Multi-Unit Developments Act 2011

Practice Note

The *Multi-Unit Developments Act 2011* ('the **Act**') has many far reaching effects with regard to such developments ('**MUDs**'), primarily apartment schemes and the apartment content in mixed-use developments, but also including conventional housing where a scheme of service charge is being operated in relation to estate common areas. The position of the owners of apartments and houses ('**units**') in existing developments which are now subject to the Act has been strengthened by the new legislation. It is not possible to produce specimen documentation which addresses all of the issues which may arise in any particular instance and practitioners will need to familiarise themselves with the provisions of the Act before they draft the documentation relating to any particular development. The precedent documentation referred to below has been issued by the Conveyancing Committee of the Law Society of Ireland and can be downloaded by logging in to the members' area of the Society's website and following the links to either the general precedents section or to the conveyancing precedents section of the Conveyancing Committee's page. The documentation is only a template which is designed for a development consisting of a single-block of residential apartments. Information to be inserted in the precedents is prompted by flags and footnotes which should be deleted in use. Any amendments made to the wording of the precedent documents should be specifically indicated to those to whom they are issued.

1. Owners' Management Company (OMC) Constitution

The precedent Constitution of the owners' management company (the '**OMC**') are those of a company limited by guarantee and not having a share capital, the predominant form of company employed for apartment management companies. Defined terms in the Articles of Association are incorporated by reference in the Memorandum of Association. The defined term, 'MUDs Act', incorporates some of the definitions in the Act.

It should be noted that this Constitution is for a new OMC pursuant to *s. 3(1)(a)* of the MUDs Act: The Act, e.g. *sections 15* and *16*, applies automatically to existing OMCs, so there is no requirement to establish a new OMC for these developments, nor is there any requirement under the Act for the amendment of their pre-Act Memorandum and Articles of Association.

Article 77 of the Articles of Association provides for the accounts to be audited. This may not be warranted for small MUDs. Although many OMC's qualify for audit exemption, any member may, pursuant to the *Companies Act 2014, s. 1218(1)*, serve a notice in writing on the OMC stating that that member does not wish the audit exemption to be available to the company. If the exemption is to be availed of, it should be provided for in the form of apartment lease, many of which currently require the accounts to be audited.

2. Owners' Management Company (OMC) Agreement pursuant to *section 3(d)*

In respect of all new residential multi-unit developments, and also existing schemes where no residential unit was sold prior to 1 April 2011, the Act requires that before the sale of any such residential unit is completed, the developer enter into a agreement with the OMC, commonly called an OMC Agreement. The precedent OMC Agreement is based on the form of building agreement for houses on building estates which has been in use for upwards of 30 years, and which most practitioners will be familiar with. However, this is an agreement with the OMC rather than any individual apartment owner. It 'front loads' all material conveyancing documentation required for the proposed scheme, including:

- the form of the assurance to be used in the sale of the residential units

- the form of the assurance to the OMC
- the form of architect's opinion on compliance with planning and building control
- the form of declaration vesting any beneficial interest which survived the transfer to the OMC
- the layout plans, drawings and specifications in respect of the Works to include the completion of the Common Areas
- the service charge budget
- the house rules (if any)

It also provides a mechanism to establish when the 'Development Stage' as defined in the Act is deemed to have ended.

3. Transfer of the Common Areas pursuant to *section 3(1)(b)*, and sections *4* & *5*

All of the four specimen transfers are on the basis of a straight forward solely residential apartment development, with the '**Estate**' consisting of a single block of residential apartments (including all internal common areas) and any external common areas with no unusual or special features, and on the assumption that it is held in fee simple, registered in the Land Registry, and the apartments will be disposed of by way of long leases.

Where a development will be transferred to the OMC in phases or where there are shared facilities (such as car parking or circulation areas) or easements being reserved, then the relevant transfer will need to reflect this. Practitioners will need to consider the terms of any existing security held over the development. Practitioners should also consider entering a Caution in the Land Registry in favour of the Developer in the case of *Section 4* transfers where the beneficial interest is retained by the Developer.

The Revenue Commissioners have confirmed to the Committee that no stamp duty is payable on deeds of transfer under these three sections of the Act. The Taxation Committee advised that the Revenue had confirmed at an Indirect Taxes TALC meeting that, if common areas alone in a development are sold to a management company for a nominal sum (as the cost of the common areas are reflected in the cost of the apartment unit), a Capital Goods Scheme adjustment is not required. On this basis, VAT would not generally be chargeable on the sale of such common areas. Obviously, if the transaction is not a fully straightforward one, VAT advice will be required.

(a) Section 3(1)(b)Transfer:To be used where <u>no residential unit</u> was transferred prior to 01 April 2011.

The approach taken is that the entire Estate (including the common areas and any residential unit referred to by the Act) is transferred to the OMC. The beneficial interest therein is reserved to the transferor. This transfer has been revised by the addition of an assent to registration of the covenants by the OMC as burdens on the Estate.

(b) Section 4 Transfer: To be used where the ownership of <u>any residential unit</u> (but less than 80% of such units) was transferred prior to 01 April 2011.

Here again, the entire Estate is transferred in accordance with the Section. The transfer is of the legal estate but retaining the beneficial interest except in relation to apartments which were sold.

(c) Section 5 Transfer: To be used where <u>not less than 80% of the residential units</u> were sold prior to 01 April 2011.

Two transfers are provided in relation to this section which (unlike *Sections 3* and *4*) does not permit the retention of a beneficial interest in the Estate:

(i) Transfer where all of the residential units were sold

Both the legal and the beneficial interest in the Estate are transferred.

(ii) Transfer where not all of the residential units (but 80% or more of such units) were sold

Both the legal and the beneficial interest in the Estate are transferred but excluding the legal and beneficial interests in the unsold apartments. If developers intend to keep some apartments it would be preferable if they had the unsold units transferred to them or their nominee before transferring the common areas to the OMC.

4. Consequences for MUDs in which units were sold prior to 01 April 2011

(a) Consequential changes in leases of apartments (or transfers of houses in an Estate intended to have the common areas managed, maintained and repaired by an OMC)

Any further leases of apartments/transfers of houses will require consequential changes. Practitioners should bear in mind that only the essential changes to bring these documents into line with the new factual situation should be made and the new form of lease/transfer should grant rights and impose obligations on the parties which are similar in all material respects to those which have already been granted and imposed on the sale of apartments/houses prior to the transfer of the common areas.

If the developer is retaining ownership of unsold units and transfers the common areas using the *section 5* transfer described at 3(c)(ii) above whereby the legal and beneficial ownership of the unsold units is reserved, then the consequential changes mentioned above will have to reflect that the developer would still be the lessor/transferor with the OMC just joining in as in the earlier sales before the transfer of the common areas, because the developer had retained the legal interest in the apartment/house).

(i) Apartments
The OMC will now be the lessor, and demise the legal interest and the developer will join in the deed to demise and confirm the beneficial interest in each unsold apartment. Consequential changes will have to be made to the recitals which will need to include the fact that the common areas have been transferred, references to the management company agreement should be modified and the party to give the covenants needs to be considered to reflect whatever is appropriate in the circumstances. As a checklist for consequential changes in leases in a *section 4* case:

1.. The OMC will become the Lessor.

2. The Developer will join as beneficial owner in the demise

3. The following should be recited:

(a) The agreement for the transfer of the common areas between the Developer and the OMC;

(b) The *Section 4* Transfer – to show the OMC's title to grant the Lease and that the beneficial interest was retained by the Developer;

(c) The fact that the Developer had previously granted leases in a similar form and that the OMC intends to grant leases in a similar form should be recited.

(d) The agreement between the OMC and the Developer that the leases will contain covenants so as to enable the management of the Estate to operate satisfactorily; and

(e) The Agreement by the Developer to sell the Unit to the Purchaser;

4. The Operative Part should express that in consideration of the payment of the premium to the Developer the OMC will demise and the Developer as beneficial owner will demise and confirm the unit to the Purchaser

5. The OMC will covenant with the Purchaser to provide the services and the Purchaser will covenant with the OMC to comply with the covenants on the Lessees part.

After the sale of the last apartment the developer will need to do a further deed to the OMC transferring the reversion of the apartments which were unsold at the time the common areas was transferred to the OMC.

(ii) Houses
Since the *Landlord and Tenant (Ground Rents) Act 1978* which prohibited the sale of new dwellinghouses by way of leases the practice of solicitors is to use a relatively simple deed of conveyance or transfer of the actual house site to the Purchaser and to grant the necessary easements for access and drainage by what is generally described as a lease of easements (but actually is just a deed of grant of easements). By virtue of this grant of easements the purchaser of a new house is granted all necessary easements for access drainage etc and in cases where an OMC is involved the grant provides that it is in exchange for entering into certain covenants which include a covenant to pay a service charge to cover the cost of maintaining the common areas. Generally the common areas will comprise the roads, footpaths, grass verges, sewers, surface water drains, and open spaces.

If the part of the site including these areas is transferred to the OMC, then the grantor of all further deeds of grants of easements (or leases of easements) to the purchasers of unsold houses will be the OMC with the developer joining in to demise and confirm the rights insofar as the developer's beneficial interest is concerned. Again, the recitals will require to be changed and the covenants re-considered.

The attention of practitioners is drawn to the Conveyancing Committee's practice note published in the June 2014 Gazette in relation to conventional housing where no OMC will be involved.

(b) The obligation on the Developer to transfer the Common Areas to the OMC

Sections 4 and *5* of the Act require the developer to transfer the ownership of the relevant parts of the common areas to the OMC, within six months from 01 April 2011 (save where the common areas have already been transferred).

Neither of these sections nor any other section of the Act provides for any sanction for non-compliance with these sections. The fact that the deadline of 30 September 2011 may have passed without the transfers having taken place does not remove the obligation to transfer, which must remain a continuing obligation.

The benefit of the obligation rests with the OMC. An OMC would appear to have two means of ensuring the transfer of the common areas: (1) by seeking an order for the performance of the provisions in the agreement that would normally have been entered into between the developer and the OMC at an early stage in the development, whereby the developer would have contracted to transfer the common areas to the OMC on completion of the development or when all the units had been sold; and (2) by applying to the Circuit Court pursuant to *s. 24* of the Act for an Order compelling the transfer.

The first of these courses will not be available where the development has not been completed or where some of the units remain unsold and, in the current financial climate, there must still be many developments where some of the units have not been sold.

Under *section 24* of the Act, an OMC may apply to the Circuit Court for an order to enforce the obligation on the developer to transfer the common areas to it. Unfortunately, it is possible that the OMC may still be under the control of the developer, either because it holds a majority of the membership or it controls the board of directors. In residential-only developments, *section 15* of the Act, which imposes a 'one unit, one vote' rule for OMCs, empowers members of OMCs to take voting control of developments where more than 50% of the units have been sold. Where the unit owners do not have control of the OMC, an individual unit owner can make the necessary application. Even if such a unit owner has never been given membership of the OMC, the court may, under *section 25(1)(f)*, permit them to bring the application. Such proceedings are likely to be expensive and represent a heavy burden on the unit owner if they have to be brought by an individual. In an ideal world, other unit owners might be expected to join in such applications, but experience suggests that this is not always achievable. The court has, of course, power to award costs against the developer, but the unit owner may well be asked to provide initial funding for the action.

If, as is commonly the case, the OMC has been struck off the Register of Companies, usually for failing to make returns, *section 30* of the Act makes special provision for applications to the Registrar of Companies for restoration of such companies to the register. An alternative, which also covers the position where the developer has also been struck off, is for the unit owners to form a new OMC and apply to the High Court under *section 26* of the *Trustee Act 1893* to have the common areas vested in the new OMC. This procedure was approved by the High Court (Laffoy J) in the case of *In the Matter of Heidelstone Company Ltd*, [2006] IEHC 408, in which it was decided that, where all the units had been sold, the developer held the common areas in trust for the owners of the apartments and the townhouses in the development.

There may well be a case for coupling, with the application for the transfer of the common areas, a claim for damages for breach of the statutory duty imposed by *sections 4* and *5*, which may have the effect of persuading the developer to devote attention to the underlying need to effect the transfer.

It has been suggested that the effect of the legislation is to render residential units in multi-unit development unsaleable where the common areas have not been transferred. The basis for this view is not obvious. This would be true in the case of units coming within *section 3* – that is, those where no residential units were sold prior to 01 April 2011, and where there is a statutory restriction on selling such units before the transfer of the common areas to the OMC has taken place. Prior to the introduction of the Act, the titles to both new and second-hand residential units in multi-unit developments were regarded as good and marketable, on the basis that there was an enforceable contract to transfer the common areas to the OMC at the appropriate stage of the development, and sales were completed on this basis.

The Act does nothing to detract from or weaken the position of a unit owner in a development governed by *sections 4* and *5*. Indeed, as mentioned above, the sections provide the OMC and individual unit owners with additional statutory rights to ensure that the common areas are transferred to OMCs and, indeed, that the transfers should be effected earlier than would have been the position under the agreements to transfer the common areas. Although the title to the sold units will not be weakened by a failure to transfer the common areas, this is not an argument for non-compliance with the statutory obligation to transfer the common areas: this transfer should be implemented as soon as practicable.

(c) Release of a solicitor's undertaking to a lender where the common areas have not yet transferred to the OMC

In relation to MUDs where units were transferred to purchasers prior to 01 April 2011, the Committee has received several queries about whether a solicitor is entitled to be released from an undertaking to a lending institution where title was certified, but where the common areas have not yet been transferred to the OMC. As indicated above, a property does not automatically become unsaleable because the common areas in the development have not been transferred. A solicitor's certificate of title is usually given to a lending institution in residential mortgage lending cases following completion of stamping and registration by the borrower's solicitor. As previously indicated by the committee, such certificates of title should operate as of the date of parting with the loan funds, or the first drawdown of loan funds where stage payments are involved, which date is usually also the date of the mortgage and of title searches. Such certificates of title certify the title to the property as of that date, and they speak only to circumstances that pertained as of that date. If some title matter arises subsequent to that date, it does not impact on the certificate of title. It appears to the committee that some solicitors may be unnecessarily qualifying their certificates of title, on account only of the fact that common areas in relevant developments have not yet been transferred to OMCs. This causes lenders to reject these certificates of title and causes unnecessary difficulty for solicitors in being released from their undertakings. The fact that the relevant parts of common areas had not yet been transferred to an OMC at the time of a sale of a unit in such a development does not constitute a 'blot' on the title at the date of the certificate of title, and does not require qualification of the undertaking or certificate of title.

5. Pre-Contract Enquiries relating to the purchase of an apartment

This precedent is provided both as a *Word* file, and in a column format as a PDF file. Section A. relates to <u>all</u> multi-unit developments. Section B. relates to a multi-unit development in which a residential unit was <u>not</u> sold prior to 1st April 2011. Section C. relates to a multi-unit development in which a residential unit <u>was</u> sold prior to 1st April 2011.

Conveyancing Committee

Revised 01 November 2015