings to members. The provision applies only in the case of *accidental* omission: not deliberate omission. Likewise the term "non-receipt" of notice would not cover a situation in which the non-receipt was due to any deliberate decision on the directors or secretaries' part to send no notice to a person, or a general indifference on their part as to who was, or was not, to be notified.

Who must receive notice and in what form?

7.21 Again this is a matter which is usually regulated by the AOMC's Articles of Association.

7.22 A standard provision is often along the following lines—

> "A notice may be given by the company to any member either personally or by sending it by post to him to his registered address. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice, and to have been effected in the case of a notice of a meeting at the expiration of 24 hours after the letter containing the same is posted and in any other case at the time at which the letter would be delivered in the ordinary course of post.
>
> Notice of every general meeting shall be given … to—
>
> (a) every member;
>
> (b) every person being a personal representative or the Official Assignee in bankruptcy of a member where the member but for his death or bankruptcy would be entitled to receive notice of the meeting; and
>
> (c) the auditor for the time being of the company."

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Chapter 8: The Appointment, Resignation, Retirement and Removal of Directors

Preliminary Issue

8.1 The ODCE has already published as part of its Decision Notice D/2002/1 a Guidance Booklet entitled "The Principal Duties and Powers of Company Directors under the Companies Acts 1963 to 2001".[15] Almost all of the material in that Booklet is fully relevant to the directors of an AOMC but, to assist users of this Guidance Booklet, matters which are especially pertinent will be repeated here (sometimes in a somewhat abridged manner, other times in a manner which is more detailed and tailored specifically to the likely circumstances of the typical AOMC).

Who are a Company's Directors?

The first directors

8.2 In general the first directors of a company are nominated (with their consent) by the persons causing the company to be incorporated. In the case of an AOMC, they will often be persons connected with the developer of the complex or nominees of the developer.

The number of directors

8.3 Company law requires that every company should have at least two directors.[16] There is no statutory maximum on the number of directors which a company may have but it is certainly desirable that this question should be clarified in the company's own Articles of Association. For this reason an AOMC's Articles of Association typically contain clauses providing that—

- the number of the company's directors shall initially be as determined by the persons who caused the company to be incorporated;
- the company may from time to time by ordinary resolution increase or reduce the number of directors.

If the Articles do not include the latter provision, members should consider amending the Articles to provide that flexibility.

8.4 Determining what ought to be the correct number of directors for an AOMC is a question which will depend on the individual circumstances of every case. A number of factors come into play—

- On the one hand having only (say) two directors in a complex of 200 apartments may mean that the directors are not sufficiently representative of the membership as a whole;

[15] Available on request from the ODCE at info@odce.ie, or at www.odce.ie/publications/decision.asp.
[16] Section 174 of the Companies Act 1963.

- To ensure the best pooling of different viewpoints, it may well be desirable to have representation of different "types" of owner, e.g., at least some persons from categories such as the following:-

    - owner-occupiers;
    - investor-owners (i.e., landlords);
    - owners (whether occupiers or landlords) who have been involved with the complex for a number of years – and who, accordingly, may have an acquired insight and experience into its profile and needs;
    - owners who have acquired their properties more recently – and who, accordingly, may come to the board of directors with fresh ideas.

- Having too many directors may, on the other hand, lead to its own problems – difficulties in convening meetings, for example, or situations in which too many different viewpoints make it harder, rather than easier, to reach a consensus;

- Quite separately from the abstract question as to what might be the ideal number of directors, there may be the more fundamental issue that only a small number of persons are willing to give of their time towards serving on the board of directors.

8.5 Assuming the company's Articles provide a clause (as above) to the effect that the members may by ordinary resolution increase or reduce the number of directors, it is good practice for appropriate resolutions to be passed from time to time. The Articles will also usually contain a clause providing that the directors themselves shall have power:-

> "to appoint any person to be a director, either to fill a casual vacancy or as an addition to the existing directors, but so that the total number of directors shall not at any time exceed the number fixed in accordance with these articles. Any director so appointed shall hold office until the next AGM, and shall then be eligible for re-election …"

8.6 Accordingly, if the company's Articles allow it to have (say) eight directors and the members have only elected three, the effect of this provision is to allow the three directors the entitlement to appoint up to five more directors without further reference to the members. If the members are content to allow that freedom to the directors this is obviously not problematic, but if the members wish to curtail that freedom it would be in their interests to resolve that (for example) the number of directors should be reduced to (say) three or four.

Changing the Directors

8.7 The duration for which a director holds office, after he/she has been appointed, is regulated mainly by the company's Articles of Association.

8.8 For that reason the rules will differ from one AOMC to another but typically one finds provisions such as the following:-

- a requirement that at the first AGM of the company *all* the directors shall retire from office, subject to the possibility that the members will resolve to re-appoint any or all of them;

- that at subsequent AGMs one third of the directors shall retire each year – usually those who have been longest in office since the last election;

- that retiring directors are eligible for re-election (provided they are willing to serve again).

8.9 In addition the Articles will usually provide that in certain circumstances a director shall be considered to have vacated his/her office such as where—

- he/she is adjudged bankrupt;
- he/she becomes or is deemed to be the subject of a disqualification order under Part VII of the Companies Act 1990;
- he/she becomes of unsound mind;
- is convicted of an indictable offence, unless the directors otherwise determine;
- defaults in declaring certain conflicts of interest to the company.

The Resignation of a Director

8.10 Article of Association usually provide that a Director may vacate his position by written notice of resignation addressed to the Company. However Section 174 of the Companies Act 1963 requires that every company should have at least two directors and, accordingly, a complex situation arises in a situation where the effect of a resignation would be to bring about a situation in which the company would have less than two directors. Sometimes, the surviving director will be permitted to appoint another director or directors, but in the ODCE's view the better course—when directors are contemplating resigning in circumstances which may leave the company short of the statutory minimum, is for the outgoing directors to assist in the convening of an Extraordinary General Meeting of the company. This will allow the members an opportunity to consider the critical phase into which their company is entering which, as will be discussed below, can of itself provide a basis on which the company might end up being struck off the Register of Companies.

Removing a Director

8.11 In addition Section 182 of the Companies Act 1963 provides that, in general, a company may by ordinary resolution of its members remove a director from office before the expiration of his/her period of office. Certain safeguards for the directors are provided including a requirement that there be *extended notice*[17] given of any resolution seeking to remove a director, together with an entitlement for the director who is the subject of any such proposal to be allowed address the meeting deciding on his/her removal and/or to have the members previously circulated with his/her written representations concerning that proposal.

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[17] See Section 182(2) and 142 of the Companies Act 1963.

Chapter 9: Directors' Meetings

9.1 It is a basic requirement of the conduct and supervision of any company's affairs that its directors should meet together to discuss issues of relevance to the company, take decision and implement them.

9.2 The AOMC's Articles of Association will usually contain certain basic rules governing Directors' Meetings, but they leave a great deal of freedom to the directors to regulate their meetings as they think fit.

9.3 Nonetheless experience suggests that a certain degree of formality is conducive to the effectiveness of any meeting and, accordingly, the ODCE suggests the following:-

(a) the meetings should be held at least once every two months, or more frequently if this is necessary for ensuring that the directors are kept aware of the ongoing affairs of the company, and are in a position to respond in a timely manner to any situation which calls for any decision or action on their part. However the meetings should not be held with such frequency as to amount to such a burden on the directors as is likely to discourage people from taking on the role of director. In this regard the ODCE notes that most directors of AOMCs act in a voluntary capacity;

(b) the directors should be given reasonable notice of meetings, and they should be held at a place and time which maximises the ease with which the directors can attend. For example it may be thought best to hold the meetings in the apartment of one of the directors who resides in the complex (assuming that they are agreeable) or, perhaps, at the offices of the AOMC's Managing Agent;

(c) to allow people plan their lives it is possibly a good idea to agree a standard schedule of meetings (e.g., 7:30 pm on the first Tuesday of every second month);

(d) it is useful to have a standard structure to the meeting e.g., agreement of the minutes of the previous meeting, discussion and decision-making in relation to standard topics (e.g., income and expenditure);

(e) non-standard items which are expected to require discussion and/or decision by the directors should be notified to them in advance. No particular formality is needed in this regard – an email ought to be acceptable to most directors.

9.4 The Articles will also provide that the directors may elect a chairperson. Alternatively, if the chairperson is not present within 5 minutes after the time appointed for holding the meeting, the directors present may choose one of their number to chair the meeting.

9.5 Even in the somewhat informal context of an AOMC, the role of a chairperson is important. It is in everyone's interests that the meeting should move along as quickly, efficiently and courteously. For this reason, it is wise for all the directors to agree that they will respect the authority of their chairperson and will allow him/her to ensure that everyone's viewpoint gets heard and that no-one is allowed to dominate the meeting.

9.6 Unless the directors choose otherwise, the quorum necessary for a meeting of directors will typically be two. This is an issue on which the directors need to reflect carefully. Obviously it is undesirable that decisions should end up being taken by only two out of (say) nine directors but, on the other hand, it is important not to set the bar so high that, in reality, situations will often arise in which the company is not able to proceed with the making of any decision because not enough directors have chosen to attend the meeting.

9.7 The ODCE has encountered also the case where there were only ever two directors and one of them has now died or resigned; or, where the required quorum was (say) five, and the number has now fallen to four. It is important to note that the powers of the last remaining director are very limited. The Articles usually provide that he/she may act only for the purpose of increasing the number of directors, or of summoning a general meeting of the company "but for no other purpose". This is an important limitation. It means, for example, that the sole-surviving director does not have any power to operate the company's bank accounts; or to approve any expenditure on behalf of the company. Accordingly it is a situation which, if necessary, should be dealt with promptly by appointing an additional director (if permitted) or by convening an EGM to allow the members decide what they wish to do about the situation.

Stocktaking Meetings

9.8 We use the term "Stocktaking" to describe (rather loosely) the sort of meeting which we think it would be sensible for the directors of an AOMC to have on all occasions when new directors first become involved in the supervision of the affairs of the AOMC.

9.9 Typically this will occur on the following occasions:-

- soon after the transfer of the common areas, when the Developer's Nominees resign as directors of the AOMC and the representatives of the apartment owner's first take over responsibility for the management of its affairs;

- at the first meeting after an AGM at which new directors have been appointed.

9.10 It seems to us that, on occasions such as these, it is wise for the Directors to formally inform themselves of a number of significant matters so that, if necessary, they can become aware of any shortcomings and deficiencies which they need to remedy during their period of office (or, if the matter is sufficiently serious, to bring to the notice of members by means of an EGM).

9.11 Because this is more an issue of good estate management than company law, we certainly do not propose to set out any sort of an exhaustive list of what the directors ought to consider. However common sense suggests that a good starting point for the preparation of such a list would be the following:-

(a) to note the governance provisions of the AOMC as contained in its Articles of Association;

(b) to note who is the Company's solicitor (see also Chapter 18 below);

(c) to note the location of the AOMC's Title Deeds;

(d) to ascertain whether the AOMC's solicitor has confirmed that the company holds good and enforceable title to all of the Common Areas in the complex;

(e) to identify and note the AOMC's privileges and obligations under the leases by which the Apartments were sold to the members;

(f) to note the bank(s) at which the AOMC's money is deposited;

(g) to clarify the up-to-date balance in those accounts and who has signing authority in relation to them (see also Chapter 13 below);

(h) to note the identity of the AOMC's Insurance Broker;

(i) to verify what Insurance Cover currently exists in relation to the complex;

(j) to establish what professional opinion has been obtained confirming that adequate insurance has been obtained having regard to the likely cost of reinstating and rebuilding the complex in the event that it were destroyed or damaged;

(k) to note the terms of the AOMC's contract with its Managing Agent (see also Chapter 17 below);

(l) to examine the AOMC's last set of audited accounts and to assess the solvency of the company generally;

(m) to consider the extent to which the company is failing to collect service charges which ought to have been paid to it;

(n) to consider, if necessary, the institution of legal proceedings to seek recovery of any unpaid service charges still outstanding;

(o) to consider the extent to which the company is likely to face increased outgoings within the next year, and in longer periods of (perhaps) five years, ten years, and more than ten years;

(p) to carefully consider the state of repair of the complex and the extent to which it is adequate to ensure the continued amenity and value of the properties in the complex as a whole;

(q) to consider the state of the AOMC's compliance with its other legal obligations (see Chapter 20 below).

9.12 We do not suggest that all of these issues should be considered in a very in-depth manner at one meeting. It may be, for example, that some of them will be capable of being noted very briefly. Likewise a brief consideration of others may very quickly show that there is a need for more detailed consideration of that issue, perhaps at another meeting. The important thing, however, is that the new directors should be capable of leaving the meeting with a clear sense of what are the important matters in relation to which, over the next few months, they and their co-directors will need to give some attention.

The Budget Meeting(s)

9.13 In many months the directors of an AOMC may find that they have little enough to discuss: the Managing Agent is doing his job in accordance with everyone's expectations and the complex

is "ticking along" fine! However at some point in each year the directors need to make time available for the important task of looking forward to the following year and working out what sort of money their AOMC is going to need to operate properly in that year.

9.14 This is a task which, obviously, is best done in conjunction with the Managing Agent who, by virtue of his/her expertise, ought to be able to assist the directors considerably with the task of estimating the extent to which costs are likely to arise and the extent to which items of new expenditure are likely to arise. In this context it will also be important to seek professional advice from the company's insurance brokers to verify whether any additional cover is necessary, and how much the following year's insurance premium is likely to be. (The Insurance Broker should be asked to consider the leases under which the Apartments are held to work out what sorts of risks the company needs to be insured against.)

9.15 It is important on these occasions not simply to take all the items of expenditure that were incurred in the current year and to project forward to work out what those items might cost in the next year. While this is a very necessary exercise—since most cost heads tend to recur from one year to the next—it is equally necessary that the directors (with the help of the Managing Agent) should engage in some fundamental thinking about what *new* spending is going to be needed in the years ahead. For example it may be that in the first few years after a complex is developed very little needs to be spent on painting. However after a few years it will be necessary to start repainting the common areas fairly frequently. Likewise items such as lifts will ultimately need to be replaced, and it is important that the AOMC should start preparing for that foreseeable event, by making appropriate transfers to its reserves. This is infinitely preferable to a situation where, almost out of the blue, the members find themselves being asked to make a very large once-off payment to fund the cost of new lifts.

9.16 Even allowing for the expertise of Managing Agents, the ODCE considers that the directors of an AOMC should periodically consider whether they ought to engage the services of someone like a Chartered Surveyor to report to them on the short, medium and long term issues which are going to have to be addressed in order to keep the complex in good repair and up to the standard of residential excellence which everyone anticipated when they originally bought their properties. For instance, there are some medium to long-term items which have the potential to be very costly and disruptive: such as the full re-wiring of not just the common areas of an apartment complex, but also all the electricity cables which lie within each of the individual apartments. However difficult those problems will be to deal with when they arise, they will be all the more difficult if no-one has given any thought to them in the years preceding their occurrence or thought to give advance notice to the apartment owners so as they can plan required decoration or refurbishment within their own apartments after the resultant disruption.

9.17 While there is a degree of informality as to how the directors conduct their meetings, it is important to ensure that proper records are maintained of what decisions are made at meetings – and, at least to some extent, of the basis on which those decisions came to be made. For this reason the law requires that minutes be kept of directors' meetings.[18] These minutes need to be preserved carefully by the company secretary. The ODCE[19] are entitled to inspect these minutes.

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[18] Section 145 of the Companies Act 1963.
[19] Section 145(3A) of the Companies Act 1963.

Chapter 10: The Company Secretary

10.1 Every company is required to have a company secretary, who may be one of the directors.[20]

10.2 As part of Decision Notice D/2002/1, the ODCE has already published a separate Information Book dealing with the Principal Duties and Powers of Company Secretaries. A copy of this guidance is available from the ODCE or at www.odce.ie/publications/decision.asp.

10.3 In summary the company secretary acts in accordance with the directors' instructions and his/her main function is to oversee the company's day to day administration and to ensure that the company complies with the law and observes its own obligations.

10.4 The first secretary of the company is the person named in the documents filed with the CRO. The subsequent appointment of a company secretary is in accordance with the Articles of Association of the company.

10.5 In the case of an AOMC, one option which a company might wish to consider is appointing their Managing Agent as the Company Secretary. Obviously this can be done only with the consent of the Managing Agent, and the Managing Agent may require a somewhat higher annual fee if he/she is expected to act in the role of Company Secretary. However there could be certain practical advantages because—for example—the Managing Agent, unlike the apartment owners who volunteer to serve as the company's directors, will presumably have office facilities available at which the formal records of the company could be kept, to which those seeking to inspect those records could go, from which communications to members could be issued, etc. This assumes, of course, that the registered office of the company was also located at the offices of the Managing Agent but since the AOMC does not ordinarily have any premises of its own, from which it can carry out such activities, this may be a sensible option.

Checklist

1. **Who is our Company Secretary?**
2. **Is he/she aware of his/her duties and in a position to discharge them properly and in a timely manner?**
3. **If not, should we possibly consider the option of seeking to have our Managing Agent become our Company Secretary?**

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[20] Section 175(1) of the Companies Act 1963.

Chapter 11: The Appointment and Removal of Auditors

11.1 The vast majority of AOMCs are constituted as *public* companies limited by guarantee and, accordingly, must once a year have their accounts examined by an independent professionally-qualified person with expertise in the field of *audit*. Audit may loosely be described as a process of systematically examining accounts with a view to forming an opinion as to whether they have been properly prepared, and whether they give a "true and fair view" of the company's state of affairs and of its profits or losses.

11.2 The ODCE is aware of calls which have been made for company law to be amended to allow for AOMCs to opt out of audit. Ultimately this is a matter for the Oireachtas to decide. However in the ODCE's view the annual audit is beneficial in so far as AOMCs are concerned even if there is a cost involved. Our reasons for taking this view include:-

- we understand that in many apartment complexes the covenants entered into by all apartment owners regulating who is to pay for the common services, and in what shares, are built around legal arrangements whereby the AOMC's auditor has a function of ascertaining and certifying the cost base out of which the individual service charges are to be computed. We are unclear as to how this process could properly be undertaken if the AOMC did not have an auditor;

- the involvement of an independent statutory auditor is a strong safeguard for members who are required to pay their service charges and who, in return, need to be satisfied that such money is being properly used for the purpose for which it was intended;

- the involvement of an independent statutory auditor is also a protection for the (usually) volunteer directors of the company. It is a process which enables them to corroborate the trust which they place in one another, and possibly also in their Managing Agent. In addition it is a matter upon which directors can rely when faced with any criticisms (however unfounded) which might be made concerning their probity in relation to the conduct of the company's affairs. In short it allows them to avoid having to say to the company's members "take our word for it" – instead they can say "not only is that what we say; your independent statutory auditor has verified it also".

11.3 The first auditor of an AOMC is usually appointed by the company's directors and thereafter the auditor is usually appointed at every AGM of the company – to hold office from the conclusion of that AGM until the conclusion of the next AGM. Special provisions exist whereby a retiring auditor may be re-appointed without the need for a formal resolution of the company.[21]

11.4 Once appointed an auditor enjoys a considerable number of statutory privileges although there is a means by which, through following an appropriate process, a company may resolve to remove its auditor.[22]

The Relationship with the Statutory Auditor

11.5 It is important to note that the primary relationship which exists is between the company and the statutory auditor. In this context the auditor will on occasions meet with the members as a

[21] Section 160(2) of the Companies Act 1963.
[22] Section 161 of the Companies Act 1963.

group (such as if he/she attends, as is their entitlement, an annual general meeting of the company) while on other occasions the auditor will meet with the AOMC's directors.

11.6 In most AOMCs, an important relationship will also exist between the AOMC's Managing Agent and the auditor, but it is important to note that the directors cannot and should not consider it enough to allow that relationship replace that which ought to exist between them and the auditor. In particular, the AOMC's directors should satisfy themselves as to the auditor's independence. If, for instance, s/he were already engaged by the Managing Agent in some capacity, this could give rise to suspicions of a conflict of interest. It would be prudent for the AOMC's directors to recommend an auditor unconnected with the Managing Agent in order to avoid any such perceptions.

11.7 The ODCE suggests that it is important that the directors of an AOMC should personally engage with the company's auditors and vice versa. Such meetings need not necessarily be either frequent or lengthy but they should happen at least once a year at the time of the annual audit. Over and above the specific issues which are by law required to be dealt with in an auditors report, there will also possibly be issues in relation to which a discussion between the directors and the auditors would prove useful.

Checklist

1. **Who is our auditor?**
2. **Are there any issues arising on foot of his/her audit reports which call for any action?**
3. **What are our channels of communication with the auditor and do they need to be strengthened?**

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Chapter 12: The importance of record keeping: Operational and Decision-Making Records, Financial Records, Statutory Registers

Operational and Decision Making Records

12.1 As in any business it is important for AOMCs to retain appropriate records concerning their operations and of the decisions which they make.

12.2 The nature and extent of an AOMC's operational records will obviously depend on the precise nature of its particular operations. However in general we would expect that an AOMC should hold copies of contracts to which it is directly a party (eg contracts with its Managing Agents). Likewise the AOMC will potentially have ongoing correspondence with its Solicitors, Insurance Brokers, Bankers, Auditors etc.

12.3 We recognise that some of this correspondence, and the day-to-day supervision of service contracts etc, may be primarily undertaken on the AOMC's behalf by its Managing Agent. However in that case it is important for the AOMC to ensure that its contract with its Managing Agent provides that he/she will retain appropriate records for an on behalf of the AOMC and that such records are the property of the AOMC. For example in the event that the AOMC decides not to renew its contract with one Managing Agent, it is important that it should be able to supply its new Managing Agent with all the records relating to such matters as inspections of the lifts in the complex, the company's insurance arrangements, etc.

12.4 The primary decision makers in a company are firstly its members in general meeting and, secondly, its board of directors. In both instances the Companies Acts requires that minutes of such meetings be recorded. Section 145(1) of the Companies Act 1963 provides that—

> "Every company shall as soon as may be cause minutes of all proceedings of general meetings and all proceedings at meetings of its directors or committees of directors to be entered in books kept for that purpose."

12.5 Section 146 of the Companies Act 1963 provides that the book containing the minutes of proceedings of general meetings of the company must be kept at the registered office of the company and must be made available for inspection (free of charge) by any member of the company.

12.6 The Companies Acts do not give members any express right to inspect the minutes of meetings of the company's directors – although the Director of Corporate Enforcement is entitled to inspect them.[23] However it would be open to an AOMC to include a provision in its Articles of Association permitting such inspection if it wished to do so. Alternatively it should be noted that the Companies Acts certainly contain no prohibition on the directors making minutes of their meetings available to members and, accordingly, it is always permissible for the directors to do so, if asked by a member.

[23] Section 145(3A) of the Companies Act 1963.

Financial Records

12.7 In any business it is essential to have available comprehensive, accurate and up-to-date financial information. Even in a typical AOMC questions such as the following are constantly going to arise:-

- what money have we received?
- who paid it to us?
- who owes us money at the moment?
- who do we owe money to?
- how much did we pay for insurance last year?
- how much do we have in the bank account at present?
- how much are we likely to have in the bank next month when this year's insurance is due?

12.8 Before setting out the company law requirements in relation to accounting records, it is probably worthwhile to say that, technical though the rules may seem, their purpose is the fairly simple and sensible one of ensuring that there exists a means by which questions like these can be readily and properly answered.

12.9 Under company law all AOMCs are required to keep "proper books of account, *whether in the form of documents or otherwise*".[24] As the italicised words suggest, the law is somewhat flexible as to the form in which such records are to be kept. A company may decide to maintain what one might call 'traditional' accounting books (e.g., volumes of ledgers, journals, cash books, etc.) but it is equally permissible for the accounting records to be maintained electronically provided that the electronic data is "readily accessible and readily convertible into written form".

12.10 Ordinarily the books of account should be kept at the registered office of the company. However the directors have power to decide that they should be kept at such other place as the directors think fit.

Proper books of account: the legal requirements

12.11 In the case of an AOMC[25] company law requires that the company's accounting records:-

(a) should correctly record and explain the transactions of the company;

(b) be kept on a "continuous and consistent basis", with all entries made in a timely manner, and consistent from one year to the next;

(c) contain entries from day to day of all sums of money received and expended by the company. Each entry should show both the date of the transaction, the amount of money spent or received, and details of the transaction. Usually these details will consist of at least two elements: (i) the name of the person or business from whom the

[24] Section 202 of the Companies Act 1990.
[25] Being a company whose business "involves the provision of services".

money was received or to whom it was paid and (ii) the reason or purpose of the transaction, e.g., "2006 Service Charges" or "Electricity Bill";

(d) include details of all the assets and liabilities of the company.

(e) include a record of all services provided and of all the invoices relating thereto.

(f) should enable—

(i) the financial position of the company to be determined at any time with reasonable accuracy;

(ii) the directors to ensure that the annual accounts of the company comply with the relevant requirements of company law;

(iii) the annual accounts of the company to be readily and properly audited.

Who can examine the company's accounting records

12.12 Company law provides that the accounting records must be freely available for inspection "at all reasonable times" by the directors of the company, the company secretary and the company's auditors.

12.13 So far as the company's directors are concerned, this is an important statutory privilege because it is one of the means by which they can discharge their general obligation to keep themselves informed as to the company's business and of verifying or scrutinising any financial transactions about which they are concerned.

12.14 Company law does not provide the *members* of a company with a statutory right to inspect its accounting records. However there is nothing whatever to prevent an AOMC from permitting a member to do so. Such a facility can be made available informally as and when requested, or can be formalised by an appropriate amendment to the AOMC's Articles of Association.

For how long must the records be preserved?

12.15 The minimum period for which all accounting records must be preserved is the period of six years after the latest date to which the record relates. However there is nothing to stop AOMCs from keeping their accounting records for a longer period and there may well be advantages in doing so. For example when considering a large capital item such as the replacement of a lift, the directors may well be interested to know what sort of expenditure arose in relation to maintenance etc. during (say) the previous 10 or 15 years.

Who is responsible for keeping the accounting records? Can the task be contracted out to a Managing Agent?

12.16 Under company law the primary obligation to keep proper books of account rests with the AOMC itself. Failure to comply with the obligation is a offence for which the AOMC may be prosecuted.

12.17 The directors of the company have a similar parallel obligation. Company law provides that where an AOMC has failed to keep proper accounting records, an offence is also committed by any director—

- who failed to take all reasonable steps to secure compliance by the company with its primary obligation, or
- who has, by his or her own wilful act, been the cause of any default by the company with its primary obligation.

12.18 However the law provides a defence for any director who can prove—

- that he or she had reasonable grounds for believing
- and did believe
- that a "competent and reliable person" was charged with the duty of ensuring that the company complied with its primary obligation
- and that such a "competent and reliable person" was in a position to discharge that duty.

12.19 In practice this means that it is permissible for an AOMC to arrange for its accounting records to be kept and preserved by its Managing Agent. In many cases this may also be a sensible arrangement since the Managing Agent will, very likely, be the initial recipient of most of the service charge payments owed to the AOMC, and the person also who receives most invoices addressed to it for services obtained. However, this is a decision which will require careful and regular consideration by the directors.

12.20 Where the Managing Agent is asked to discharge this role, it is critical to ensure that what the Managing Agent will be keeping is the accounting records of the AOMC: as distinct from their own records relating to the AOMC. These accounting records are and must remain the property of the AOMC and must be freely available for inspection by the directors, secretary and auditor of the AOMC. Moreover the AOMC's directors must be satisfied that they have reasonable grounds for believing that the Managing Agent is a "competent and reliable person" as regards the keeping of a company's accounting records and that they are in a position to discharge that duty.

12.21 In the ODCE's view, this means that the directors of an AOMC who decide that they wish for its accounting records to be kept and preserved by their Managing Agent should carefully agree the basis upon which the Managing Agent is to do so. They should also monitor the Managing Agent's discharge of that task (if necessary by exercising their statutory right to inspect the accounting records) to ensure that it is satisfactory. Furthermore it is certainly good practice for the directors to review the issue carefully with the company's auditors in the context of each annual audit and to address any shortcomings about which the auditors may have any concerns.

The role of auditors

12.22 Auditors too have an important role in verifying that proper accounting records are being kept by an AOMC. Company law provides that in their audit report the auditors must state specifically whether in their opinion proper books of account have been kept by the company. Where proper books of account have not been kept, the auditors will also be required to report

that default to the ODCE and they may also be required to bring it to the attention of the public by means of a notice filed with the Companies Registration Office.

12.23 In the event that an auditor is not in a position to state categorically that in his/her opinion proper books of account have been kept by a company the issue is one which will clearly require urgent discussions between the auditors and the AOMC's directors. However it is also a matter which ought to be of significant concern to the company's members. For that reason the ODCE thinks it advisable for members, when they receive the AOMC's audited accounts, to look at the auditor's report and check what he/she has to say about the books of account kept by the AOMC. Any shortcomings identified should be raised and discussed at the company's AGM.

Statutory Registers

12.24 The Companies Acts requires that every company maintain certain statutory registers. Those which are most likely to be relevant to an AOMC are its Register of Members and its Register of Directors and Secretaries.

The Register of Members

12.25 Section 116 of the Companies Act 1963[26] requires that in the case of a guarantee company not having a share capital (the form in which most AOMCs are constituted) every company shall keep a Register of its Members containing details of the names and addresses of the members, the date at which he/she was entered in the register as a member and the date at which any person ceased to be a member. These entries must be made within 28 days from the person agreeing to become a member.

12.26 In *any* company it is important for the company to know who are its members so that all those entitled to be notified of meetings are duly notified, and only those entitled to participate in decision-making actually do so. In AOMCs there is one additional factor namely that the AOMC needs to know who are the persons obliged to pay service charges to it. Accordingly maintaining the Register of Members in an accurate and timely manner serves a dual purpose in AOMCs.

12.27 We think it important to draw attention to the fact that the Register of Members of any company, AOMCs included, is a *public* document. Section 119 of the Companies Act 1963 provides that, in general, it may be inspected free of charge by any member of the company and—on payment of a prescribed fee—by any other person.

12.28 ODCE has heard of instances in which members of a company have encountered difficulties when seeking to know who are the other members of their AOMC. We have been told of instances in which AOMC directors, AOMC secretaries and even Managing Agents occupying the position of AOMC secretary, have told members that such details are confidential. We think it important to emphasise that this is not so. Section 119 of the Companies Act 1963 clearly provides that such information must be made available, not only to members but—if requested by them—to the public at large. Section 119(3) provides that it is an offence to refuse to permit an inspection of the register of members while Section 119(4)

[26] As amended by Section 20 of the Companies (Amendment) Act 1982.

provides that in the case of any such refusal the High Court may by order compel an immediate inspection of the register.

The Register of Directors

12.29 Section 195(1) of the Companies Act 1963[27] requires that every company shall kept at its registered office a register of its directors and secretaries.

12.30 The register must contain details of the each officer's name, date of birth, usual residential address, nationality, business occupation and particulars of any other directorships of bodies corporate (whether incorporated in the State or elsewhere) held by him/her, or which have been held by him/her within the preceding ten years.

Checklist

1. **Are we keeping sufficient records of our operations and the required statutory records of our members' and directors' meetings?**
2. **Who is responsible for keeping our AOMC's Accounting Records?**
3. **Where are they kept? If not at the AOMC's registered office, do we need a resolution of the Directors authorising that they be kept elsewhere?**
4. **If they are kept by a third party (eg a Managing Agent) *(i)* are they being separately maintained as the accounting records of our AOMC, which belong to us and to which we have full and free access – including the power (if necessary) to take them away? *(ii)* can we properly regard that third party as a "competent and reliable person" for the purposes of the Companies Acts?**
5. **Are we satisfied that the accounting records are being kept *properly* – as specified in paragraph 12.11 above?**
6. **Are they being preserved for at least the statutory minimum period?**
7. **Have the auditors given an unqualified opinion that the accounting records are being properly kept? Even if they have, have we ever discussed with the auditors whether there are any aspects of our accounting practices which could or should be improved?**
8. **Are our Registers of Members and Directors kept in an accurate, up-to-date and timely manner?**

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[27] As substituted by Section 51 of the Companies Act 1990 and subsequently amended by Section 47 of the Companies (No.2) Act 1999 and Section 91 of the Company Law Enforcement Act 2001.

Chapter 13: The Operation of the AOMC's Bank Account

13.1 In general company law does not contain any detailed rules concerning a company's banking operations. However in order to optimise—

- the proper governance of an AOMC,
- the keeping of its accounting records and
- the preparation of its annual accounts;

The ODCE suggests that AOMC's should consider the following observations.-

13.2 Existing law does not preclude the funds of an AOMC being kept in a pooled bank account (or accounts) operated by a Managing Agent. However there are clearly some disadvantages from a control perspective to doing so, even where the Managing Agent has very detailed and transparent reporting arrangements with the AOMC.

13.3 In the ODCE's view it is preferable that all of an AOMC's money (which will generally consist only of the service charges which it receives each year, together with any reserves carried forward from previous years together with any accumulated sinking funds) should be held in bank accounts (or a single bank account) which are opened and operated in the name of the AOMC itself.

13.4 The directors of the company should consider carefully, from a prudential perspective, what safeguards they wish to put in place as regards withdrawals from the AOMC's Bank Account. This is obviously a matter for the directors' own choosing, but it seems to the ODCE that the essential choices are as follows:-

- whether the Managing Agent is to be an Authorised Signatory for withdrawals from the Company's Bank Account;
- if so, whether there ought to be a financial limit on the maximum amount which can withdrawn/paid on the Managing Agent's sole signature;
- which of the AOMC's Directors ought to be Authorised Signatories for withdrawals from the Company's Bank Account? Is the Bank entitled to act on the signature of any one of those persons or should cheques (perhaps above a certain limit) have to be co-signed by at least two or more directors?
- who is to have custody of the AOMC's chequebooks and deposit books?
- who is to receive the Bank Statements in relation to the AOMC's accounts? Should they come directly to the AOMC itself, or are the directors satisfied to let them be sent directly to the Managing Agent under an arrangement whereby he/she copies them (say) monthly to the AOMC Directors together with an up-to-date Bank Reconciliation Statement?

Checklist

1. Is all of our AOMC's money lodged to Bank Account(s) in the name of our company?

2. **If not, are we satisfied with the safeguards which exist in relation to any pooled account into which our AOMC's money is lodged?**

3. **Who currently has authority to effect withdrawals of money belonging to our AOMC?**

4. **Who ought to have such authority, and subject to what safeguards?**

5. **Do the existing authorities need to be modified in any way?**

6. **If so, who is going to engage with our Bank(s) to modify the existing Authorised Signatory mandates?**

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Chapter 14: Operational and Financial Reporting – The Audited Annual Accounts

Terminology

14.1 We use here the term "operational reporting" to mean the periodic delivery to members of the AOMC, and to other interested persons, of *narrative* statements describing important aspects of the ongoing work of the AOMC.

14.2 The term "financial reporting" is used here to mean the periodic delivery to members etc of conventional *accounts* and other financial statements setting out details of the monetary aspects of the AOMC's business.

Operational Reporting

14.3 There are two principal forms of operational reporting which ought to exist in an AOMC.

14.4 Firstly Section 158 of the Companies Act 1963[28] provides that there should be appended to a company's balance sheet, and laid before the company's Annual General Meeting, *"a report by the Directors on the state of the company's affairs"*. The report must deal, amongst other matters, *"so far as [it is] material for the appreciation of the state of the company's affairs, with any change during the financial year in the nature of the business of the company … or in the classes of business in which the company has an interest"*.

14.5 In the case of most companies Section 13 of the Companies (Amendment) Act 1986 requires that the directors' report should also contain certain additional specified information including *"particulars of any important events affecting the company .. if any, which have occurred since the end of [the financial year in relation to which the report relates]"* and *"an indication of likely future developments in the business of the company and of its subsidiaries"*. However Section 2(1) of the Companies (Amendment) Act 1986 provides that the 1986 Act does not apply to *"a company not trading for the acquisition of gain by the members"* and, in the ODCE's view, most AOMC's fall within that description. Accordingly, strictly speaking, we cannot say that the additional requirements of Section 13 of the 1986 Act must necessarily be included in the directors' report of an AOMC.

14.6 These phrases express very wide-ranging concepts, and to that extent, although we acknowledge the non-applicability of the extending provisions of the 1986 Act, this does not necessarily mean that the Directors' Report of an AOMC ought to be very short and cursory statement.

14.7 Instead it seems to us that both on a proper interpretation of the law and in the spirit of good corporate governance, the Directors of an AOMC ought to be quite comprehensive in the contents of their Directors' Report. Furthermore we think that, even looking beyond the minimum requirements of the law, directors of AOMCs have further good reasons why they should be quite forthright in preparing their directors' report because—looked at from their personal perspective—the more information they give to their fellow members, the less the members can seek to opt out of taking responsibility themselves for whatever are the current needs of the company.

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[28] As amended by Section 90 of the Company Law Enforcement Act 2001.

14.8 In short it seems to us that the directors of an AOMC would be well advised not to shy away from delivering a "warts and all" Directors Report to their members. For example, if they are apprehensive that there may be only three or four years of useful life left in the lifts of the apartment block and that the cost of repairing them is likely to be very large and will require that service charges increase, they should say so. Such news may well be unwelcome to the members, but that is no good reason for the directors holding it back from them. On the contrary, the directors are likely to face a much more testing environment if they wait for another three years and then tell the members the bad news when there is even less opportunity to prepare for it and when it will be difficult for the directors to explain why nobody was consulted about the issue sooner.

In the same way it seems to us that where the directors of an AOMC consider that they have "good news" to deliver, such as the resolution of any long-standing difficulties, or the receipt of a professional opinion commenting favourably on the state of repair of the complex, it is fitting that such matters be referred to also in the Directors Report.

14.9 In our commentary on an AOMC's Articles of Association, we have adverted to the fact that a company is free to amend its Articles to adopt additional internal rules over and above those which apply under the Companies Acts. If the members of an AOMC wished to do so, it would be open to them to adopt an article specifying that their Directors' Report should contain—in addition to the particulars required by Section 158 of the Companies Act 1963[29]—any other disclosures that the members believe should be made available to them at least on an annual basis.

Financial Reporting

14.10 An AOMC is also required under the Companies Acts to prepare annual financial statements.

14.11 In the case of many companies these requirements are largely now contained in the Companies (Amendment) Act 1986. However, as noted above, that Act does not apply to "a company not trading for the acquisition of gain by the members". Accordingly the financial reporting requirements for most typical AOMCs are those contained in Sections 147 to 159 of the Companies Act 1963[30], and in the Sixth Schedule to that Act.

14.12 These technical accounting requirements are somewhat complicated and we do not propose to go into them in any substantial detail: especially since almost all AOMCs will have their accounts prepared with the assistance of professional accountants who act also as the auditors to the company. However there are certain basic points which we wish to make.

14.13 The basic elements of a company's financial statements are:-

[29] See footnote 28 above.

[30] As amended by the European Communities (International Financial Reporting Standards and Miscellaneous Amendment) Regulations 2005, S.I. 116 of 2005.

(i) a profit and loss account[31] (which summarises the main categories of company income and expenditure and permits a calculation to be made of the profit or loss for the reporting period);

(ii) a balance sheet (which describes the net worth of the company taking all of its assets and liabilities into account at the reporting date);

(iii) appropriate notes containing further information which aids in the understanding of both the profit and loss account and the balance sheet.

14.14 The fundamental purpose of a company's financial statements is to deliver comprehensive and intelligible financial information to the company members and to other persons who have an interest in the company's finances.

14.15 The Companies Acts never *limit* the amount of information which can lawfully be disclosed in a company's financial statements. Instead its object is to set down *minimum amounts* of information which must be disclosed: without prejudice, however, to the entitlement of a company to disclose as much and more as it chooses.

14.16 This principle is reinforced by the statutory statements that—

> "the balance sheet shall give a ***true and fair*** view of the state of affairs of the company as at the end of the financial year and the profit and loss account shall give a ***true and fair*** view of the profit or loss of the company for the financial year"[32]

14.17 For these reasons, we suggest that an AOMC should prepare its balance sheet and profit and loss account not in some sort of a slavish adherence to the *minimal* levels of disclosure required under the Companies Acts, but for the purpose of putting before the company's members *as much* financial information as is necessary to optimise the extent to which the financial statements will enable the members to get a really good sense of where the company stands financially.

14.18 We are not suggesting however that the financial statements should be excessively detailed. Obviously there comes a point at which if too much information is given, the financial statements start becoming less intelligible.

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[31] We note that, as enacted, Section 148(1) of the Companies Act 1963 provided that in the case of a company "not trading for profit", what was required was not "a profit and loss account" but rather an "income and expenditure account". Since we have already acknowledged that most typical AOMCs are probably companies "not trading for the acquisition of gain by the members" (within the meaning of Section 2(1) of the Companies (Amendment) Act 1986, it follows that we would agree also that they will generally not be "trading for profit" either. However for financial years which commence on or after 1 January 2005 Section 148 of the Companies Act 1963 has been amended by Regulation 4 of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005. Amongst other things this amendment has seemingly removed the distinction between a "profit and loss account" and an "income and expenditure account". Accordingly the position as we see it is that even in the case of what the Acts describe as "a company not trading for the acquisition of gain by the members" a "profit and loss account" is now required.

[32] Section 149(2) of the Companies Act 1963.

14.19 The detailed accounting requirements of the Sixth Schedule to the Companies Act 1963 were never devised with the particular needs of AOMCs in mind. For that reason we think that there may be some merit in amending the company's Articles of Association to adopt an *internal rule* of the company specifying that certain additional information *must* always be included in the notes to the company's accounts. For example we suggest that it might be appropriate for the following information to be routinely included—

Service Charges

(a) the number of property units from which the company is entitled to receive service charges;

(b) the aggregate amount of service charges which ought to have been received in the financial year;

(c) the aggregate amount of service charges which ought to have been received in the financial year but which were not paid;

(d) the number of properties which are in arrears as to the payment of their service charges;

(e) the aggregate amount of still-outstanding service charges from all previous years.

Insurance

(f) The amount of insurance cover which has been put in place in respect of the complex;

(g) Details of the basis on which that level of insurance cover is thought sufficient – including, where relevant, details of the advice received from the company's insurance brokers or (if such is the case) the fact that no such advice has been obtained.

Depreciation, Dilapidation and Capital Expenditure

(h) Details of the extent to which, in the opinion of the Directors, the company is likely to have to expend any significant sums of money on repairs, renovations, replacements, improvements, etc. Such details shall extend to an outline of what works are envisaged, an estimate of their likely cost and an indication of when such expenditure is likely to have to be incurred.

(i) Details of the extent to which the company expects to be able to meet any such expenditure out of its accumulated reserves and/or the extent to which it envisages that it will have to increase the service charges payable by its members and/or to impose any once-off capital levies.

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Chapter 15: Filings with the Companies Registration Office

15.1 AOMCs, like every other company, are required by law to make an annual return to the Companies Registration Office (CRO).[33]

15.2 The return is a comparatively simple document setting out basic information in relation to the company and its directors. Where, as is usually the case, the AOMC is constituted as a company limited by guarantee, there is no requirement for it to contain a listing of all the members of the company – although such a list is required where the AOMC is constituted as a company limited by shares.

15.3 Certain documents must by law be annexed to the company's annual return. In the usual case where the AOMC is "a company not trading for the acquisition of gain by the members",[34] these documents are usually[35] certified copies of:-

- the balance sheet as laid before the AGM of the company held during the period to which the return relates;
- the related profit and loss account of the company;
- the directors' report accompanying the balance sheet;
- the auditors' report on the balance sheet.

15.4 In addition to the company's Annual Return, an AOMC must also file details of certain other matters with the CRO. These include the following:-

- Notices of any changes in the composition of the company's directors or secretary: Form B10;
- Notice that a person holding the office of director of secretary of a company has died: Form B70;
- Notice of any increase in the total number of members of the company: Form B9;
- Notice of any change in the location of the company's registered office: Form B2;
- Notices of places where the register of members, register of debenture holders, register of directors' and secretary's interests in shares and debentures, and directors' service contracts/memoranda are kept: Form B3;
- Notice of the nomination of a new Annual Return Date: Form B73;

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33 Section 125 of the Companies Act 1963 as replaced by Section 59 of the Company Law Enforcement Act 2001.

34 Section 2(1) of the Companies (Amendment) Act 1986.

35 Section 128 of the Companies Act 1963.

- Notice of the Fact of Any New Director of the Company being the subject of a Foreign Disqualification: Form B74;
- Notice of any mortgage or charge created by the company: Form C1;
- Notice of any special resolution of the company: Form G1;
- Notice of certain Ordinary Resolutions of the Company: Form G2;
- Notice of any removal of the company's auditor: Form H3.

15.5 Further information in relation to these filings is available at the website of the Companies Registration Office: www.cro.ie. Alternatively you can telephone the CRO on 01-804-5200 or on Lo-Call 1890-220-226. At the date of publication, the CRO's offices are located at Parnell House, 14 Parnell Square, Dublin 1.

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Chapter 16 – Service Charges

16.1 The level of service charges is an issue which gives rise to many of the concerns and complaints which the ODCE hears voiced in relation to AOMCs. Accordingly, although the topic is rather extraneous from a purely company law perspective, we nonetheless think it appropriate to include some discussion of the question. However we must stress that the adequacy or level of a service charge is not a matter of company law. In consequence the ODCE does not have a role in determining questions such as the alleged excessiveness or insufficiency of the service charges.

16.2 As we understand it, the level of service charges in an apartment complex is typically influenced by factors such as the following:-

- the types of services which *as a matter of property law* the apartment owners are *entitled* to have provided to them under the long leases through which they hold their apartments. For example almost all leases will provide that the AOMC will arrange for the provision such matters as the lighting of the common areas and for them to be kept "in good and substantial repair and condition". In other complexes, the leases may provide explicitly for the provision of a caretaker or concierge.

  Obviously if the members have bought into a scheme in which it is intended that there will be a full-time caretaker or concierge, this will mean that the service charges for that complex will have to be higher than in a scheme where such a person was not to be employed;

- any additional services which the members have opted to have provided to them: even though they are not expressly required under the leases. For example the members may have decided to install a CCTV system (which was not contemplated in the leases) and this will give rise to ongoing installation and maintenance charges. Likewise the members may have decided that they want a full-time caretaker, even though the lease is silent as to whether one is (or is not) to be provided;

- The extent to which the members are free to choose the level or quality of service to which they are entitled. This varies depending on the service in question.

  For example a cost such as insurance is one over which the AOMC may not have too much influence: because (usually) the leases will have imposed an obligation on the AOMC to insure the entirely complex for *"the full reinstatement cost thereof"*. If that means that insurance cover of €70 million is needed, it is simply not an option for members (or a majority of members) to suggest that the company should save money by taking out only €50 million of cover.

  On the other hand, the members have some degree of choice in so far as repairs and maintenance are concerned. Typically leases provide that the AOMC is under an obligation to keep the common areas *"in good and substantial repair and condition"*. We do not intend to offer a view as to what exactly that phrase means – because it is a concept more of Housing Law and Landlord & Tenant Law than one which has any meaning in company law. Nonetheless common sense suggests to us that it allows for a certain margin of appreciation. Accordingly the AOMC may conclude that while it might be desirable to re-paint the common areas of their apartment complex,

it is not essential to do so this year, because a failure to do so will not—in this year at least—cause the complex to fall short of the standard of "good and substantial repair";

- the extent to which, in procuring services, the AOMC is able to obtain good value for money. For example it may be possible that, by placing their insurance business with a more competitive company, rather than a less competitive one, the annual insurance premium can be reduced without any loss of cover. Alternatively by employing a good Managing Agent, the AOMC may find that he/she is able to source painters or gardeners who can provide the same services less expensively than those who might be sourced by a less efficient Managing Agent;

- the extent to which the AOMC is choosing to build up a reserve fund to meet the cost of major repairs, future contingencies and replacement of capital items (e.g., lifts, security gates, etc.). This is an element of the service charge which the AOMC *can* opt to keep very low but, in our view, doing so will almost certainly give rise to a false and dangerous economy. If the AOMC's reserves are low or non-existent, all this means is that when major repairs are needed, or when lifts need to be replaced etc., the members will then have to make very large one-off payments: or else see the value of their apartments falling very considerably because of the AOMC's failure/inability to make the necessary repairs or replacements. Indeed basic economic theory would suggest that even long before such payments may be needed, purchasers ought not to regard two otherwise-equivalent apartments as being of equal value when one is located in a complex where adequate reserves are being accumulated, while the other is not.

16.3 Although we have alluded to it previously in a somewhat different context, we think it worthwhile to repeat that the way in which service charges are computed is usually specified with some precision in apartment leases. A typical clause will be along the following lines

(a) the Owner will pay to the Management Company [x]% of the costs and expenses incurred by the Developer in providing the [common services] (which aforementioned costs and expenses are hereinafter called "the service charges");

(b) the amount of the service charges for the previous year shall be ascertained and certified annually by the Auditors of the Management Company as soon after the end of the financial year as shall be reasonably practicable;

(c) in ascertaining and certifying the service charges, the Auditors shall act as experts and not as arbitrators and their Certificate shall be conclusive evidence that the service charges were actually incurred. A copy of the Auditors' Certificate shall be supplied by the Management Company to the Owner on written request;

(d) subject to the provisions of paragraph (e) on the 1st day of April in each financial year, the Owner shall pay to the Management Company such sum in advance and on account of the service charge as the Management Company shall in its sole discretion deem to be a fair and reasonable interim payment in respect of the year then commencing;

(e) as soon as practicable after the issue of the Auditors' Certificate, the Management Company shall furnish to the Owner an account of the service charges for the year to

> which the Certificate relates for which the Owner shall be liable, due credit being given therein for all interim payments made by the Owner for the year in question, and thereafter the Owner shall forthwith pay to the Management Company the service charges or any balance found payable in respect thereof, or there shall be allowed by the Management Company and repaid to the Owner any amount which may have been overpaid by the Owner (as the case may be).

16.4 Obviously it is possible for the service charge clauses of an apartment lease to be structured differently. However, even in instances where a clause such as the above is used, we have our suspicions that AOMCs do not always go about the computation and verification of their service charges in this manner. This is obviously undesirable but we must stress that—where that occurs—it seems to us that it constitutes a breach of the property law relationship between the members and the AOMC: rather than any breach of an obligation under the Companies Acts. Accordingly it falls largely outside the ODCE's remit.

16.5 In a similar vein, we think it important to say that, as we see it, the auditor of an AOMC—who performs a role in relation to the ascertainment of service charges pursuant to a clause like this—is not engaged in any acts of audit such as are provided for in the Companies Acts. His/her role seems to be governed predominantly by the *non-statutory* function assigned to him/her under the leases entered into between the apartment owners and the AOMC.

16.6 Finally it seems to us that the concept of a service charges is one which is often perceived in perhaps an excessively negative way by apartment owners. We are not so naïve as to think that people should be glad to have to pay it but, on the other hand, we think that it would be helpful if—to some extent at least—apartment owners began to see their service charge (at least in some respect) as an investment in the capital asset which is their apartment. Indeed we would go so far as to say that there is possibly even an extent to which apartment owners (or persons contemplating the purchase of an apartment) should at least be open to asking themselves the rather radical question as to whether, perhaps, the service charge is not high enough? Once again it seems to us that people need to beware in this area of what may turn out to be false economies: where, by reason of insufficient service charges having been collected over the years, and spent wisely, a complex of apartments has deteriorated in quality to the point where the individual apartments of individual owners are now not at all so valuable as they would have been if a little more money had been spent along the way.

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Chapter 17: The Contractual Relationship with the Managing Agent

17.1 The AOMC's contractual relationship with its Managing Agent is one of critical importance.

17.2 Without a good Managing Agent, it is unlikely that—except in the very smallest of complexes—the AOMC will be able to guarantee the delivery of all the common services and amenities which the apartment owners expect, and the absence of which is likely to lead to the complex deteriorating quickly and becoming a less desirable place to live. Unless this is quickly resolved, such an outcome is likely to lead to owners and investors seeing the values of their properties falling or—at any rate—not keeping pace with increases which are occurring in similar properties located in complexes which are better managed.

17.3 However, an AOMC's relationship with the Managing Agent is one which is governed primarily under contract law as well as the Sale of Goods and Supply of Services Act 1980. It is not one which has its origins in company law.

17.4 The ODCE does not have the skills to start specifying what are (or ought to be) the characteristics of a good Managing Agent. As we see it this is largely a concept of Estate Management: which is an area in relation to which we do not have any statutory competence. However, subject to that caveat, a commonsense approach suggests to us that there are a number of factors which are conducive to an AOMC having a good relationship with its Managing Agent:-

(a) both sides (the AOMC and the Managing Agent) need to appreciate that the relationship between them is one of contract, i.e., of agreement;

(b) accordingly the terms of that agreement need to be carefully considered;

(c) at the outset the directors and members of the AOMC need to be realistic and willing to look beyond the short-term in determining what is to be the budget out of which the Managing Agent is to source and deliver the common services. If the complex consists of (say) 200 apartments with an average price of €400,000, it means that the complex as a whole consists of more than €80 million worth of residential property. Even the best managing agent will probably not be able to do much in maintaining the value of those properties if his/her budget is only €50,000 per annum;

(d) the AOMC must therefore ensure that it (i.e., all the owners who have a stake in the successful management of the estate and the maintenance and enhancement of the value of the properties therein) has worked out—preferably in conjunction with its existing Managing Agent—what sort of money is needed to run the complex well;

(e) the directors of the AOMC must then be satisfied that they have chosen the correct Managing Agent to run the property. As in every other line of business, some Agents are more expert than others, and some are more efficient and cost-effective than others. It is important for the members and directors of the AOMC to be satisfied that—having regard to the amount of money they are willing to pay towards the maintenance and upkeep of their estate—that the most suitable Managing Agent has been selected to do the job. Directors and members need to realise that as the relationship with the

Managing Agent is one of contract, they are free not renew the contract once it expires and to seek to place their business elsewhere;

(f) in addition we think it very desirable that there should be a clear and straightforward written contract which sets out the rights, duties and obligations of both the Managing Agent and the AOMC. Clear statements are needed as to what the Managing Agent is agreeing to do (or not to do) and how he/she proposes to do it. Likewise it is important to define what the Managing Agent can expect of the AOMC's directors: such as, for example, their agreement to give clear and timely instructions to the Managing Agent in relation to issues which call for decision-making by the directors; or a provision that when issues of genuine legal uncertainty in relation to the operation of the complex arise, the directors will arrange for legal advice to be obtained at the AOMC's expense, to guide them and the Managing Agent in determining how to proceed;

(g) any agreement should also state under what circumstances either party has the right to terminate the agreement prior to the renewal date, for example, what breaches of the agreement are of sufficient gravity to warrant its termination, and also where appropriate what notice is required from either side for a termination without cause;

(h) we would suggest that at least once a year the Directors of the AOMC and the Managing Agent ought to step back from day-to-day issues (whether to paint the hallway in Block 1, what to do about people parking in other people's parking spaces) and to attempt to look forward perhaps five or ten years to work out what will then be the needs of the complex and what should be done in the interim to ensure that it will be possible to meet them.

17.5 In the ODCE's experience, there is often a surprising degree of uncertainty as to the terms on which a Managing Agent has been retained by an AOMC. In our view there might be merit if, through a consensus on the part of Managing Agents generally, a form of Standard Terms of Engagement were to emerge which would allow AOMCs a much simpler basis to understand the contractual relationship with their Managing Agent. While recognising fully that parties must be free to contract on whatever terms they think appropriate, we are conscious also of the benefits which have accrued in other areas where standard contacts are used frequently: such as the General Conditions of Sale published by the Law Society of Ireland or the Standard Conditions of Contract published by the Royal Institute of Architects in Ireland.

Checklist

1. **Who is our Managing Agent and how did they come to hold that position?**
2. **What are the terms of our contract with the Managing Agent? Is there a written agreement in which it is set forth?**

3. Are we allocating a sufficient budget to allow a good Managing Agent to provide good services to an apartment complex such as ours?

4. What are the channels of communication which exist between us and our Managing Agent? Do we give him/her all the direction and support which he/she is entitled to expect from us? Does he/she give us all the information, guidance and advice which we need?

5. Having regard to the budget we are allocating, is our Managing Agent providing a good service to us?

6. If not, ought we to be seeking to work with the Managing Agent to identify how the service could be improved?

7. Is there any good reason why we should possibly be seeking to place our business with a different Managing Agent?

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Chapter 18: The Relationship with the AOMC's Solicitors

18.1 There is no legal obligation on any company to have a legal adviser but, from the perspective of good corporate governance, we would suggest that there are considerable advantages for an AOMC in having one.

18.2 In the first case there is a complicated legal framework which underpins the role of the AOMC and the role which it is expected to perform. Because of the obvious importance of everyone adhering to that framework, it is clearly desirable that—as and when it is needed—the AOMC should be able to obtain professional legal advice in relation to any issues where it is uncertain as to what is the correct legal way of dealing with a situation.

18.3 Secondly there is one practical advantage associated with the AOMC having an ongoing relationship with a firm of solicitors. One of the key roles of the AOMC is to hold legal title to the land on which the apartment complex has been built: not simply the land which now forms part of the so-called "common areas" of the complex, but also the land which is subject to the long-leases on foot of which each of the apartment owners holds their apartment.

18.4 In most instances, this means that the AOMC ought to be in possession of the original Title Deeds to all of that land, and the so-called *counterparts* of the leases which the developer entered into with all of the apartment owners. These are important and valuable documents which need to be preserved safely. Solicitors are well used to document management tasks of this sort and will generally have available to them secure storage facilities appropriate for the retention and preservation of deeds.

18.5 We realise that there are, of course, added costs associated with the taking of legal advice and that—ultimately—any expenditure on legal advice will have to be borne by the members through the amount of their service charges. However in our view it is a false economy for the members of an AOMC to seek to avoid incurring this expenditure. Firstly, unless the AOMC has particularly unusual needs, they are likely to have to consult their solicitor only on a few occasions within the year and the charges involved will probably be comparatively small – when viewed in the context of the possibly tens of millions of euro of residential property whose value is at least partly dependent on the successful operation of the AOMC. Secondly we are conscious that the members of an AOMC who agree to go on its board of directors are voluntarily performing an important task which, not infrequently, very few of their fellow-members are willing to discharge. The law places significant obligations on those directors and in our view the least which those directors should expect from their fellow-members is a willingness to fund the provision for them of legal advice necessary to assist them in the discharge of the burdens which they have voluntarily assumed for the benefit of their neighbours as a whole.

Checklist

1. **Who is our solicitor?**
2. **Are our AOMC's title deeds being stored by him/her? If not, where are they?**

3. If we have not previously done so, would there be any benefit in sitting down with our solicitor for general advice as to how we operate our AOMC? For example, do our Articles of Association need to be modified in any way? Are we doing enough about collecting any outstanding unpaid service charges? Is there a need to review (or possibly put in place) our contract with our Managing Agent?

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Chapter 19: Changing the Articles of Association

19.1 We discussed earlier the extent to which an AOMC's Articles of Association are "its internal rulebook" and that the company enjoys considerable freedom to lay down rules—

- which are appropriate for its needs, and
- which assist in its proper operation and governance.

19.2 In all AOMCs, we think it wise for the members and directors to keep their Articles of Association under frequent review. The important point to note is that *they are not set in stone*. In fact they can be altered fairly easily, although we would caution that it is prudent for legal advice to be sought before doing so.

19.3 Once the AOMC has concluded that a change is desirable, the process of changing the articles is fairly straightforward. It is as follows:-

(a) an Extraordinary General Meeting of the members must be convened;

(b) not less than 21 days' notice of this meeting should be given, and the notice convening it should specify clearly that it is intended to propose that a special resolution be adopted changing the articles of association. The precise changes should be stated in the Notice: perhaps in an Appendix to it. It is good practice also for the Notice to be accompanied by a letter from the Directors outlining the purpose of the changes, and why they are thought appropriate and desirable;

(c) at the meeting a special resolution must be adopted authorising the company to change its articles.[36] In general this means that, on the resolution to amend the articles, at least three-quarters of the votes cast by such members as, being entitled to do so, vote[37] on the question, must be in favour of the proposal;

(d) within 15 days after the meeting the company—acting through its directors and secretary—must forward a printed copy of the resolution to the CRO. The relevant Companies Office form is Form G1. The form must be accompanied by an up-to-date copy of the company's articles embodying the alterations effected by the adoption of the resolution.

19.4 It must be said, however, that there are certain limits on the extent to which a company may alter its articles. The three main limitations are as follows:-

(a) it is not permissible for the company's articles to be in conflict with the company's Memorandum of Association, with the Companies Acts 1963 to 2005, or with the general law. So, for example, since the Companies Acts require that the accounts of a company limited by guarantee must be audited, it is not permissible for the members to adopt an article of association saying that the company need not submit its accounts for audit;

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[36] Section 15(1) of the Companies Act 1963.
[37] In person or, where proxies are allowed, by proxy.

(b) in the case of a company not having a share capital—which is the way in which AOMCs are commonly constituted—the articles may not be altered so as to increase the liability of any member to pay money to the company;[38]

(c) the power to alter the articles must be exercised by the members in good faith for the benefit of the company as a whole. Accordingly, for example, the object of the alteration must not be to secure some ulterior advantage for certain members.

What sort of Articles might be changed?

19.5 In the Appendix we have set forth the "standard" Articles of Association included at Table C in the First Schedule to the Companies Act 1963.

19.6 Section 13A(1) of the Companies Act 1963[39] provides that a company limited by guarantee not having a share capital (the form in which most AOMCs are constituted) *may* adopt all or any of the regulations contained in Table C. However Section 13A(2) goes on to provide that irrespective of what sort of Articles of Association such a company adopts,

> "in so far as the articles do not exclude or modify the regulations contained in Table C, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles."

19.7 In the ODCE's view it is desirable that the Articles of Association of an AOMC should be an entirely self-contained document. Accordingly in our view it would be preferable if—for the avoidance of doubt—AOMCs were to specifically *disapply* the provisions of Table C, to prevent the default position in Section 13A(2) applying. The company should then set forth such of the Table C regulations as it wishes to adopt, and supplement them with other regulations which are specifically appropriate to the AOMC's needs.

19.8 The following are amongst the regulations contained in Table C which, in the ODCE's view, ought to be re-considered in the typical AOMC:-

- **Regulation 2**. We think it better that the Articles should contain detailed provisions setting forth who are to be the members of the AOMC. In this regard it is probably advisable to deal with the concept of the Developer's Nominees who will usually be the only members at the outset. Provision should be included to specify when the membership of those persons will cease. Likewise it is probably advisable to insert clauses which show the extent to which membership of the AOMC arises from, and is inextricably linked with, ownership of an apartment in the complex.

- **Regulation 4.** In our view it might be advisable for an AOMC to go further than specifying merely all general meetings will be held in the State. For example it might be worthwhile adopting a wording which provided that the meetings should be held "at a location and time which can reasonably be expected to be

[38] Section 27(1) of the Companies Act 1963.
[39] As inserted by Section 14 of the Companies (Amendment) Act 1982.

convenient to the maximum number of the members of the company". Alternatively the company could even think it appropriate to go further and to specify, for example, that all general meetings were to be held "at a location to which the members can reasonably be expected to have easy access, and which is located no more than 10 kilometres from the apartment complex".

- **Regulation 5.** In the ODCE's view AOMCs should perhaps consider the option of adopting a regulation which is more prescriptive than the statutory minimum, but which would allow for simplicity and certainty in identifying when the AGM of the company was to take place. For example, assuming that the company's financial statements are prepared to the end of December in each year, it seems to us that an AOMC would always keep itself within the requirements of the Companies Acts if it were to say that its AGMs would *always* be held in either July, August or September of the following year.

- **Regulation 23.** While we are generally favourable towards all measures which assist an AOMC in the collection of the service charges which it requires in order to provide the management services to a complex, we nonetheless recognise that there will inevitably be situations in which a member will in arrears as regards the payment of their service charges. Sometimes these arrears will be the result of short-term financial difficulty and we think it invidious that the existence of such a state of affairs should be capable of having to be disclosed publicly through a statement made at a general meeting of the company that a member is ineligible to vote. Even where the non-payment results from less meritorious circumstances, we consider that the debt collection jurisdiction of the courts provides a better means for securing payment of service charges than the disenfranchisement of persons in an AOMC.

  In addition we are conscious of the hypothetical risk that a disenfranchisement provision of this sort *could* have the effect that if the directors were to fix the service charges at an exorbitant and unjustified level, the members' capacity to control that situation would be almost non-existent unless and until they first paid the charges.

- **Regulation 40:** This provides that "a director may vote in respect of any contract in which he is interested or any matter arising thereout." In the ODCE's view it is not necessarily good practice for a director of an AOMC to be capable of voting on—for example—the renewal of a Managing Agency contract to a firm in which the director has a substantial interest.

  However a degree of protection is given against abuse of this power by the statutory requirement that the director of such companies disclose his interest in any contract in which he is interested and that this interest be registered in a book which is open to inspection by the members and the officers of the company. [40] Given the nature of the service contracts entered in to by AOMCs, consideration might be given to strengthening the protections available to members. In

[40] Section 194 of the Companies Act, 1963 as amended and extended by the sections 27 and 47 of the Companies Act 1990.

particular, consideration might be given to the removal of Regulation 40 or to an amendment which would restrict a director's vote when considering contracts in which he is interested. Alternatively, or as a supplementary provision, the statutory protection provided could be strengthened by requiring the company to give actual written notice of the director's interest in the contract to all members of the company prior to the directors voting on such contract.

- **Regulations 41ff.** The rules relating to retirement by rotation are somewhat complicated. We wonder if it might be simpler for AOMCs to adopt a simpler regulation. We have in mind at least two possibilities—

    - *Firstly* the AOMC could prescribe its own regulation that at every AGM *all* of the directors would retire from office, but that each of them would be eligible for re-election.

    - *Secondly* the AOMC could prescribe that, once appointed, a director would continue to hold office until such time as he or she resigned from office, ceased to be a member of the company, or that their position was otherwise deemed to be vacated in accordance with Regulation 39.

- **Regulation 45.** We question whether an AOMC should have a regulation under which the absence of a recommendation from the outgoing directors should be any impediment to the election of any member as a director of the company.

- **Regulation 69.** AOMCs might like to consider the option of making it possible for their notices to be sent by email.

19.9 We suggest also that there are some additional matters—which have no counterparts in Table C—which an AOMC might usefully consider adopting in its Articles. For example:-

- There might be some merit in providing for some sort of a Discussion Forum which could be convened more easily, and with less formality, than a General Meeting of the Company. Obviously it would be necessary to specify that such a gathering was *not* a general meeting of the company and that no decision could be taken at such a Forum that is required by law to be taken at a general meeting of the company. Subject to those caveats, however, we think that there might be utility in having a less formal forum in which there could be dissemination of relevant information to members, discussion of issues which were of concern to the members, or discussion of issues in relation to which the directors wished to canvass the opinions of the members.

- AOMCs might like to include provision in their Articles ensuring that the Directors' Reports and Financial Statements sent to members included information additional to the minimum which is required under the Companies Acts, for example, the information set out in paragraph 14.19 above.

Checklist

1. **Would the governance and operation of our company be enhanced by any changes in any of its Articles of Association?**

2. **If so, what does our solicitor advise in relation to the changes which we think desirable?**

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Chapter 20: Other Legal Obligations

20.1 As indicated at the outset this booklet is written primarily from the perspective of the ODCE which is concerned with the encouragement of compliance with company law.

20.2 However while the ODCE does not have a statutory role in the enforcement of any other law, we nonetheless think it right that in a publication like this we should at least allude to the possibility that AOMCs can potentially have responsibilities under other legislative codes.

20.3 The following list is in no way intended to be exhaustive. It is included simply to alert AOMCs to the possibility that their potential responsibilities under these codes *may* make it prudent for them to consider them—and the extent to which there are others—in conjunction with their Managing Agents, their auditors and their solicitors:-

- the Taxes Consolidation Act 1997 – especially if the AOMC is operating at a profit or has benefited from any capital gains, e.g., on the granting of a right-of-way to an adjoining landowner;
- the Waste Management Acts – especially in so far as the disposal of refuse is concerned;
- the Litter Pollution Act 1997;
- the Occupiers' Liability Act 1995 – especially concerning the safety of access to the premises;
- the Fire Services Act 1981;
- the Local Government (Multi-Storey Buildings) Act 1988;
- the Planning and Development Act 2000;
- disability Law – concerning access;
- employment Law – in so far as the AOMC has any direct employees (e.g., caretakers);
- the Safety, Health and Welfare at Work Act 2005: especially in so far as the common-areas of the apartment complex represent a place of work for any persons;
- the Data Protection Acts – in regard to the records kept by or on behalf of the AOMC and any CCTV systems which are operated or maintained on the AOMC's behalf;
- the Residential Tenancies Act 2004. So far as the ODCE is aware, this is the only piece of legislation in which the Oireachtas has expressly created a statutory duty which must be discharged by AOMCs. Sections 187 and 188 of the Act provide as follows:-

Duty of management companies in relation to certain complaints.

187. (1) This section applies where a tenant of a dwelling which is one of a number of dwellings comprising an apartment complex makes a complaint of the kind referred to in *section 12(1)(h)* to the landlord of the dwelling and that complaint (the ''relevant complaint'') is forwarded to the management company of the complex (the ''relevant company'').

(2) Where this section applies the relevant company, in performing any of its functions in relation to the apartment complex concerned, shall have regard to the relevant complaint and shall furnish to the landlord mentioned in *subsection (1)* (for the purpose of its being forwarded to the tenant concerned) a statement in writing as to the steps, if any, it has taken to deal with the matter or matters to which the complaint relates.

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Provision of information in relation to service charges by management companies.

188. (1) A tenant of a dwelling which is one of a number of dwellings comprising an apartment complex may request the management company (if any) of the complex (''the company'') to furnish to him or her particulars in writing of the service charges made by the company in respect of the dwelling in a specified period and how those charges have been calculated.

(2) Subject to *subsection (3)*, it shall be the duty of the company to comply with such a request.

(3) If the owner of the dwelling were to make a request of the company to furnish to him or her the particulars mentioned in *subsection (1)* and the company would not be obliged to furnish all of those particulars to him or her then the duty of the company under *subsection (2)* shall be read as extending only to the particulars that the company would be obliged to furnish to the owner were such a request to be made.

(4) In this section ''service charges'' means charges made by the company in respect of the performance of functions by it in relation to the apartment complex concerned.

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Chapter 21: The Failure of the Company – Winding-Up and Strike-Off

21.1 Like any other company, it is possible for the legal existence of an AOMC to be brought to an end. In this regard, the Companies Act provides for two principal means by which such a termination can occur: winding-up and strike-off.

Winding-Up

21.2 We do not propose to deal here in any great detail with the issue of winding-up. Suffice it to say that there are two main types of winding-up: solvent and insolvent winding-up.

21.3 A solvent winding-up is a process which is initiated by the members of the company itself and is generally the result of a consensus on their part that there no longer remains any good reason why the company needs to remain in existence. It may be that the company's business is no longer profitable, or that the members are simply anxious to close the business because they wish to retire or move on to other business ventures. Alternatively the company may, perhaps, have been established for a particular purpose which has now been completed or fulfilled.

21.4 Under the current law, we do not see how circumstances could arise in which the need for an AOMC could cease, while ever there the apartment complex remained in existence. The AOMC is a critical feature of the legal structure underpinning the apartments and—without it—there would both practical and legal difficulties. For that reason we find it difficult to conceive of circumstances in which the members could conclude that it would be appropriate to seek to have the company wound-up voluntarily.

21.5 An insolvent winding-up usually occurs in one or other of the following circumstances:-

- where the company in general meeting resolves that it cannot by reason of its liabilities continue in business, and that it should be wound-up voluntarily;[41] *or*

- where a creditor successfully persuades the High Court that the company is unable to pay its debts and that it is appropriate for the Court to appoint a liquidator – even though this course of action may be opposed by the company.

21.6 While we can easily see how circumstances might arise in which the company <u>as it is currently financed</u> would be unable to pay its debts, it seems unlikely to us that the members of an AOMC could ever properly conclude that it is appropriate for that situation to be resolved by means of allowing it to be wound up. As we see it, the winding-up of an AOMC would critically undermine the value of all the apartments within the complex because the AOMC is a critical feature of the legal structure which underpins each of the apartments. While we are not experts in the area of property law, we have doubts as to whether the apartments could continue to be regarded as being held on a "good marketable title" in the event that the AOMC had been wound up. For this reason it seems to us that the only sensible approach for the members of an AOMC, when faced with a situation in which <u>as it is currently financed</u> the company is unable to pay its debts, is to take appropriate steps to re-finance the company: if necessary by means of

[41] Section 251(1)(c) of the Companies Act 1963.

all the owners making a once-off additional contribution to enable the existing debts to be discharged.

Strike-Off

21.7 Strike-off is another hazard which threatens the continuation of the legal existence of an AOMC. It is best avoided, because as indicated earlier in the absence of an AOMC, the individual properties comprising the apartment complex are unlikely to be saleable.

21.8 Strike-off occurs by administrative act of the Registrar of Companies when certain statutory circumstances prevail. Chief among them is the situation in which the company has failed in its statutory duty to make annual returns to the CRO under Section 125 of the Companies Act 1963.[42] However strike-off is also possible—

- where the CRO has reasonable cause to believe that a company is not carrying on business;[43]
- where the CRO has reasonable cause to believe that the company does not have at least one director who is a resident in the State;[44]
- where there are no persons recorded in the CRO as directors of the company;[45]
- where the Revenue Commissioners notify the CRO that the company has failed to deliver a statement which it is required to deliver under Section 882(3) of the Taxes Consolidation Act 1997.[46]

21.9 There are four important points which we wish to make about strike-off:-

- firstly it is something which is eminently avoidable: because it cannot occur where a company is up-to-date with filing its returns, is carrying on its business, has the appropriate number of directors (including at least one director resident in the State) and delivers the required statement to the Revenue Commissioners;
- strike-off is always preceded by correspondence from the CRO in which the company is informed that it is *at risk* of strike-off and invited to take the appropriate steps (e.g., by filing outstanding accounts, by delivering the appropriate Revenue Statement) to avert the threat;
- even where a company has been struck-off, the High Court has power during the following period of 20-years to restore the company to the register;

42 Section 125 of the 1963 Act was replaced by Section 59 of the Company Law Enforcement Act 2001. See also Section 12 of the Companies (Amendment) Act 1982.
43 Section 311 of the Companies Act 1963.
44 Section 43 of the Companies (No.2) (Amendment) Act 1999. Note that it is possible for this "resident director" obligation to be avoided if the company enters into an appropriate bond.
45 Section 48 of the Companies (No.2) (Amendment) Act 1999.
46 Section 12A of the Companies (Amendment) Act 1982.

- furthermore, where the strike-off occurs by reason of the non-filing of annual returns, the CRO has power to restore a company within twelve months – thereby obviating the need for an application to the High Court if prompt action is taken to seek to undo the consequences of strike-off.

21.10 Accordingly strike-off is something which can be avoided and, even when it happens, the consequences of it can be reversed. However applications to the High Court tend to be expensive, and accordingly it is much more sensible for an AOMC to comply with its legal obligations and ensure that the company does not become eligible for strike-off.

21.11 We think it only proper to allude also to the extent to which the officers of a company (i.e., its directors and secretary) may face *personal* consequences in the event that the company is struck off:-

- firstly Section 160(2)(h) of the Companies Act 1990[47] provides that one of the grounds on which the ODCE may seek to have a person *disqualified* from acting as a company director, or being concerned in the management of any company, is where he/she was a director of a company at the time when the CRO initiates a strike-off process owing to a company's failure to file annual returns, and where—owing to the company's failure to avert that threat of strike-off by filing the outstanding returns—the company allows itself to be subsequently struck –off;

- secondly we think it at least conceivable that the directors and secretary who allowed the company to be become struck-off *could* be required to reimburse a company for costs, expenses and damages which arose as a result of the strike-off. Section 383(3) of the Companies Act 1963 provides that it is the duty of each director and secretary of a company to ensure that the requirements of the Companies Acts are complied with by the company. This includes the requirements that annual returns be filed with the Companies Office. While we are unaware of any decided case dealing with this precise issue, we do not think it impossible to conceive of a situation in which the aggrieved members of an AOMC—who found themselves having to fund the cost of a High Court application to seek to have the company restored—might not also be minded to claim that those costs ought properly to be borne by the directors "on whose watch" the strike-off was allowed to happen.

Checklist

1. **Have we delivered the required statement under Section 882(3) of the Taxes Consolidation Act 1997 to the Revenue Commissioners?**

2. **Are we up-to-date with the filing of our annual returns?**

3. **What steps do we take to minimise any default in the filing of our annual returns?**

4. **Do we always have at least one director who is resident in the State?**

[47] As amended by Sections 14 and 42 of the Company Law Enforcement Act 2001.

5. **Do we notify the CRO in a timely manner of changes in the composition of our board of directors so that a situation will never occur in which the CRO may be under the impression that we have no directors?**

6. **If something does go wrong we will be written to by the CRO telling us that we are at risk of being struck off unless we remedy the situation. That letter will be sent to our registered office. Is the address of our registered office properly recorded with the CRO and are we satisfied that "warning bells" will ring when such a letter is received there?**

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Chapter 22 – The Role of the ODCE

22.1 We began this booklet with a reference to the ODCE's role in relation to the encouragement of compliance with company law.

22.2 Throughout the text we have sought to highlight many of the key company law obligations and privileges of AOMCs, their directors and members.

22.3 However we have also sought, where appropriate, to emphasise the extent to which many issues concerning AOMCs—including many which are most often of day-to-day concern to apartment owners—have their roots in legal obligations or privileges which flow not from company law, but from other legal sources: especially the *property law* relationships created under the leases which form the primary title documents of apartment owners.

22.4 In addition to its previously-mentioned compliance role, the ODCE also has a statutory role concerning the enforcement of the Companies Acts (including by the prosecution of offences) and the undertaking of investigations into suspected offences. Furthermore the ODCE has certain additional powers of investigation in cases where there are circumstances suggesting that the affairs of a company are being or have been conducted with intent to defraud, or for any other fraudulent purpose, or in a manner which is unfairly prejudicial to some or all of its members or creditors, or where any acts of the company are or were unlawful. In appropriate cases the ODCE can also seek to have persons disqualified from acting as company directors and has other significant powers in relation to insolvent companies.

22.5 Cases certainly arise in which it can be appropriate for the ODCE to carry out an investigation into, or to take proceedings in relation to, issues connected with an AOMC. **However this does not mean that it is appropriate for all or any concerns in relation to AOMCs to be referred to the ODCE.** We are not a regulator of AOMCs as such. Instead the cases in which it is most usually appropriate for us to become involved are those where there are circumstances suggesting:-

- a breach of the Companies Acts;
- a breach of a common-law or fiduciary duty on the part of an officer of the company.

22.6 For these reasons we discourage people from referring issues to us which do not have a connection with the breach of an identifiable company law obligation. Obvious examples include the following:-

- issues in relation to the level of service charges;
- issues concerning the quality of services which are being provided by a Managing Agent;
- issues relating to delays in the transfer of common-areas from a developer to an AOMC.

22.7 There are, however, functions which the ODCE can perform and which may be particularly helpful in so far as AOMCs are concerned. Foremost amongst these is our power, under Section 131(3) of the Companies Act 1963, to direct the calling of an AGM where there has

been default on the part of the company in doing so. This is dealt with further at paragraph 7.3 above.

22.8 In cases where people consider that there has been a breach of an obligation under the Companies Acts, or that a situation warrants investigation under the Companies Acts, we invite them to make their concerns known to us. Our Complaint Form is available on our website at http://www.odce.ie/contact/default.asp.

22.9 However we think it important to add that we generally expect that complainants should have taken all reasonable steps to resolve a situation before they seek to involve the ODCE. In particular we expect that people should first have corresponded with their AOMC, setting out their concerns in full and asking for a reasoned response from the AOMC. A reasonable time ought to be allowed for the AOMC to reply.

22.10 We should also say that, in some cases at least, our approach to dealing with AOMCs is influenced by our having regard to AOMC's rather unusual and special character. The directors of an AOMC are usually apartment-owners who take on the rather thankless task of becoming unremunerated directors – often in a situation where very few of their fellow apartment-owners are willing to do so. We recognise that most are motivated by a genuine willingness to volunteer their services for the benefit of their complex, and their neighbours or fellow investors. While we certainly do not subscribe to the view that such a "volunteer status" gives the directors any immunity as regards their obligations under the Companies Acts, we recognise also that in some cases at least there may not be a compelling public interest in seeking to subject them to the full rigours of the law, in terms of prosecutions, High Court proceedings etc. Accordingly—where appropriate—we endeavour to ensure that matters are resolved on an administrative basis, without resort to legal procedures.

22.11 In addition it sometimes appears ironic to us that at least some apartment owners seem to prefer to complain about their AOMC and its directors, than to become actively involved in it. In our view the best solution to some of the concerns which members express about their AOMCs would be if those members, and others who feel like them, would put themselves forward for membership of the company's board of directors. What most AOMC boards need most of all is that as many as possible of their members should be willing to get involved, and play their part in joining with their fellow owners in working together to assess the overall needs of their complex, and resolving whatever problems it faces.

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APPENDIX

Default "Table C" Articles from the First Schedule to the Companies Act 1963

Interpretation.

1. In these articles:—

"the Act" means the Companies Act 1963 (No. 33 of 1963);

"the directors" means the directors for the time being of the company or the directors present at a meeting of the board of directors and includes any person occupying the position of director by whatever name called;

"secretary" means any person appointed to perform the duties of the secretary of the company;

"the seal" means the common seal of the company;

"the office" means the registered office for the time being of the company.

Expressions referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography and any other modes of representing or reproducing words in a visible form.

Unless the contrary intention appears, words or expressions contained in these articles shall bear the same meaning as in the Act or any statutory modification thereof in force at the date at which these articles become binding on the company.

Members.

2. The number of members with which the company proposes to be registered is 500, but the directors may from time to time register an increase of members.

3. The subscribers to the memorandum of association and such other persons as the directors shall admit to membership shall be members of the company.

General Meetings.

4. All general meetings of the company shall be held in the State.

5. (1) Subject to paragraph (2), the company shall in each year hold a general meeting as its annual general meeting in addition to any other meetings in that year and shall specify the meeting as such in the notices calling it; and not more than 15 months shall elapse between the date of one annual general meeting of the company and that of the next.

(2) So long as the company holds its first annual general meeting within 18 months of its incorporation, it need not hold it in the year of its incorporation or in the following year. Subject to article 4, the annual general meeting shall be held at such time and at such place in the State as the directors shall appoint.

6. All general meetings other than annual general meetings shall be called extraordinary general meetings.

7. The directors may, whenever they think fit, convene an extraordinary general meeting and extraordinary general meetings shall also be convened on such requisition, or, in default, may be convened by such requisitionists, as provided by section 132 of the Act. If at any time there are not within the State sufficient directors capable of acting to form a quorum, any director or any two members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.

Notice of General Meetings.

8. Subject to sections 133 and 141 of the Act, an annual general meeting and a meeting called for the passing of a special resolution shall be called by 21 days' notice in writing at the least, and a meeting of the company (other than an annual general meeting or a meeting for the passing of a special resolution) shall be called by 14 days' notice in writing at the least. The notice shall be exclusive of the day on which it is served or deemed to be served and of the day for which it is given and shall specify the place, the day and the hour of meeting and, in the case of special business, the general nature of that business and shall be given, in manner hereinafter mentioned, to such persons as are, under the articles of the company, entitled to receive such notices from the company.

9. The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings at that meeting.

Proceedings at General Meetings.

10. All business shall be deemed special that is transacted at an extraordinary general meeting, and also all that is transacted at an annual general meeting with the exception of declaring a dividend, the consideration of the accounts, balance sheets and the reports of the directors and auditors, the election of directors in the place of those retiring, the re-appointment of the retiring auditors, and the fixing of the remuneration of the auditors.

11. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members present in person shall be a quorum.

12. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week at the same time and place, or to such other day and at such other time and place as the directors may determine, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

13. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company, or if there is no such chairman, or if he is not present within 15 minutes after the time appointed for the holding of the meeting or is unwilling to act, the directors present shall elect one of their number to be chairman of the meeting.

14. If at any meeting no director is willing to act as chairman or if no director is present within 15 minutes after the time appointed for holding the meeting, the members present shall choose one of their number to be chairman of the meeting.

15. The chairman may with the consent of any meeting at which a quorum is present (and shall, if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for 30 days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

16. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless a poll is (before or on the declaration of the result of the show of hands) demanded—

(a) by the chairman; or
(b) by at least three members present in person or by proxy; or
(c) by any member or members present in person or by proxy and representing not less than one-tenth of the total voting rights of all the members having the right to vote at the meeting.

Unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried or carried unanimously or by a particular majority or lost, and an entry to that effect in the book containing the minutes of proceedings of the company shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution.

The demand for a poll may be withdrawn.

17. Except as provided in article 19, if a poll is duly demanded it shall be taken in such manner as the chairman directs and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

18. Where there is an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote.

19. A poll demanded on the election of a chairman, or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs, and any business other than that upon which a poll has been demanded may be proceeded with pending the taking of the poll.

20. Subject to section 141 of the Act, a resolution in writing signed by all the members for the time being entitled to attend and vote on such resolution at a general meeting (or being bodies corporate by their duly authorised representatives) shall be as valid and effective for all purposes as if the resolution had been passed at a general meeting of the company duly convened and held, and if described as a special resolution shall be deemed to be a special resolution within the meaning of the Act.

Votes of Members.

21. Every member shall have one vote.

22. A member of unsound mind, or in respect of whom an order has been made by any court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee, receiver, guardian, or other person appointed by that court, and any such committee, receiver, guardian, or other person may vote by proxy on a show of hands or on a poll.

23. No member shall be entitled to vote at any general meeting unless all moneys immediately payable by him to the company have been paid.

24. No objection shall be raised to the qualification of any voter except at the meeting or adjourned meeting at which the vote objected to is given or tendered, and every vote not disallowed at such meeting shall be valid for all purposes. Any such objection made in due time shall be referred to the chairman of the meeting whose decision shall be final and conclusive.

25. Votes may be given either personally or by proxy.

26. The instrument appointing a proxy shall be in writing under the hand of the appointed or of his attorney duly authorised in writing, or, if the appointed is a body corporate, either under seal or under the hand of an officer or attorney duly authorised. A proxy need not be a member of the company.

27. The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of that power or authority shall be deposited at the office or at such other place within the State as is specified for that purpose in the notice convening the meeting not less than 48 hours before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote, or, in the case of a poll, not less than 48 hours before the time appointed for the taking of the poll, and in default the instrument of proxy shall not be treated as valid.

28. An instrument appointing a proxy shall be in the following form or a form as near thereto as circumstances permit—

"_____ Limited.

I/We,
.....
of
.....
in the County of ....., being a member/members of the above-named company, hereby appoint .....of
.....
.
or failing him,
.....
of
.....
.
as my/our proxy to vote of me/us on my/our behalf at the (annual or extra-ordinary, as the case may be) general meeting of the company to be held on ..... day of ....., 19..... and at any adjournment thereof.

Signed this ..... day of ....., 19.....

This form is to be used in favour of/against the resolution. Unless otherwise instructed, the proxy will vote as he thinks fit. "

29. The instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll.

30. A vote given in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death or insanity of the principal or revocation of the proxy or of the authority under which the proxy was executed, if no intimation in writing of such death, insanity or revocation as aforesaid is received by the company at the office before the commencement of the meeting or adjourned meeting at which the proxy is used.

Bodies Corporate acting by Representatives at Meetings.

31. Any body corporate which is a member of the company may by resolution of its directors or other governing body authorise such person as it thinks fit to act as its representative at any meeting of the company, and the person so authorised shall be entitled to exercise the same powers on behalf of the body corporate which he represents as that body corporate could exercise if it were an individual member of the company.

Directors.

32. The number of the directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum of association or a majority of them.

33. The remuneration of the directors shall from time to time be determined by the company in general meeting. Such remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.

Borrowing Powers.

34. The directors may exercise all the powers of the company to borrow money and to mortgage or charge its undertaking and property or any part thereof, and to issue debentures, debenture stock and other securities, whether outright or as security for any debt, liability or obligation of the company or of any third party.

Powers and Duties of Directors.

35. The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not by the Act or by these articles required to be exercised by the company in general meeting, subject nevertheless to the provisions of the Act and of these articles and to such directions, being not inconsistent with the aforesaid provisions, as may be given by the company in general meeting: but no direction given by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that direction had not been given.

36. The directors may from time to time and at any time by power of attorney appoint any company, firm or person or body of persons, whether nominated directly or indirectly by the directors, to be the attorney or attorneys of the company for such purposes and with such powers, authorities and discretions (not exceeding those vested in or exercisable by the directors under these articles) and for such period and subject to such conditions as they may think fit, and any such powers of attorney may contain such provisions for the protection and convenience of persons dealing with any such attorney as the directors may think fit, and may also authorise any such attorney to delegate all or any of the powers, authorities and discretions vested in him.

37. All cheques, promissory notes, drafts, bills of exchange and other negotiable instruments, and all receipts for moneys paid to the company, shall be signed, drawn, accepted, endorsed or otherwise executed, as the case may be, by such person or persons and in such manner as the directors shall from time to time by resolution determine.

38. The directors shall cause minutes to be made in books provided for the purpose—

(a) of all appointments of officers made by the directors;.

(b) of the names of the directors present at each meeting of the directors and of any committee of the directors;

(c) of all resolutions and proceedings at all meetings of the company, and of the directors and of committees of directors.

Disqualification of Directors.

39. The office of director shall be vacated if the director—

(a) without the consent of the company in general meeting holds any other office or place of profit under the company; or

(b) is adjudged bankrupt in the State or in Northern Ireland or Great Britain or makes any arrangement or composition with his creditors generally; or

(c) becomes prohibited from being a director by reason of any order made under section 184 of the Act; or

(d) becomes of unsound mind; or

(e) resigns his office by notice in writing to the company; or

(f) is convicted of an indictable offence unless the directors otherwise determine; or

(g) is directly or indirectly interested in any contract with the company and fails to declare the nature of his interest in manner required by section 194 of the Act.

Voting on Contracts.

40. A director may vote in respect of any contract in which he is interested or any matter arising thereout.

Rotation of Directors.

41. At the first annual general meeting of the company, all the directors shall retire from office and at the annual general meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest one-third, shall retire from office.

42. The directors to retire in every year shall be those who have been longest in office since the last election, but as between persons who became directors on the same day, those to retire shall (unless they otherwise agree amongst themselves) be determined by lot.

43. A retiring director shall be eligible for re-election.

44. The company, at the meeting at which a director retires in manner aforesaid, may fill the vacated office by electing a person thereto, and in default the retiring director shall, if offering himself for re-election, be deemed to have been re-elected, unless at such meeting it is expressly resolved not to fill such vacated office or unless a resolution for the re-election of such director has been put to the meeting and lost.

45. No person other than a director retiring at the meeting shall, unless recommended by the directors, be eligible for election to the office of director at any general meeting unless, not less than 3 nor more than 21 days before the date appointed for the meeting, there has been left at the office notice in writing, signed by a member duly qualified to attend and vote at the meeting for which such notice is given, of his intention to propose such a person for election, and also notice in writing signed by that person of his willingness to be elected.

46. The company may from time to time by ordinary resolution increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

47. The directors shall have power at any time, and from time to time, to appoint any person to be a director, either to fill a casual vacancy or as an addition to the existing directors, but so that the total number of directors shall not at any time exceed the number fixed in accordance with these articles. Any director so appointed shall hold office only until the next annual general meeting, and shall then be eligible for re-election, but shall not be taken into account in determining the directors who are to retire by rotation at such meeting.

48. The company may by ordinary resolution of which extended notice has been given in accordance with section 142 of the Act remove any director before the expiration of his period of office, notwithstanding anything in these articles or in any agreement between the company and such director. Such removal shall be without prejudice to any claim such director may have for damages for breach of any contract of service between him and the company.

49. The company may by ordinary resolution appoint another person in place of a director removed from office under article 48. Without prejudice to the powers of the directors under article 47, the company in general meeting may appoint any person to be a director, either to fill a casual vacancy or as an additional director. A person appointed in place of a director so removed or to fill such a vacancy shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

Proceedings of Directors.

50. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. Questions arising at any meeting shall be decided by a majority of votes. Where there is an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors. If the directors so resolve it shall not be necessary to give notice of a meeting of directors to any director who being resident in the State is for the time being absent from the State.

51. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall be two.

52. The continuing directors may act notwithstanding any vacancy in their number but, if and so long as their number is reduced below the number fixed by or pursuant to the articles of the company as the necessary quorum of directors, the continuing directors or director may act for the purpose of increasing the number of directors to that number or of summoning a general meeting of the company, but for no other purpose.

53. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but, if no such chairman is elected, or if at any meeting the chairman is not present within 5 minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

54. The directors may delegate any of their powers to committees consisting of such member or members of the board as they think fit; any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on it by the directors.

55. A committee may elect a chairman of its meetings; if no such chairman is elected, or if at any meeting the chairman is not present within 5 minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

56. A committee may meet and adjourn as it thinks proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and when there is an equality of votes, the chairman shall have a second or casting vote.

57. All acts done by any meeting of the directors or of a committee of directors or by any person acting as a director shall, notwithstanding that it is afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

58. A resolution in writing, signed by all the directors for the time being entitled to receive notice of a meeting of the directors, shall be as valid as if it had been passed at a meeting of the directors duly convened and held.

Secretary.

59. Subject to section 3 of the Companies (Amendment) Act 1982, The secretary shall be appointed by the directors for such term and at such remuneration and upon such conditions as they may think fit; and any secretary so appointed may be removed by them.

60. A provision of the Act or these articles requiring or authorising a thing to be done by or to a director and the secretary shall not be satisfied by its being done by or to the same person acting both as director and as, or in place of, the secretary.

The Seal.

61. The seal shall be used only by the authority of the directors or of a committee of directors authorised by the directors in that behalf, and every instrument to which the seal shall be affixed shall be signed by a director and shall be countersigned by the secretary or by a second director or by some other person appointed by the directors for the purpose.

Accounts.

62. The directors shall cause proper books of account to be kept relating to --

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

(b) all sales and purchases of goods by the company; and

(c) the assets and liabilities of the company.

Proper books shall not be deemed to be kept if there are not kept such books of account as are necessary to give a true and fair view of the state of the company's affairs and to explain its transactions.

63. The books of account shall be kept at the office or, subject to section 147 of the Act, at such other place as the directors think fit, and shall at all reasonable times be open to the inspection of the directors.

64. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by statute or authorised by the directors or by the company in general meeting.

65. The directors shall from time to time in accordance with sections 148, 150, 157 and 158 of the Act cause to be prepared and to be laid before the annual general meeting of the company such profit and loss accounts, balance sheets, group accounts and reports as are required by those sections to be prepared and laid before the annual general meeting of the company.

66. A copy of every balance sheet (including every document required by law to be annexed thereto) which is to be laid before the annual general meeting of the company together with a copy of the directors' report and auditors' report shall, not less than 21 days before the date of the annual general meeting, be sent to every person entitled under the provisions of the Act to receive them.

Audit.

67. Auditors shall be appointed and their duties regulated in accordance with sections 160 to 163 of the Act.

Notices.

68. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice, and to have been effected in the case of a notice of a meeting at the expiration of 24 hours after the letter containing the same is posted and in any other case at the time at which the letter would be delivered in the ordinary course of post.

69. Notice of every general meeting shall be given in any manner hereinbefore authorised to—

(a) every member;

(b) every person being a personal representative or the Official Assignee in bankruptcy of a member where the member but for his death or bankruptcy would be entitled to receive notice of the meeting; and

(c) the auditor for the time being of the company.

No other person shall be entitled to receive notices of general meetings.

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