Office of the Director
of Corporate Enforcement

Oifig an Stiúrthóra um
Fhorfheidhmiú Corparáideach

Company Law Handbook on Residential Property Owners' Management Companies

("Management Companies")

COMPANY LAW HANDBOOK ON RESIDENTIAL PROPERTY OWNERS' MANAGEMENT COMPANIES ("MANAGEMENT COMPANIES")

Decision Notice D/2008/1

www.odce.ie

Copyright and Disclaimer Statements

Copyright

The contents of this document are the copyright of the Office of the Director of Corporate Enforcement ("the ODCE").

However, in compliance with the Re-use of Public Sector Information Regulations 2005 (S.I. 279 of 2005)[1] the ODCE encourages the re-use of all information that it produces.

Accordingly, this document may be reproduced and/or re-used, subject to the latest PSI licence available at www.psi.gov.ie.

You may re-use this document, or the information therein, free of charge in any format, provided that—

- the reproduced information is accurate;
- it is used for a lawful or proper purpose;
- the source of the information and copyright is clearly acknowledged;
- the information is not used for the principal purpose of advertising or promoting a particular product or service.

Disclaimer

Nothing herein should be construed as a representation by, or on behalf of, the ODCE as to its definitive interpretation of any of the provisions of the Companies Acts 1963 to 2006 or as an authoritative interpretation of any law.

This document discusses matters which are beyond the strict statutory remit of the ODCE. This is done for the purpose of enabling relevant company law aspects to be seen and understood in the wider contexts where they are typically likely to arise for persons who have little previous experience of company law, and who first come upon it as something ancillary to their interest in a residential property in respect of which a management company has a role.

Readers are cautioned, however, that the ODCE has no special expertise regarding any matter other than company law. Accordingly, any discussion of non-company law matters in this handbook should not be regarded as having any authoritative value.

In addition (both as regards company law matters *and* non-company law matters) the ODCE accepts no responsibility or liability howsoever arising from any errors, inaccuracies or omissions in the contents of this document. The ODCE likewise reserves the right to consider the law afresh on every occasion where a situation arises which calls for the exercise or non-exercise by it of any of its statutory functions. Accordingly, it is possible that individual cases, as and when they arise, may end up being dealt with differently than the provisions of this document might suggest.

In summary, while the ODCE hopes that this document will be of general use to persons connected with management companies, the ODCE emphasises that anyone contemplating making any decisions in relation to any of the matters dealt with in this handbook should always give serious consideration to the desirability of seeking advice from appropriate independent experts; who, in giving such advice, will be able to tailor it specifically to a client's particular needs and circumstances.

[1] Available at www.psi.gov.ie

CONTENTS

Section	*Topic*	*Page*
1.0	The aim and origins of this handbook	(1)
2.0	What are management companies?	(6)
3.0	Multi-unit developments and the functions in them typically discharged by a management company	(8)
4.0	The advantages which flow from a management company being established under the Companies Acts	(11)
5.0	The key phases in the evolution of a management company: *(i)* the developer-only phase; *(ii)* the developer-and-owners' phase; *(iii)* the owners-only phase	(14)
6.0	Understanding the role of the management company during each of the phases of its evolution	(15)
7.0	A critical distinction: management companies contrasted with managing agents	(21)
8.0	Management companies as *(i)* companies limited by shares or *(ii)* companies limited by guarantee not having a share capital	(24)
9.0	The management company's articles of association	(34)
10.0	Membership of a management company	(38)
11.0	The management company's register of members	(43)
12.0	The voting power of management company members	(48)

Section	*Topic*	*Page*
13.0	How management company directors are appointed, how many directors the company can have, and how that number can be changed	(54)
14.0	How management company directors cease to hold office	(59)
15.0	The management company's register of directors and secretaries	(65)
16.0	The predominant role of the directors as regards the management of the management company	(68)
17.0	The requirement for the directors to act collectively, or through committees duly authorised by the full board	(75)
18.0	The duties of management company directors	(78)
19.0	The extent to which a management company director might be personally liable for actions or omissions	(84)
20.0	Steps management company directors can take to limit any personal liabilities which they might potentially face by reason of any alleged default, breach of duty etc	(89)
21.0	The situation where no-one is willing to become a director of a management company	(92)
22.0	The company secretary	(95)
23.0	Directors' meetings	(97)
24.0	Annual General Meetings (AGMs)	(111)
25.0	Extraordinary General Meetings (EGMs)	(130)
26.0	Chairing a management company's AGMs or EGMs	(138)
27.0	How management company members can opt to be represented at AGMs or EGMs by proxies or representatives	(143)

Section	*Topic*	*Page*
28.0	Decision making by management company members otherwise than at a general meeting: the written resolution procedure	(148)
29.0	The management company's accounting records	(149)
30.0	The management company's statutory auditors	(154)
31.0	The management company's annual accounts	(156)
32.0	Audit exemption	(160)
33.0	The directors' report	(165)
34.0	The management company's registered office	(168)
35.0	The requirements for the management company's business letters, websites, etc to contain relevant details concerning the company and the identity of its directors	(172)
36.0	Filings with the Companies Registration Office	(174)
37.0	The operation of the management company's bank account(s)	(178)
38.0	The relationship with the management company's solicitor	(180)
39.0	Service charges	(182)
40.0	Management company members' rights to apply to the High Court for *(i)* orders compelling compliance with provisions of the Companies Acts, *(ii)* relief in cases of oppression and/or *(iii)* orders arising from irregularities at company meetings	(187)
41.0	Statutory investigations of management companies' affairs	(192)
42.0	Terminating the existence of the management company – winding-up and strike-off	(196)
43.0	Non-company law legal obligations of management companies	(201)

Section	*Topic*	*Page*
44.0	**The role and approach of the ODCE: what it can/cannot do in relation to management companies**	**(203)**
Appendix I	**Outline of key provisions typically found in property law agreements between a unit owner in a hypothetical apartment complex and the associated management company**	**(206)**
Appendix II	**An example showing how the "Rotation of Directors" provisions found in Tables A and C might work in practice**	**(209)**
Appendix III	**"Table A, Part II" Articles of Association from the First Schedule to the Companies Act 1963**	**(215)**
Appendix IV	**"Table C" Articles of Association from the First Schedule to the Companies Act 1963**	**(238)**

1.0 THE AIM AND ORIGINS OF THIS HANDBOOK

[1.01] The aim of this handbook is to provide a general guide to issues relating to the governance of residential property owners' management companies – which, in the remainder of the text, will be referred to simply as 'management companies'.

[1.02] The handbook is written from the perspective of the ODCE which is a statutory agency whose remit includes that of encouraging compliance with company law.[1]

[1.03] The ODCE hopes that the handbook will be a useful resource for a variety of persons concerned with management companies, especially—

(a) the owners or occupiers of houses or apartments located within multi-unit developments[2] where a management company is involved in issues such as—

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

(ii) the provision of common services in respect of those areas;

(b) persons contemplating the purchase of such properties;

(c) persons connected with the central management of management companies, *e.g.* their directors, and persons (such as managing agents) who are engaged by management companies to deal with day-to-day management tasks;

(d) the developers of multi-unit developments;

(e) solicitors and accountants, who from time to time find themselves called upon to give professional advice to management companies and/or to any of the persons listed in paragraphs (a) to (d).

[1.04] The handbook does not set out to be an exhaustive guide to *all* issues that may arise in relation to management companies 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 predominantly concerned with issues of housing policy, neighbourhood development, property law or the principles of good estate management. However in order that the handbook will be of most use to the expected readership, and will allow for the relevance of company law issues to be most apparent, it will occasionally be necessary to refer to matters from the spheres of property law, estate management, etc. Company law issues concerning management companies

---

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

2 See paragraphs [3.01] and [3.02].

often arise in a context where aspects like these are relevant also. Accordingly, so that the company law dimension can be best explained, those wider aspects or contexts will also be discussed, where appropriate.

[1.05] This handbook is the outcome of a process which, from an ODCE perspective, began in December 2006 with the publication of our *Consultation Paper C/2006/2* entitled *"Draft ODCE Guidance on the Governance of Apartment Owners' Management Companies (AOMCs)."* In that Consultation Paper we noted that in recent years the ODCE had received a steady stream of complaints about the governance of companies associated with the management of—

(a) apartment developments;

(b) some conventional housing estates where a management company has a role in the provision of shared services;

(c) other "mixed-use" developments, such as those in which, for example, a block of apartments includes some retail units at ground level.

[1.06] Recognising that the Companies Acts are relevant to the governance of such companies, but that the extent of that relevance is not widely known by many property stakeholders, we prepared and appended to the Consultation Paper Draft Guidance on the Governance of AOMCs.[3]

[1.07] We invited all interested parties to comment on the format and content of the Draft Guidance and, in particular, to deal with the following questions—

(a) whether, having regard to its primary purpose, the Draft Guidance was clear and useful;

(b) whether there were any omissions or issues which should have been discussed in the ODCE Guidance, or better explained;

(c) whether the ODCE Final Guidance should be in a similar form to the draft Guidance, although supplemented by a list of key governance requirements;

(d) whether, and to what extent it was helpful and appropriate for the ODCE to have proposed certain changes to certain regulations often contained in management companies' articles of association, or whether such changes might give rise to unrecognised disadvantages;

(e) recognising that the Draft Guidance had been developed with apartment owners' management companies particularly in mind, whether there were distinct features of the management companies for housing

---

[3] The consultation paper and draft guidance are available at www.odce.ie/en/media_consultation_notices.aspx.

estates or mixed use developments which required specific attention in the development of the ODCE's Final Guidance.

[1.08] The ODCE's Consultation Paper was circulated to a large number of agencies, bodies and persons whom we envisaged might have useful perspectives to share in relation to these issues. In addition we placed advertisements widely in the media concerning the topic. We also publicised the Consultation Paper by a mass-marketing campaign.

[1.09] The outcome of this process was that we received almost 70 submissions in response to our Consultation Paper. These came from across the full spectrum of persons interested in the area: private individuals who resided in multi-unit developments or owned investment properties located there, public representatives, property managing agents, Government Departments, statutory agencies, professional bodies whose members have ongoing dealings with management companies, etc.

[1.10] To all of those who responded to the Consultation Paper the ODCE owes a sincere debt of gratitude for the helpful and insightful comments which respondents offered. Those observations have significantly enhanced our understanding of this topic. In addition many respondents were kind enough to commend the ODCE for having taken an initiative in this area and this is something for which we are also very grateful.

[1.11] The ODCE's publication of its Consultation Paper occurred at a time when wider issues concerning management companies (and the multi-unit developments with which they are associated) have been attracting significant public attention in several other ways. At the official or industry level these included the following events or matters—

(a) The publication in June 2006 by Dublin City Council of *Successful Apartment Living - A Role for Local Authorities in Private Residential Management Companies*.[4]

(b) The publication in October 2006 by the National Consumer Agency of *Management Fees and Service Charges Levied on Owners of Property in Multi-Unit Dwellings*.[5]

(c) The publication in December 2006 by the Law Reform Commission of its Consultation Paper on *Multi-Unit Developments*.[6]

---

4 The report by Evelyn Hanlon is available at www.dublincity.ie/Housing/ApartmentOwners/Pages/ApartmentOwners.aspx.

5 The report prepared for the National Consumer Agency by DKM Consultants Ltd in association with Kevin O'Higgins, Solicitors, is available at www.consumerconnect.ie/eng/Hot_Topics/Campaigns/management_companies_report_final.pdf.

6 The consultation paper LRC CP 42-2006 is available at www.lawreform.ie/publications/consultpapers.htm.

(d) A Government Decision in December 2006 to establish a high-level interdepartmental committee, comprising representatives of relevant Departments / Offices, to assist in the development of a coherent and comprehensive legislative response to issues arising in relation to property management companies. The ODCE was invited to participate in the work of this committee.

(e) A Public Conference in January 2007 entitled *Law Reform Options for Multi-Unit Developments* organised jointly by the Law Reform Commission and the Department of Justice, Equality and Law Reform.[7]

(f) The establishment in March 2007 by the National Consumer Agency of a Multi-Unit Development Stakeholder Forum comprising key stakeholders in the relevant sector.[8]

(g) The publication in June 2007 by Dublin City Council of *Successful Apartment Living - Survey of Service Charges, Design, Management and Owners' Attitudes in 193 Private Apartment Schemes in Dublin City.*[9]

(h) The publication in March 2008 by the Irish Home Builders Association of its *Code of Practice for Management Companies in respect of Multi-Unit Developments*.[10]

(i) The publication in June 2008 by the Law Reform Commission of its Report on *Multi-Unit Developments*.[11]

(j) The publication in September 2008 by the National Consumer Agency of—

- the Conclusions & Outputs of its Multi-Unit Development Stakeholder Forum; and,

- *Buying and Living in a Multi-Unit Development Property in Ireland*.[12]

[1.12] These several publications, and the discussions within and leading up to them, have significantly informed the ODCE in the preparation of this handbook. Likewise since December 2006 the ODCE has continued to deal with many queries

---

7 The ODCE's Consultation Paper was one of the topics discussed and considered at this Conference.

8 See www.consumerconnect.ie/eng/Hot_Topics/Campaigns/Property_Forum.

9 See footnote 4.

10 The Code of Practice is available at www.homefacts.ie/Managment_Companies.html.

11 The report LRC 90-2008 is available at www.lawreform.ie/publications/reports.htm.

12 All are available at www.consumerproperty.ie.

and complaints from members of the public relating to management companies and these too have given us additional insights into other ways in which our *Draft Guidance* of December 2006 needed to be modified.

[1.13] During 2008 the Law Reform Commission concluded its detailed study into the topic of *Multi Unit Developments* and has made recommendations as to various ways in which the law should be reformed to deal with them.[13] As previously noted[14] the Government previously established a high-level interdepartmental committee, comprising representatives of relevant Departments / Offices, to assist in the development of a coherent and comprehensive legislative response to issues arising in relation to property management companies. Arising from that process, it is expected that new legislation may emerge to strengthen the law in relation *inter alia* to management companies. However this handbook is written on the basis of the law as it stands in December 2008.

---

13 See footnote 11 for details of the Commission's Report, and footnote 6 for details of the Commission's earlier Consultation Paper.

14 See subparagraph (d) of paragraph [1.11].

2.0 WHAT ARE MANAGEMENT COMPANIES?

[2.01] From a company law perspective the terms "management company" or "property management company" have no special meaning. However for the purposes of this handbook the ODCE uses the term *management companies* to describe certain companies that, in recent years, have become a common feature of the way in which it has been sought to organise communal issues arising from the ownership of housing units (such as apartments, duplexes, holiday village properties, and sometimes traditional houses) located in many Irish multi-unit developments[15] where residential housing units comprise the entirety of the development, or a substantial component of it. A significant number of such companies have been incorporated.[16]

[2.02] Broadly speaking the idea behind most management companies is that where a group of persons individually own all the apartments / houses etc in a multi-unit development, they ought also (at least after the multi-unit development has been fully completed by its developer) to be the members of a company which owns the common areas[17] associated with their individual units, and which ultimately controls the extent, quality and cost of the shared services[18] from which individual units benefit.

[2.03] From an ODCE perspective we think it important to stress that management companies are in no way a requirement of company law. There is nothing in the Companies Acts which states that a management company must be brought into existence in connection with any multi-unit development, and some multi-unit developments exist which do not have a management company associated with them. For example in some developments *co-ownership agreements* exist which form the basis for the ownership of common areas, and the organisation of shared services.[19] In other multi-unit developments co-operative societies have been established to discharge similar functions.[20] This ODCE handbook does not seek to explain anything about those sorts of alternative arrangements.[21]

[2.04] Furthermore – and this is an important point which the ODCE wishes to emphasise – neither is there any special body of company law which applies only to management companies, or whereby company law is applied differently so far as

---

15 See paragraphs [3.01] and [3.02].

16 In the National Consumer Agency's publication *Management Fees and Service Charges Levied on Owners of Property in Multi-Unit Dwellings* (see footnote 5) it was estimated that there were about 4,600 such companies.

17 Areas such as hallways, stairwells, gardens, refuse disposal areas, car parks, etc.

18 Services such as repair, cleaning, insurance, security, etc.

19 Co-ownership agreements are essentially rooted in the laws of contract and private property, rather than in any particular Act or Acts of the Oireachtas.

20 Co-Operative societies are governed by the Industrial and Provident Societies Acts 1893 to 1978.

21 Because they have no connection with company law: the only area of law for which the ODCE has any functional responsibility.

management companies are concerned.

[2.05] The impetus for the establishment of a management company is usually a simple one: that it has basically become the norm in the Irish property development market so far as many multi-unit developments are concerned, because of the advantages summarised in paragraphs [4.01] to [4.04].

[2.06] Almost invariably this is so as regards most apartment complexes.[22] Also in some instances, even as regards so-called 'traditional housing estates' it sometimes appears to have happened that some local authorities have signified that do not foresee themselves "taking the estate in charge" upon its ultimate completion and that, accordingly, a management company should be established.[23] The ODCE understands that following initiatives taken by the Department of the Environment, Heritage and Local Government this is less likely to occur in the future and, furthermore, the circumstances in which a local authority should take an estate in charge have now been clarified in greater detail.[24] Other than to refer to these departmental initiatives the ODCE has no role whatever in relation to the "taking in charge" of estates, and company law does not seek to regulate it in any way.

[2.07] In a conventional housing estate where there is a management company the role of the company is not usually so extensive as in an apartment complex. This is because in such a case the common areas usually do not include internal areas such as hallways etc or internal fixtures and fittings such as lifts. However certain core functions fall to be discharged by the company: such as maintaining and repairing external common areas, arranging for lighting and insurance, hiring managing agents and contractors etc.

[2.08] Management companies often exist also in *mixed developments* where, for example, there may be something like a block with ground floor retail units, apartments overhead and an underground car-park below. Alternatively the extent of the "mix" may be even greater with, for example, part of the complex sold as residential apartments, other parts sold off as retail spaces and yet another portion given over to office space and/or leisure facilities.

---

22 Except *(i)* those which are small enough to allow matters to be dealt with by way of co-ownership agreements and *(ii)* some apartment complexes that were developed by local authorities for occupancy by local authority tenants, and where it was the intention of the local authority that they would retain ownership of the common areas and deal with the provision of all or most of the shared services.

23 For further information on this issue – which has nothing to do with company law and in relation to which the ODCE has no role whatever – see Chapter 4 of Dublin City Council's *Successful Apartment Living - A Role for Local Authorities in Private Residential Management Companies,* July 2006, details at footnote 4.

24 Department of the Environment, Heritage and Local Government – Circular Letter PD 1/08, *Taking in Charge of Residential Developments / Management Arrangements,* 26 February 2008 available at www.environ.ie/en/Publications/DevelopmentandHousing/Planning/FileDownLoad,16779,en.pdf

3.0 MULTI-UNIT DEVELOPMENTS AND THE FUNCTIONS IN THEM TYPICALLY DISCHARGED BY A MANAGEMENT COMPANY

[3.01] By multi-unit developments[25] we mean a form of residential accommodation in which individual property "units" share a range of facilities, known as common areas, such as entrance doors/lobby areas, car parking, stairwells, lifts, garden or recreational areas, etc. Unit owners may also share and/or access certain services on a communal basis, *e.g.* waste disposal, security services, cleaning and maintenance contracts etc.

[3.02] As stated by the National Consumer Agency—

> "A multi-unit development may be one of a variety of dwelling types such as a house, an apartment or duplex. In a traditional stand-alone house, the facilities and services or areas such as those referred to above are maintained by the individual property owner, or where applicable, the local authority. In a multi-unit development, they are owned and maintained by the unit owners on a communal basis. This is because all owners share, use and own the common areas, for example halls, gardens and parking with other units. Unit owners pay an annual fee known as a service charge to pay for the maintenance of these common areas and other shared services such as cleaning and waste disposal …
>
> When you purchase a unit in a multi-unit development, you purchase both your individual property and a share of the ownership of the common areas. You therefore enjoy two legal interests: one, as the owner of your individual unit and second, as a part owner of the common areas."[26]

[3.03] We have already observed that management companies are not a product of company law.[27] Accordingly, in order to ascertain what are the intended functions of the management company in any particular multi-unit development, there is no point in looking to the Companies Acts. Instead the legal source from which the management company's operational role can be discovered is by looking at the property law documents under which the residential units have been sold to the residential unit owners, *i.e.* each unit owner should look to their own title deeds.

[3.04] Appendix I on page 206 contains an outline of the sort of provisions commonly found in the title deeds of an apartment, governing the relationship *inter*

---

25 The explanation which follows is borrowed substantially from Section 1 of *Buying and Living in a Multi-Unit Development Property in Ireland* published by the National Consumer Agency. The full text of this document is available at www.consumerproperty.ie.

26 Section 1.1 of the National Consumer Agency's *Buying and Living in a Multi-Unit Development Property in Ireland*.

27 See paragraphs [2.03] and [2.04].

alia between an individual apartment owner and the management company associated with the multi-unit development. In a multi-unit development which consists of / includes conventional houses many of the same sorts of provisions will often exist; although some of those outlined in Appendix I are obviously of particular relevance to apartments and so are less likely to arise in the case of houses. Similarly in a mixed development, provisions which are both similar and different to those in Appendix I will often feature.

[3.05] Each multi-unit development is different, however, and while Appendix I lists features which will commonly be found in the title deeds of many multi-unit developments, it does not represent an exhaustive list upon which any significant reliance should be placed. Accordingly, the ODCE urges that any owner of a property located in a multi-unit development with which a management company is associated, who wishes to know what is the particular role and function of his/her management company (including the question of what are his/her obligations owed to it, and its obligations owed to him/her) should familiarise themselves carefully with the precise contents of their own title deeds.[28]

[3.06] It also needs to be emphasised that while management companies are almost always involved in the eventual ownership of common areas of the multi-unit development with which they are associated, and in the provision of shared services to it, it is not always the case that this role exists from the moment that the first property in the multi-unit development is sold to its purchaser. In many cases that role commences fully only after the multi-unit development has been completed by its developer[29] and up to that time ownership of the common areas remains with the developer and responsibility for the provision and control of the shared services may likewise remain with him/her. This aspect of matters is outlined further in paragraphs [5.01] to [6.21].

[3.07] The fact that the intended functions of the management company (and issues concerning the time from which such functions will become effective) have their roots in title deeds is one from which an important legal consequence flows. The covenants and conditions of title documents become binding on a property owner because of his/her agreement to acquire the property whose title deeds record that such covenants and conditions will exist as between whoever owns that property from time to time, and whoever it was that sold it in the first instance, or the successor in title to that original vendor. They do not flow from the company law

---

28 Where an owner's property is mortgaged to secure an outstanding loan the original of their title deeds will usually be held by the financial institution who gave the mortgage loan, unless it is the case that the title deeds are not yet registered and are still in the custody of the owner's solicitors. Alternatively if there is no mortgage associated with the property, owners may have deposited their title deeds with their solicitors for safekeeping, or left them with a bank on a similar basis – unless they have opted to keep them themselves, or have made other arrangements in relation to the deeds. If deeds are held directly by a solicitor the client should contact their solicitor to see them, or obtain copies of them. In cases where deeds are held by a financial institution as security for a loan it is usually necessary, when seeking access to them, to make the request through a solicitor.

29 What constitutes completion is usually stipulated in the title deeds relating to the properties in the multi-unit development and/or in the contracts signed between the developer and the first purchasers of the properties.

relationship that exists between the management company and its members.

[3.08] Accordingly, in so far as the first purchaser of a unit in a multi-unit development is concerned, they make a direct agreement with both the developer and the management company which includes stipulations as to what is going to be the role and function of the management company, when it will commence, and what obligations they will owe to the company (both as to how much they will have to contribute annually to the management company, or the basis on which that will be determined, and on some limitations on the extent to which they can enjoy their property). It is that agreement – as embodied in the title deeds – which is the primary source of the law relating to the relationship between the management company and the original purchaser in so far as all the matters dealt with in the agreement are concerned. That agreement does not have its origins in company law and so company law plays no role in determining, for example, matters such as the following: what is an appropriate service charge to be paid by the property owner to the management company; whether the management company is maintaining the common areas to an adequate or appropriate standard; or whether it is fair or otherwise for the apartment owner to be prohibited from erecting their own satellite dish.

[3.09] Title deeds of this sort are invariably entered into by people on the basis that they do so on their own behalf and for their successors in title. This means that if the first owner sells his/her property to a second owner, that person then becomes bound by those original agreements (by virtue of his/her agreement with the vendor of the property to buy it subject to those agreements). In turn as the second owner sells it on, the third owner becomes similarly bound, and so on and so forth. Again it is the succession of property law agreements that govern much of the relationship between successive property owners and the management company: not company law.

[3.10] Where company law is of some relevance in relation to these functions is that to the extent that the management company has been allocated functions relating to the ownership of the common areas of the multi-unit development and the provision of services, these have to be organised and controlled by the management company's directors. Accordingly, each unit owner being able to take part in the election of those directors, and the several other provisions of company law which regulate the relationship between members of a company and its directors, are relevant in ensuring that unit owners are, to some extent, able to influence the other side of the property law agreements to which they have become a party. For example by electing good and responsible directors they may be able to ensure that the management company is vigilant in ensuring that service charges are set at a level which is neither too high for the unit owners to be able to bear, nor so low that there is a risk of the common areas falling into disrepair. Alternatively, through the provisions of company law dealing with the keeping of proper accounting records and the preparing and circulation of annual accounts, they will be able to get a sense of how efficiently or otherwise the money paid to the management company is actually being spent.

4.0 THE ADVANTAGES WHICH FLOW FROM A MANAGEMENT COMPANY BEING ESTABLISHED UNDER THE COMPANIES ACTS

[4.01] As the ODCE understands it the reasons why management companies are generally established in conjunction with residential multi-unit developments, and why that is done by the incorporation of a company under the Companies Acts, include the following factors.

[4.02] Firstly, it is a means by which arrangements can be structured so that, once the development is completed (and in some instances before that time) the owners of the relevant housing units should be able to maintain an input into—

(a) decision-making as regards their development, and

(b) controlling the costs of having common services provided for their collective benefit.

Admittedly that decision making and control is usually exercised indirectly by the members of the management company through their power to periodically elect[30] the persons[31] who are to serve as the management company's directors and who, in consequence of that office, are the persons with the predominant decision-making powers as regards the day-to-day affairs of the management company.

[4.03] Secondly, using some form of a corporate structure through which to manage a multi-unit development is normally advantageous when one looks at the alternative. Unless the multi-unit development is very small, it would normally be impractical for the common areas to be co-owned by all the unit-owners in their personal capacities, and for arrangements in relation to the provision of common services to be dealt with by contracts (*e.g.* those relating to the hiring of cleaners and caretakers, lift maintenance agreements, etc.) under which each of the owners was jointly and severally liable in their personal capacities.[32]

[4.04] Thirdly, where it is decided to operate this function through a company incorporated under the Companies Acts 1963 to 2006—

(a) what is brought into existence is what lawyers frequently describe as "a

---

30 And, where appropriate, to remove from office in between elections: see further paragraphs [14.10] to [14.15].

31 Who will usually be drawn from amongst the members' own ranks.

32 The Law Reform Commission has recommended that the law should allow for co-ownership relationships to operate in the case of multi-unit developments only where they are comprised of four or fewer housing units. Where the multi-unit development includes five or more housing units the Commission recommends that the law be changed to require that an 'Owners' Management Company', incorporated under the company law code, be used. See generally paragraphs 3.05 to 3.15 of the Commission's report, the details of which are at footnote 11.

legal entity separate and distinct from its members;"

(b) 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;

(c) 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;

(d) although the company is owned by its members, they do not personally need to put their names to any contracts or arrangements entered into by the company; in the event of the other parties to any such contracts or arrangements wishing to sue on foot of them it is the company which must be sued: not any or all of the members in their personal capacities;

(e) moreover assuming the company is incorporated with limited liability[33] the members typically have at most only an insignificant obligation to contribute to any deficiency in the assets of the company in the event that it becomes insolvent—

(i) where the management company is incorporated as a private company limited by shares[34] each of the members will usually be allocated one €1 share in respect of each housing unit in the multi-unit development which they own; they may or may not be asked to pay those €1 sums when their share in the company is being allocated to them; if they are, and the company subsequently becomes insolvent no further call can be made on them to contribute to the company's deficiency of funds; if they have not previously paid the €1 sum they can be required to pay it if the company becomes insolvent, but that is the limit of their personal liability;[35]

(ii) where the management company is incorporated as a company limited by guarantee not having a share capital[36] each of the members undertakes that in the event of the company being wound up while he/she is a member, or within one year afterwards, that he/she will pay a sum – which is usually fixed at

---

33 It is possible for companies to be formed in which the members retain unlimited liability as regard all the company's debts and obligations, but it is unlikely that this choice would be adopted in respect of a management company associated with a multi-unit development.

34 See paragraphs [8.01] to [8.33] for an outline of the difference between a private company limited by shares and a company limited by guarantee not having a share capital.

35 Section 207(1)(d) of the Companies Act 1963.

36 See footnote 34.

a small amount such as €1 – towards payment of the company's debts, liabilities, etc; that trivial sum is again the limit of the member's personal liability as regards the company's obligations;[37]

(f) company law contains a well-developed[38] 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 by the directors in whom the members place their trust as regards the management and control of their company's business and affairs. As described by one English textbook writer—

> "The framework of company law provides a ready-made system of checks and balances in the relationship between the company, its members and its officers."[39]

---

37 Section 207(1)(e) of the Companies Act 1963. Note that the member's undertaking is contained in the memorandum of association of the management company where it is incorporated as a company limited by guarantee not having a share capital, as required by Section 6(3) of the Companies Act 1963. Pursuant to Section 25 of the Companies Act 1963 the memorandum binds the members to the same extent as if it had been signed and sealed by the member, and contained covenants by each member, to observe all the provisions of the memorandum. Accordingly each succeeding member of the company is deemed to have given this undertaking simply by virtue of his/her becoming a member of the company.

38 Modern company law has its origins in the mid 19th century and, in the meanwhile, a vast number of difficulties, circumstances and disputes have arisen which have led *either* to the Oireachtas (or previous parliaments) modifying company law to better provide for what should happen when such events occur, *or* which have led to clarification of the law by the courts, or the resolution of difficulties on the basis of principles drawn from the common law, the Constitution, or other appropriate sources. So far as the updating of company law by the Oireachtas is concerned several years of work by the Company Law Review Group ("the CLRG") culminated in 2007 with the publication of *Company Law for the 21st Century* which contains a new *General Scheme of [a] Companies Consolidation and Reform Bill*. Arising from the CLRG's work the Government has given approval for the drafting of an updated code of Irish company law which, in due course, will come before the Oireachtas and will most likely emerge as new law to replace the Companies Acts 1963 to 2006. The CLRG's website is at www.clrg.org.

39 West, *Companies Limited by Guarantee* (Second Edition, Jordan Publishing Limited, 2004) at section 1.6.5.

5.0 THE KEY PHASES IN THE EVOLUTION OF A MANAGEMENT COMPANY: *(I)* THE DEVELOPER-ONLY PHASE; *(II)* THE DEVELOPER-AND-OWNERS' PHASE; *(III)* THE OWNERS-ONLY PHASE

[5.01] As the ODCE understands it, most management companies evolve through what we see as three distinct phases. For ease of reference we have decided to label them as above.[40]

[5.02] What we are calling the developer-only phase is one which begins with the formal incorporation of the management company. This usually happens some time *after* the developer has begun to build the multi-unit development but *before* any units have yet been offered for sale. During this time the only members of the management company are usually the developer of the multi-unit development and/or persons nominated by him/her.[41]

[5.03] The developer-and-owners' phase is one which usually begins as soon as the sale of first unit in the multi-unit development is completed. As each successive sale is completed, the unit purchasers typically become members of the management company with the result that the membership now consists of—

- the developer and/or his/her nominees, and
- each of the purchasers of the units in the associated multi-unit development.

[5.04] The owners-only phase begins once the developer has finally completed the multi-unit development and has transferred all his/her remaining ownership of its common areas to the management company. At this point the developer and his/her nominees usually cease to be members of the management company. Accordingly, from this point onwards, the only members of the management company are usually those who are the owners of the units in the associated multi-unit development.

[5.05] This three-phase evolution is one which, so far as the ODCE understands it, is common in the majority of management companies associated with multi-unit developments. However management companies do not always evolve in this way. For example, we have seen cases in which the underlying title deeds relevant to the properties, and the company's articles of association, stipulate that unit purchasers will become members of the management company only upon the completion of the multi-unit development, after the developer has transferred all his/her remaining ownership of the common areas to the management company.[42]

---

40 The terms do not have meaning in law.

41 Even one member will be enough if the management company is incorporated as a private company limited by shares: Regulation 4 of the European Communities (Single-Member Private Limited Companies) Regulations 1994, S.I. 275 of 1994. At least seven members will be required if the management company is incorporated as a company limited by guarantee not having a share capital: Section 5(1) of the Companies Act 1963.

42 Such a company, it would seem, has only two phases in its evolution: a developer-only phase, followed by an owners-only phase.

6.0 UNDERSTANDING THE ROLE OF THE MANAGEMENT COMPANY DURING EACH OF THE PHASES OF ITS EVOLUTION

[6.01] In any company it is vital that both members and directors should understand fully what role the company is intended to perform. Knowing what the company should be seeking to do, and should not be seeking to do, are questions that are of fundamental importance so that the company's activities, however great or little they may be, can be carried on efficiently and effectively.

[6.02] In general company law does not lay down what are, or should be, the activities or role of any company: management companies included.[43] Those who incorporate the company specify at the outset what are to be its objects, which must then be set forth in the company's memorandum of association.[44] Thereafter, those objects are generally capable of being modified if the members of the company, as constituted from time to time, pass a special resolution to amend the memorandum of association.[45]

[6.03] It is therefore advisable for anyone connected with a management company to obtain an up-to-date copy of its memorandum and articles of association so as to ascertain the objects of the company. This should be possible in any of the following ways—

1. On payment of a small fee, a copy of any company's memorandum and articles of association can be obtained from the CRO.[46]

2. Every company is obliged, on being so required by any member of the company and subject to the member paying a small fee, to send to the member an up-to-date copy of the company's memorandum and of its articles.[47]

3. A copy of the management company's memorandum and articles will usually be amongst a unit owner's title deeds for their property in a multi-unit development. If these are readily available[48] that is a possible way of obtaining a copy of the memorandum and articles of

---

43 The Companies Acts do however contain provisions which seek to restrain some activities of companies. For example under Section 297 of the Companies Act 1963 it is an offence for anyone to be party to the carrying on of the business of a company for any fraudulent purpose.

44 Section 6(1)(a) of the Companies Act 1963.

45 Section 10 of the Companies Act 1963.

46 See www.cro.ie for further information.

47 Section 29(1) of the Companies Act 1963. The fee is 32 cent or such lesser sum as the company may prescribe.

48 See foonote 28.

association.[49]

[6.04] The roles or activities of a company follow also from whatever agreements the company becomes party to (although such agreements should be for objects that are within the scope of those specified in the company's memorandum of association). In the case of a management company, significant information as to its intended role and function is usually contained in the conveyancing documents by which individual unit-owners in the associated multi-unit development purchased their apartments or houses, as the case may be.

[6.05] In general those conveyancing documents will outline in detail matters such as—

(a) what obligations it is intended that the management company will owe to the unit-owners;

(b) what obligations it is intended each unit-owner will owe to the management company;

(c) the commencement date with effect from which those respective obligations will be owed.

[6.06] The contents of conveyancing documents vary from one multi-unit development to another. In the circumstances it is advisable that anyone connected with a management company should source a copy of the documents relevant to their multi-unit development – if necessary with the assistance of their solicitors.

[6.07] So far as the mutual obligations of management companies and unit-owners are concerned paragraphs [3.04] to [3.10] outline the sort of matters which typically are assigned to the parties under conveyancing documents concerning multi-unit developments.[50]

When the management company's operational obligations commence

[6.08] As noted above it is usual for conveyancing documents to specify the date or event with effect from which the management company's obligations are to commence.

[6.09] The ODCE has seen many instances in which the underlying conveyancing documents provide for something along the following lines—

---

[49] However if there has been any alteration to the memorandum or articles since the purchase of the property, this will not be reflected in the copy documents kept with the title deeds.

[50] However yet again we must emphasise that these vary from one development to another. Accordingly we strongly urge that anyone connected with a management company should study carefully whatever is contained in their own title deeds.

(a) that up until the time when the developer has completed the estate and transferred ownership of the common areas to the management company—

(i) it is the developer who will be responsible for the management of the common areas, and the provision of the shared services to the units in the multi-unit development;

(ii) that during this period, service charges will be payable to the developer: not to the management company;

(b) that after the developer has completed the estate and transferred ownership of the common areas to the management company (but not before that date)—

(i) it is the management company which will be responsible for the management of the common areas, and the provision of the shared services to the units in the multi-unit development;

(ii) that from this time onwards, service charges will be payable to the management company: not to the developer;

(c) that, even though the operational role of the management company is postponed until after the transfer of the common areas, the unit-owners will be members of the management company prior to that date;

[6.10] On the other hand, provisions along the lines in paragraph [6.09] are not universal. In other cases we have seen conveyancing documents which provide along the following lines—

(i) that even before the developer completes the estate and transfers ownership of the common areas to the management company, both the developer and the management company will be jointly responsible for the management of the common areas, and the provision of the shared services to the units in the multi-unit development;

(ii) up until the transfer of the common areas the only members of the management company will be the developer's nominees;

(iii) that the membership of the unit owners will commence only from the time when the common areas are transferred to the management company by the developer.

[6.11] In the ODCE's view it is important for management companies and anyone connected with them to comprehend exactly what is the role intended to be performed by the company in the period before the developer has completed the estate, and transferred ownership of the common areas to the management company.

[6.12] For example where the arrangements are along the lines indicated in paragraph [6.09] it seems arguable that in the period prior to transfer of the common areas, the management company should have no role in the delivery of managed services. The services should instead be provided by the developer, and managing agents involved at that stage should be regarded as contractors of the developer – not of the management company. 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 should be to examine what property law rights or entitlements are open to them as against the developer, rather than as against the management company. Likewise any attempt by the management company to sue in its own corporate name for the non-payment of service charges may be ineffective.[51]

[6.13] If it is the case that the conveyancing documents have created a regime in which it is intended that the management company should have no role in the delivery of services during the developer-and-owners' phase it follows that, where that regime is implemented, the accounts of the management company will have nothing to say about the service charges paid by unit owners to the developer, nor anything about how the developer has dealt with the expenditure of those service charges. Likewise, although such a management company is still required to hold an AGM, that AGM is not primarily concerned with those issues (because they are matters to which the management company as such is not a party).

[6.14] Respondents to the ODCE Consultation Process indicated that, even in cases where underlying conveyancing documents envisage the management company discharging only the deferred role summarised in paragraph [6.09], "current industry practice" is that this is not usually what actually happens, and that the management company starts taking on an active operational role during the developer-and-owners' phase.

[6.15] Although it is not primarily a company law issue, the ODCE finds it curious as to why, if it is desired that a management company should have a significant operational role throughout the developer-and-owners' phase, the underlying property law arrangements put in place seem to often provide otherwise.

[6.16] However what may be a company law issue is the question of whether, or on what terms, it is appropriate for the directors of a management company to effectively take over what (in the relevant property law documents) were intended to be the responsibilities of the developer during the developer-and-owners phase, before the date on which the company is legally obliged to do so. The consequence of doing so may be that the company will thereby become the target of complaints, ill-feeling or even legal proceedings in respect of matters which would otherwise have had to be dealt with directly by the developer. Even if the directors of the management company are nominees of the developer, their duties as directors of the management company are owed primarily to the management company as a

---

[51] See *Tyrrelstown No. 4 Management Ltd v. Okonkwo*, unreported, Dublin Circuit Court, 19 October 2006 an account of which was contained in *The Irish Times* of 20 October 2006.

separate legal entity. These duties include the obligation to act in the management company's best interests[52] – a set of interests which may not necessarily be identical to whatever, at the relevant time, are the best interests of associated companies, such as those of the developer of the multi-unit development.

[6.17] Accordingly, in cases where underlying conveyancing documents envisage the management company discharging only the deferred role summarised in paragraph [6.09], it seems to the ODCE that, before agreeing to assume managerial burdens sooner than such agreements contemplated, management company directors need at the least to satisfy themselves that to do so is in the best interests of the management company as a separate legal entity.

[6.18] The ODCE does not contend that management company directors should *never* agree to take on such a role earlier than the date envisaged in conveyancing documents. There may well be other circumstances which would point to the management company's best interests being served by doing so, even allowing for disadvantages such as those described in paragraph [6.16]. For example if the management company does not have an operational role during the developer-and-owners' phase, there will probably be significantly less potential accountability and transparency for unit owners. Where the collection and expenditure of service charges falls to be dealt with by the developer directly, it therefore follows that such matters will be accounted for in the financial statements of the developer's company. The unit-owners (because they are not members of the developer's company) are not entitled to receive the financial statements of that company, nor to attend its AGMs at which those financial statements fall to be considered.[53]

[6.19] As previously stated, company law does not lay down what should be the activity and operational role of any sort of company: management companies included. Accordingly, the ODCE does not express a view as to the desirability of the operational role of a management company being organised along the lines outlined in paragraphs [6.09], [6.10] or otherwise. These are all legitimate options, explicitly set forth in conveyancing documents which purchasers of units in a multi-unit development enter into with the benefit of advice from their own solicitors.

[6.20] Irrespective of what way the commencement of the operational role of the management company is dealt with, what conveyancing documents seem frequently to provide is a role for the management company's auditors, or those of the developer's company, in 'ascertaining and certifying' service charges. Ostensibly this is an alternative sort of safeguard which, if full effect can be given to it, might be thought to be a sufficient alternative to accounting for the service charges in financial statements prepared under the Companies Acts. However giving effect to provisions of this sort appears to be problematic as a result of difficulties which the audit

---

52 See paragraphs [18.07] to [18.14].

53 In their response to the ODCE Consultation Process the Irish Property Facilities Managers' Association observed that these aspects might result in additional disinclination on the part of unit-owners' to pay their service charges.

profession have identified with clauses of this sort.[54]

[6.21] Respondents to the ODCE's Consultation Process have indicated that in practice what often occurs during a period when ownership of common areas remains vested in a developer, along with responsibility for the provision of shared services, is that an *ad hoc* committee of unit owners is established,[55] so that they are able to become involved in contributing to relevant decision-making, and to start becoming apprised of issues for which they will ultimately have to assume formal responsibility once the transfer of the common areas to the management company occurs. This seems an eminently sensible strategy to adopt. However, without wishing to detract from its undoubted merits, the ODCE nonetheless thinks it appropriate to observe that, from a company law perspective, an *ad hoc* residents' committee of this sort, and the valuable work which it does, should not be confused with the role of a properly constituted board of directors of a management company in which both the legal power and duty to discharge a property management role has become formally vested on the basis of underlying property law agreements. Furthermore if a situation were to develop in which the members of the *ad hoc* committee were *"persons in accordance with whose directions or instructions the directors of the [management] company [were] accustomed to act"*, this would make the members of that committee shadow directors of the management company.[56]

---

54 See paragraphs [39.08] to [39.17]

55 Usually at the invitation of the developer and/or the managing agent.

56 Section 27(1) of the Companies Act 1990. As shadow directors the persons concerned would be subject to many of the same duties, obligations and liabilities as if they were formally appointed directors of the company.

7.0 A CRITICAL DISTINCTION: MANAGEMENT COMPANIES CONTRASTED WITH MANAGING AGENTS

[7.01] Before proceeding further, we think it important to emphasise one critical distinction which, in the ODCE's experience, is not always fully appreciated.

Management companies

[7.02] A management company generally exists only in relation to, and for the benefit, of *one* individual multi-unit development.[57] It is structured so that ultimately it is to be exclusively owned and controlled by all the owners of the units within that development. In general it is intended that such a company will operate on a not-for-profit basis.[58]

[7.03] As a matter of property law[59] management companies take on an obligation to provide services to multi-unit developments.[60] Similarly (and again as a matter of property law) multi-unit development owners each assume an obligation to pay service charges *to the management company* to fund the provision of those services.

[7.04] In some cases the directors of a management company may conclude that it is feasible to collect those service charges and to use them directly in the provision of management services. For example the management company may recruit employees such as painters, cleaners, gardeners, etc., and pay them wages in return for their work.[61] Alternatively the management company may enter into one contract with a firm of cleaners, another contract with a firm of painters, another contract with a firm of gardeners, etc., each of those contracts providing that—in return for periodic payments—the employees of those firms will do various acts of

---

57 Although in larger multi-unit developments there may sometimes be more than one management company – for example separate management companies for separate apartment blocks.

58 However this does not mean that the company is constrained to operate each year in such a way that its income never exceeds its expenditure. To that extent it is permissible for the company to make a 'profit' in the elementary sense of having a surplus of income over expenditure. Such a surplus will usually be simply transferred to the company's reserves, perhaps its sinking fund or building investment fund. Alternatively the surplus may be the means for expending a little more than was originally intended on servicing the multi-unit development *e.g.* a decision to do some additional planting & gardening, or to upgrade the CCTV system. What does not normally happen, however, is that there would be some sort of a distribution of such a surplus to the company's members, *e.g.* in the form of a dividend.

59 *Not* company law.

60 Such as those outlined in paragraphs [3.04] to [3.10]. As noted in paragraphs [6.08] to [6.12] the management company may not necessarily have undertaken to provide these services during all or any of the developer-and-owners' phase. See also paragraph [7.12].

61 Dealing also with all the usual obligations of an employer under employment law, health & safety legislation, etc.

painting, cleaning, gardening, etc.

[7.05] It is more common, however, for the directors of a management company to conclude that they do not 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. Such directors will generally opt instead to engage the services of a *managing agent*.

Managing agents

[7.06] 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/or provision of all or most of the services which are needed by management companies on a day-to-day basis. Managing agents are businesses which operate on a for profit basis, the profit being derived from the fee which the managing agent charges one or more management companies for making his/her services available to that management company. Typically managing agents will be concerned in the management of several different estates or complexes; or as many as several dozen in the case of some of the largest firms.

[7.07] A more detailed account of the role of managing agents can be found in Section 6 of the booklet *Buying and Living in a Multi-Unit Development Property in Ireland* published by the National Consumer Agency.[62] In addition management companies will undoubtedly find it useful to consider also the document *Management Company / Managing Agent Standard Contract Terms and Conditions Checklist* which is one of the outputs of the National Consumer Agency's Multi Unit Development Stakeholder Forum.[63]

[7.08] Ordinarily, it is a contract which underpins the legal relationship between a management company and its managing agent. That contract is made between the management company and the managing agent, not between any individual multi-unit owner(s) and the managing agent. That contract alone determines what are the managing agent's obligations. Unless the contract provides otherwise, the norm is that the managing agent's contractual obligations are owed to the management company – not to the individual multi-unit development owners. However in practice the contractual obligations of the managing agent include some obligations to receive direct communications from the individual multi-unit development owners and to act on them where to do so is within the framework of the standing instructions which the management company, through its directors, have given to the agent.

[7.09] In short—

---

62 See footnote 25.

63 Available at www.consumerproperty.ie.

- where a multi-unit development is located at, say, 16 Parnell Square;

- it will usually be found that the management company associated with such a multi-unit development has a name which may, for example, be "Sixteen Parnell Square Management Company Limited";

- the members of that management company are, or are intended to be, the owners of all the units located in the multi-unit development;

- 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 as "Dublin One Property Services Limited".

[7.10] 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 multi-unit development 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 allegedly 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.

[7.11] In situations of this sort, it is usually inappropriate for individual unit owners to look to company law as a means of seeking to address grievances of this sort. The individual unit 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 unit owner has in relation to Dublin One Property Services Limited, need properly to be addressed to Sixteen Parnell Square Management Company Limited. The members need to exercise their rights[64] to seek to persuade the directors of Sixteen Parnell Square Management Company Limited to exercise whatever rights the management company 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.

[7.12] In situations where the management company's role has not yet commenced as regards the ownership of the multi-unit development's common areas and the provision of shared services to the development, the managing agent will usually have a contractual relationship with the developer who has retained responsibility for those matters. In that situation complaints about the alleged inadequacy of services being delivered by the managing agents may need to be addressed directly to the developer, rather than to the management company.

---

[64] Primarily as the beneficiary of the covenants given by the management company in the conveyancing documents as to the extent and quality of the services which will be provided in respect of the multi-unit development.

8.0 MANAGEMENT COMPANIES AS (I) COMPANIES LIMITED BY SHARES OR (II) COMPANIES LIMITED BY GUARANTEE NOT HAVING A SHARE CAPITAL

[8.01] Irish company law provides for companies of a number of different types.[65]

[8.02] So far as management companies are concerned, to date the large majority have been incorporated as *public companies limited by guarantee not having a share capital* while a minority have been incorporated as *private companies limited by shares*.[66]

[8.03] For the reasons explained below, the option of incorporating as one type of company rather than the other does not always arise. However in many cases there is indeed a choice. Where such an option exists, the decision to incorporate as a public company limited by guarantee not having a share capital, rather than as a private company limited by shares, or vice versa, is a significant choice that has long term consequences for the purchasers of units in the multi-unit development with which the management company is intended to be associated.

[8.04] The long term nature of those consequences stems in part from the fact that company law does not currently provide any means by which a company limited by guarantee can be re-registered as a company limited by shares, or vice versa. Accordingly, what is at stake here is currently something of a "once and for all choice".[67]

[8.05] The choice (where it arises) is one made normally by the developer of the multi-unit development with which the management company is to be associated, in conjunction with his/her professional advisers. In the ODCE's view this decision is one that should be made with careful regard for its long term consequences.

[8.06] Since the law allows the choice in some instances the ODCE does not propose to say that it thinks that in all instances the choice should be exercised in one way, rather than the other. Instead we propose highlighting some of the factors which we understand are often relevant in weighing up which type of company is preferable. The particular relevance of each of these factors will probably vary from one case to another. Accordingly, no significance should be attributed to the order in

---

65 The most common types are *(i)* private companies limited by shares, *(ii)* public companies limited by shares, *(iii)* public companies limited by guarantee not having a share capital, *(iv)* various forms of unlimited companies.

66 It is also possible under the Companies Acts to have a *private company limited by guarantee and having a share capital* but the ODCE is unaware of this option being resorted to with any degree of frequency: or of any advantages which the use of such a company might serve in the case of the typical multi-unit development.

67 However such changes may become possible if/when legislation is enacted by the Oireachtas along the lines recommended in Part B6 of the General Scheme of the Companies Consolidation and Reform Bill prepared by the Company Law Review Group. See further footnote 38.

which we have dealt with them below. Likewise it should not be assumed that the circumstances outlined below are the only factors ever relevant. In this regard we would urge that in every case developers should take specific legal advice in relation to the question of what *in the particular circumstances of their intended multi-unit development* is most appropriate; and should not limit themselves to a consideration of the factors set out below.

How the choice can be fundamentally determined by the number of units in the associated multi-unit development

[8.07] One of the main reasons, it would seem, why management companies have tended to be created as public companies limited by guarantee not having a share capital is that, until 2006, a private company limited by shares was ordinarily permitted to have no more than 50 members.[68] Since many multi-unit developments were constructed with 50 units or more, it followed that, in such instances, it was not feasible to seek to incorporate the associated management company as a private company limited by shares.

[8.08] However since 1 July 2005, it has been possible for a private company limited by shares to have as many as 99 members.[69] Accordingly, there is now greater scope than previously for those incorporating a management company to consider the option of using a private company limited by shares, rather than a company limited by guarantee not having a share capital, even where the management company is intended to serve many a medium-size multi-unit development.[70]

[8.09] On the other hand there is one category of multi-unit development in which, as company law currently stands, it is inappropriate for the associated management company to be incorporated as a company limited by guarantee not having a share capital. That is where the multi-unit development is expected to consist of 6 or fewer housing units. The problem here is that if the number of members of a public

---

68 Section 33(1) of the Companies Act 1963.

69 Section 33(1) of the Companies Act 1963 as amended by Section 7 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006. Note that this amendment, although introduced in a 2006 statute is deemed to have come into operation on 1 July 2005 by virtue of Section 2(3) of the 2006 Act.

70 In determining how many members the company will have it is important to include not only the number of housing units in the associated multi-unit development, but also any of the developer's nominees whom it is desired should remain as shareholders during the developer-and-owners' phase. However this may not be necessary if it is envisaged that the membership of the unit-owners will be deferred until the transfer of the common-areas from the developer to the management company, along the lines outlined in paragraph [6.10]. The fact that a unit may end up being jointly owned by two or more persons is not necessarily a limiting factor because, as noted at paragraph [10.16] to [10.19] it is possible for a management company's articles of association to stipulate that where there are joint owners of a property in the associated multi-unit development, they will together be regarded as holding only a single membership in the management company.

company[71] is reduced below seven, and it carries on business for more than 6 months while the number is so reduced—

> "… every person who is a member of the company during the time that it so carries on business after those 6 months and knows that it is carrying on business with fewer than … seven members .. shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor."[72]

[8.10] In effect what this means is that if there are only 6 or fewer members of a management company which is incorporated as a company limited by guarantee not having a share capital, a situation will quickly arise in which the members lose the protection of limited liability[73] - which is typically one of the major reasons why it was thought appropriate in the first instance to incorporate any sort of a limited company. This is a serious situation which obviously should be avoided.[74]

[8.11] Summarising these two different considerations what we can say is that under Irish company law as it currently stands—

(a) Where the multi-unit development with which a management company is to be associated consists of 6 or fewer units, it is generally inappropriate for the management company to be incorporated as a company limited by guarantee not having a share capital. The better solution[75] is to incorporate such a management company as a private company limited by shares.

(b) Where any multi-unit development with which a management company is to be associated consists of 7 or more units, it is generally possible for the management company to be incorporated as a company limited by guarantee not having a share capital.

(c) Where the multi-unit development with which the management company is to be associated consists of 99 or fewer units it is possible for the management company to be incorporated as a private company limited by shares. However this figure may need to be reduced in respect of each nominee of the developer by whom it is envisaged that shares in the management company will be held during the developer-and-owners' phase.

---

71 A term which includes a company limited by guarantee not having a share capital, as explained in paragraph [8.27].

72 Section 36 of the Companies Act 1963.

73 See sub-paragraph (e) of paragraph [4.04].

74 However it is worth noting that the Company Law Review Group has recommended that Section 36 should not be re-enacted in the legislation envisaged in their *General Scheme of Companies Consolidation and Reform Bill*, as to which see footnote 38.

75 Subject, however, to the other factors outlined below to which consideration needs also to be given.

(d) Where the numbers are such as to permit a choice between the two company types, it is appropriate to have regard to other factors: including those outlined in the paragraphs below.

The extent to which the capital maintenance rules of company law may influence the choice

[8.12] Another reason why, when there is a choice, management companies tend more often than not to be incorporated as companies limited by guarantee not having a share capital may be that, with such companies, it may be considered that it will be easier for the company to operate free from the rules concerning the maintenance of share capital which apply under the Companies Acts to all companies incorporated with a share capital.

[8.13] Where the management company is incorporated as a private company limited by shares *ipso facto* it is a company with a share capital. That share capital may be very small in amount (the sums of €1 each paid, or promised to be paid, by each of the persons to whom a share in the management company is allocated) but it is nonetheless a share capital to which the usual capital maintenance rules apply. These are detailed and complicated rules of company law, a full treatment of which is beyond the scope of this handbook.[76] Suffice to say that the ODCE can understand how persons responsible for incorporating a management company, or advising thereon, might sometimes conclude that one of the advantages of forming the management company as a company limited by guarantee not having a share capital (rather than as a private company limited by shares) is that it will generally leave the management company outside the limiting scope of many of those rules.

[8.14] Where it is intended to incorporate a management company as a private company limited by shares one of the capital maintenance rules to which careful regard will have to be had is the principle that, in general, ordinary shares of a company, once issued, cannot be cancelled by some simple administrative act. In general the only ways that ordinary shares can be cancelled are—

(a) if the company has taken the steps envisaged under Section 72(2) of the Companies Act 1963, which includes *inter alia* a requirement that the decision to reduce the company's capital is confirmed by an order of the High Court; or,

(b) assuming the company's articles of association so permit, by converting the relevant ordinary shares into redeemable shares[77] and duly redeeming them;[78] or,

(c) if the appropriate steps are taken following a situation in which it has

---

76 For a full account see Courtney *The Law of Private Companies* (2nd edition, Tottel Publishing, 2002) at Chapter 18.

77 In accordance with Section 210 of the Companies Act 1990.

78 In accordance with all the relevant requirements of Part XI of the Companies Act 1990.

been possible for the shares to have been acquired by the company "otherwise than for valuable consideration".[79]

[8.15] Having regard to the way in which the developers of many Irish multi-unit developments wish that they or their nominees should remain members[80] of management companies not only during the company's developer-only phase, but also during the whole of the developer-and-owners' phase, it will usually be the case that those planning the structure of the management company will need to pay careful attention to the mechanics of how the involvement of those developer's nominees is eventually to cease.

[8.16] It is common practice for the first members of a management company to be nominees of the developer of the associated multi-unit development, and for those persons to continue as members up to the end of the developer-and-owners' phase.[81] As each of the units in the associated multi-unit development is sold, the number of the management company's members continues to grow during the developer-and-owners' phase until eventually the members of the company are each of the developer's nominees and each of the unit owners. Usually it is envisaged that when eventually the development is completed, the membership of the developer's nominees in the management company should cease; so that the management company can embark on its owners-only phase with a membership consisting only of each of the owners of the properties in the associated multi-unit development.

[8.17] Where the management company is a company limited by guarantee it is possible to structure its articles of association so that the membership of the developer's nominees automatically ceases at the end of the developer-and-owners' phase; with the effect that the voting entitlements that previously attached to those members ceases also to be of any relevance. Alternatively it may be a condition of the transfer of the common areas from the developer to the management company that such of the developer's nominees as held shares in the management company will simply resign as members at the time of that transfer. In a company limited by guarantee not having a share capital, the absence of any share capital associated with anyone's membership means that simple steps like these are enough to bring a full end to the membership of the developer's nominees.

[8.18] However where the management company is a private company limited by shares the situation is more complex. Suppose for example that 2 "A" shares of €1 each have been allocated to the developer's nominees upon incorporation of the company, and that as each of (say) the 100 apartments in the associated multi-unit development is sold 1 "B" share of €1 is allocated to each apartment purchaser.[82] Following the sale of the last apartment the share capital of the management

---

79 Section 41(2) of the Companies (Amendment) Act 1983.

80 Often with weighted voting entitlements: see paragraphs [12.04] to [12.09].

81 See paragraph [5.03].

82 For the purpose of this example it is assumed that the "A" shares will carry enhanced voting rights.

company will consist of €102 represented by 100 "B" shares and 2 "A" shares. When it is time for the developer's nominees to withdraw from the company their two "A" shares cannot simply be cancelled, unless in accordance with one of the ways outlined in paragraph [8.14]. Unless those responsible for incorporating the management company consider those options feasible, it may be that they will thus conclude that the better option may be to incorporate the management company as a company limited by guarantee not having a share capital.

Formalities associated with changes in membership upon a sale of a property in the associated multi-unit development and the extent to which they may/should influence the choice

[8.19] Even where it is envisaged that the eventual number of the management company's members will be such as to permit the company to be incorporated as a private company limited by shares, another reason—as the ODCE understands it—why management companies are, more often than not, incorporated as companies limited by guarantee not having a share capital (rather than as private companies limited by shares) is because of a view that in a guarantee company it is easier to deal with changes of membership, *i.e.* the formalities concerning membership of the management company which arise whenever there is a sale of any of the properties located in the associated multi-unit development.[83]

[8.20] From a company law perspective[84] the ODCE is not persuaded that this particular consideration is one to which significant weight should be attached when choosing whether to incorporate a management company as a guarantee company without a share capital, rather than as a private company limited by shares.

[8.21] It is true that in the case of a private company limited by shares it is necessary that the articles of association "restrict the right to transfer its shares",[85] that share certificates be issued to members,[86] and that any transfer of a member's shares must be in writing[87] and usually accompanied by delivery-up of the share certificate previously issued to the transferring member.[88] Accordingly, on a sale of a unit in the multi-unit development where the associated management company was incorporated as a private company limited by shares, the formalities which will have to be attended to as regards membership in the associated management company include completion of a share transfer form,[89] signature of that document by or on behalf of the transferor and transferee,[90] delivery of that document to the secretary

---

83 *"To allow for seamless transfers of membership"*, as one respondent to the ODCE's Consultation Process put it.

84 We acknowledge that there may be other considerations which are relevant from other perspectives *e.g.* those of conveyancing and property law.

85 Section 33(1)(a) of the Companies Act 1963, as amended by Section 7 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006.

86 Section 86 of the Companies Act 1963.

87 Section 81 of the Companies Act 1963.

88 Regulation 25(b) of Table A, Part I.

89 Regulation 23 of Table A, Part I.

90 Regulation 22 of Table A, Part I.

of the management company together with the vendor's share certificate, registration of the transfer by the management company including the amending of the relevant particulars in its register of members,[91] and the issue by the management company of a new share certificate to the purchaser of the unit.

[8.22] Superficially, it might seem that, by incorporating the management company as a company limited by guarantee not having a share capital, it should be possible to reduce these formalities. For example, as there is no share capital in a management company, there is obviously no obligation on it to issue share certificates: and hence no need for such certificates to be delivered up by outgoing members, or for new certificates to be issued to incoming members.

[8.23] In practice, however, many management companies incorporated as companies limited by guarantee not having a share capital issue "membership certificates". Where that is so, the integrity of the system of having membership certificates will necessitate that the outgoing member's membership certificate will have to be delivered up, and a new one issued to the incoming member.

[8.24] Moreover there is an obligation on all management companies[92] to maintain a register of members[93] and that will necessitate the incoming member's name and address having to be entered in the register, and a record made of the cessation of the outgoing member's membership. This can only be done when some appropriate documentation is furnished to the secretary of the management company: which includes those relevant particulars; which can properly be construed as an application by the incoming member for membership of the management company;[94] and which has been signed by or on behalf of both the outgoing and incoming member in a manner which enables the management company to be satisfied as to its authenticity.

[8.25] For these reasons, it seems to the ODCE that even where the management company is incorporated as a company limited by guarantee not having a share capital (rather than as a private company limited by shares), the appropriate formalities involved in dealing with the cessation of the outgoing member's membership, and the commencement of the incoming member's membership, are not so materially less burdensome as to warrant the choice between the two company types being simplistically determined on that basis alone.

[8.26] Furthermore, the ODCE notes that the Company Law Review Group has recommended that company law should be changed to provide that, even where a

---

91 See paragraphs [11.01] to [11.17].

92 Including those which were incorporated as companies limited by guarantee not having a share capital.

93 See paragraphs [11.01] to [11.17].

94 Some form of an application, whether express or implied, seems essential. Section 31(2) of the Companies Act 1963 provides that, aside from the first members of a company following its incorporation, the membership of subsequent members is derived from their *agreement* to become a member, as well as their name being duly entered in the register of members.

management company is incorporated as a company limited by shares, there should be an easing of the formalities required upon a transfer of shares.[95] The CLRG's *General Scheme of Companies Consolidation and Reform Bill* envisages that—

> (1) Where the constitution[96] of a residential management company stipulates that the only holders of shares are to be the holders of a particular estate or interest in land, then the conveyance, assignment or transfer (other than by way of security) of such holder's estate or interest shall operate to transfer the shares of that holder.
>
> (2) Any transferee of a share or shares pursuant to subhead (1) shall deliver a copy of the conveyance, assignment or transfer to the company within two months of its date, and the company shall treat such document as a transfer of the relevant share or shares.[97]

Availability of audit exemption

[8.27] The consequences of a company being entitled to avail of audit exemption, and the detailed rules governing its eligibility to do so, are outlined in paragraphs [32.01] to [32.14]. For present purposes, the most significant of the rules to note is that if a management company has been incorporated as a company limited by guarantee not having a share capital it is not entitled to avail of audit exemption. This follows from the fact that only a private company is eligible to avail of audit exemption,[98] and a company limited by guarantee not having a share capital is regarded in Irish company law as a public company. (The terminology here may seem somewhat confusing but in short the Companies Acts provide that the term "public company" means "a company which is not a private company."[99])

[8.28] From the responses to the ODCE's Consultation Process it is apparent that many people consider it disadvantageous that audit exemption is not available to management companies incorporated as companies limited by guarantee not having a share capital. Accordingly, to the extent that this is or should be a relevant factor,[100] it may be a reason (when the choice exists) to favour incorporating a management company as a private company limited by shares rather than as a

---

95 But only as regards management companies; not public and private companies in general.

96 The document which, under the CLRG proposals, will replace what is currently a company's memorandum and articles of association.

97 Head 33 of Part A3 of the General Scheme.

98 Section 32(1)(a) of the Companies (Amendment) (No.2) Act 1999.

99 Section 2(1) of the Companies (Amendment) Act 1983. However it should be noted that companies limited by guarantee not having a share capital are not *public limited companies*, or PLCs as those sorts of companies are frequently described. In the same section 2(1) a PLC is defined as "a public company limited by shares or a public company limited by guarantee and having a share capital …[etc]": a definition which does not encompass a (public) company limited by guarantee *not* having a share capital.

100 For an outline of the ODCE's view on the extent of the advantages and disadvantages see paragraphs [32.15] to [32.19].

company limited by guarantee not having a share capital. The ODCE emphasises, however, that the availability of audit exemption is only one of several factors that need to be considered. In our view the choice should never simplistically be made for that reason alone.

Availability of filing exemption

[8.29] Furthermore, as a public company, it is not possible for a management company which was incorporated as a company limited by guarantee not having a share capital to take advantage of the exemption under which certain small private companies limited by shares—

(a) enjoy a derogation from the usual requirement to submit copies of their profit & loss accounts and directors' reports with their annual returns to the CRO, and

(b) are required to file only an abridged version of their balance sheet.[101]

[8.30] Again, the non-availability of this exemption for companies limited by guarantee not having a share capital is another factor to which some persons may decide to have some regard when choosing whether to incorporate a management company as a private company limited by shares, rather than as a company limited by guarantee not having a share capital.

[8.31] Once again, the ODCE suggests that a choice should never be made on this basis alone. Furthermore, it seems to the ODCE that even if a management company is incorporated as a private company limited by shares, and so entitled to avail of filing exemption, the desirability of doing so is something to which the company's directors will have to have careful regard. The non-availability of full accounts in the CRO is an issue which may be of concern to persons making preliminary inquiries as to whether they want to take any more concrete steps towards purchasing a property in the associated multi-unit development.

Inclusion of members' names and addresses in annual returns to the CRO

[8.32] Another practical consequence of whether a management company is a company limited by shares, rather than a company limited by guarantee not having a share capital, is that in the former case the annual return of the company to the CRO is required to contain a list of the names and addresses of all of the members of the company. The corresponding details are not required to be included in the Annual Return of a company which is limited by guarantee and does not have a share capital.[102]

---

101 Section 8 of the Companies (Amendment) Act 1986.

102 See *note twelve* in Form B1, which is the prescribed form for the purposes of Section 125(1) of the Companies Act 1963, as substituted by Section 59 of the Company Law Enforcement Act 2001. Form B1 can be downloaded at www.cro.ie/ena/forms.aspx.

[8.33] It is possible that, in some instances, people might take the view that the current freedom not to have to disclose members' names and addresses in annual returns to the CRO is a reason in favour of incorporating a management company as a company limited by guarantee not having a share capital, rather than as a private company limited by shares. However, it should be recalled that even where a management company is not required to include members' names and addresses in its annual returns, the statutory obligation remains to maintain a register of members which itself is a record that can be inspected as of right by any member of the public.[103] Accordingly, the names and addresses of members will still be a matter of public record.

---

[103] See paragraphs [11.01] to [11.11], footnote 140 especially.

9.0 THE MANAGEMENT COMPANY'S ARTICLES OF ASSOCIATION

[9.01] All management companies have their own *articles of association* which are the company's 'internal regulations' and set out key rules for the conduct of its affairs.

[9.02] In general, it is permissible for companies to adopt their own articles and, so long as they do not seek to adopt any rules which conflict with any minimum standards set down in the Companies Acts or elsewhere in the law, the members of a company enjoy a large measure of freedom to adopt whatever rules best suit their own purposes, and facilitate the effective internal management of their company. Choosing what sort of rules to include in articles of association is something in relation to which it is very desirable that those incorporating companies should take legal advice. A well drafted set of articles, appropriate to the particular needs and circumstances of the company, ought to assist in its proper operation and governance.

[9.03] However, the Companies Acts also offer companies the option to avail of certain sets of standard articles, either in whole or in part. Moreover, the law provides that where a company's own articles do not deal *alternatively* with any of the matters dealt with in those standard articles, the relevant elements of the standard articles[104] will operate by default.

[9.04] In the case of a private company limited by shares, the relevant set of standard articles are those contained in Part II of Table A in the First Schedule of the Companies Act 1963. The standard articles so far as a company limited by guarantee not having a share capital are those contained in Table C in the First Schedule of the Companies Act 1963.

[9.05] Applying the principles summarised in paragraphs [9.03] and [9.04]—

- The regulations set forth in Part II of Table A, or Table C, are those which *may* be adopted in whole or in part by a management company – depending on whether the company was incorporated as a private company limited by shares (Part II of Table A) or as a company limited by guarantee not having a share capital (Table C).

- Where a management company adopts all or part of the relevant Table it is permitted to supplement its articles with additional regulations of the company's own choosing.

- If no articles for the management company are registered when it is incorporated the regulations in the relevant Table are deemed to be the

---

[104] *i.e.* Those *not* dealt with alternatively in the articles which the company has adopted for itself.

regulations of the company.

- If articles of association are registered for the management company then, in so far as the articles do not exclude or modify the regulations contained in the relevant Table, "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."[105]

[9.06] In practice, what this means is that for many management companies their articles adopt fairly significant elements of the provisions contained in Part II of Table A or Table C. Sometimes this is done on the basis of a statement such as the following—

> "The Articles of Association of the company shall be those contained in Table C in the First Schedule of the Companies Act 1963 except that—
>
> (i) regulations 23, 40 and 45 shall not apply;
>
> (ii) regulation 47 shall be replaced by the following provisions—
>
> 47A. The directors shall … [etc]
>
> (iii) the following additional regulations shall apply—
>
> 70. A member may … [etc]
>
> 71. The directors may … [etc]."

[9.07] Because so many management companies adopt articles which include many of these standard regulations we have included the contents of Part II of Table A in Appendix III of this handbook.[106] The contents of Table C are set out in Appendix IV of this handbook.

---

105 Section 13 and 13A of the Companies Act 1963. (Section 13A was inserted by Section 14 of the Companies (Amendment) Act 1982.)

106 Note that Part II of Table A adopts all but 6 of the 138 regulations contained in Part I of Table A – the default set of regulations for a *public* company limited by shares. Part II includes 6 different regulations which are to be used in substitution for those omitted regulations. In addition it contains 3 supplementary regulations to deal with matters which have no parallels in Part I of Table A. For ease of reference Appendix III has been prepared on a consolidated basis, as explained in the title thereto on page 215 of this handbook.

[9.08] The extent to which a management company is free to have articles of association in such varying formats—adopting as much or little of Tables A or C as the original subscribers or subsequent members think appropriate—means that it is very important that anyone connected with a management company should obtain a copy of its articles of association and study carefully the regulations of the company as stated therein.[107]

Altering a management company's articles of association

[9.09] In all management companies, we think it wise for the members and directors to keep their articles of association under frequent review. The most 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 always prudent for legal advice to be sought before doing so.

[9.10] Once the management company has concluded that a change is desirable, the process of changing the articles is fairly straightforward. What is required is a special resolution[108] of the members passed at a duly convened AGM[109] or EGM[110] of the company or, where the company's articles permit such a procedure, by means of a written resolution of all the company's members.[111] The precise terms of the intended alteration, and the purpose and consequences of the change should be specified in the notice convening the relevant meeting.

[9.11] There are, however, certain limits on the extent to which a company may alter its articles. Amongst those limitations are the following—

(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 2006, or with the general law. So, for example, since the Companies Acts require that the accounts of a management company which was incorporated as a company limited by guarantee not having a share capital 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;

(b) in general it is not permissible for unwilling members to be required, by means of an alteration to a company's memorandum or articles of association, to have to bear an increased liability to contribute to

---

107 See paragraph [6.03] for details of how to obtain a copy.

108 A special resolution is one passed by not less than 75% of the votes cast by such members of the company as, being entitled to do so, vote in person or, where proxies are allowed, by a proxy at a general meeting of which not less than 21 days' notice, specifying the intention to propose the resolution as a special resolution, has been duly given. See Section 141(1) of the Companies Act 1963.

109 A proposed amendment of the company's articles of association will be special business at an AGM. See paragraphs [24.51] to [24.55].

110 See paragraphs [25.01] to [23.32].

111 See paragraphs [28.01] to [28.04].

the share capital of a company, or otherwise to pay money to the company;[112]

(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.

It is beyond the scope of this handbook to deal any more extensively with these limitations.[113] As stated previously it is always prudent for legal advice to be sought in relation to any contemplated change in a company's articles of association.

[9.12] Where a management company has changed its articles of association the company must forward a printed copy of the relevant resolution to the CRO within 15 days after the meeting at which the change occurred.[114] The relevant Companies Office form is Form G1. The form must be accompanied by an up-to-date copy of the company's articles of association embodying the alterations effected by the adoption of the resolution.[115]

Dealing with alleged breaches of the management company's articles

[9.13] Section 25(1) 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.

[9.14] One of the consequences which flows from this statutory provision is that where there is alleged non-compliance by a company with its articles, members may have an entitlement to sue the company to enforce the provisions of the articles.[116] This, in fact, is the primary means of seeking to enforce articles of association. It is a right for members to assert themselves and not one in relation to which – usually – there is any enforcement alternative available which the ODCE is capable of taking.[117]

---

112 Section 27(1) of the Companies Act 1963. However under Section 27(2) an alteration whereby a member's liability is so increased can become binding on the member in any case where he or she agrees in writing, either before or after the alteration is made, to be bound thereby.

113 See Courtney, *The Law of Private Companies* (2nd edition, Tottel Publishing, 2002) paragraphs [3.065] to [3.088].

114 Section 143 of the Companies Act 1963.

115 Regulation 5 of the European Communities (Companies) Regulations 1973, S.I. 163 of 1973.

116 But see paragraphs [40.16] to [40.18] concerning the extent to which this is usually possible only where the alleged breach is of a members' personal rights under the articles, not the company's rights under the articles.

117 As compared with instances where it is alleged that the company or any of its officers has breached an obligation imposed on them directly by the Companies Acts, rather than merely by the company's own articles.

10.0 MEMBERSHIP OF A MANAGEMENT COMPANY

Other relevant ODCE publications

[10.01] 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.*[118] Much of the material in that booklet is relevant to the members of a management company. However to assist users of this handbook, some matters which are particularly pertinent will be repeated here (sometimes in an abridged manner, other times in a manner which is more detailed and tailored specifically to the likely circumstances of the typical management company).

The inextricable link between ownership of a unit in multi-unit development and management company membership

[10.02] In general, membership of a management company is carefully linked to ownership of one of the housing units in the multi-unit development with which the management company is associated; and *vice versa*.

[10.03] When a multi-unit development in which it is envisaged that a management company will have a role is first being marketed, it is usually a condition of the sale of each of the individual units that the purchasers will each become members of the management company. This is often underpinned by a recital in the related conveyancing documents for each property which records the fact that the purchaser is, or has applied to become, a member of the management company.

[10.04] Admittedly, there are some multi-unit developments in which the documentation is structured in such a way that multi-unit development owners become members of the management company only when the developer has completed the estate and transferred the common areas etc thereof to the management company.[119]

[10.05] Frequently, the interlinked nature of ownership of a housing unit located in a multi-unit development and management company membership is further underpinned by a provision in the conveyancing documents under which each unit owner covenants along the lines that he/she will—

> "not assign or sub-let the unit … (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."

---

118 Available at www.odce.ie/en/media_decision_notices.aspx.

119 See paragraph [6.10].

[10.06] Finally, from a legal perspective, the link between unit ownership and management company membership is often reinforced by a provision in the management company'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 units located within the multi-unit development with which the management company is associated.

[10.07] Because the conveyancing documents under which properties located in multi-unit developments typically require that the owners of the units should also be members of the associated management company, it is generally the case that a purchaser's solicitor will attend to the task of ensuring that his/her client does in fact become such a member of the management company.[120]

[10.08] Aside from these private law provisions which seek to ensure that all unit owners become members of the associated management company, we think it important to draw attention to one practical consideration. As the ODCE sees it, there is every good reason why the owner of a unit located in a multi-unit development should want to be a member of the associated management company, and few good reasons why they should not. It appears to the ODCE that a common misconception is that the liability of unit owners in a multi-unit development to pay service charges arises from their membership of the management company. For reasons which we are endeavouring to explain in this handbook, that is rarely so. In most cases a unit owner's primary liability to pay service charges arises not as a matter of company law,[121] but under the property law obligations which are derived from the conveyancing documents which regulate the conditions on which owners holds their housing units. Accordingly, those service charges would be payable even if the owner sought to not become a member of the management company, or sought to relinquish his/her membership. Membership of the management company does, however, enable the unit owner to have a say in how well they wish their multi-unit development to be managed, and how efficiently they seek to have their service charges spent – primarily through members' entitlement to financial statements concerning the management company, to seek explanations from the company's directors, to participate in the election of those directors and to seek election as a

---

120 In this regard the ODCE understands that the standard "Requisitions on Title" commonly used by solicitors, and published by the Law Society of Ireland, contain a series of enquiries which are designed to assist the purchaser's solicitor in advising his/her client in relation to many issues concerning the management company and the associated multi-unit development, and to help ensure that the client will become a member of the management company on completion of the purchase.

121 Although some respondents to the ODCE's Consultation Process pointed out that sometimes the articles of a management company stipulate that members are required to pay their service charges. However as we understand it, stipulations of that sort are usually secondary to obligations principally assumed under the corresponding property law documents which the members entered into when they acquired their properties in the multi-unit development. Furthermore an obligation on members to pay regular amounts to the company, such as amounts in the nature of service charges, must be expressly stipulated in a company's articles, and cannot be implied from them. See *Bratton Seymour Service Co Ltd v. Oxborough* [1992] BCLC 693.

director where the unit owner is willing to hold that office.

Cessation of membership

[10.09] It follows that, just as the property and company documentation is structured to ensure that new owners of units in a multi-unit development always become members of the associated management company, so too departing owners should cease to be members.

[10.10] Where the management company was incorporated as a company limited by shares the process by which membership is relinquished is through a transfer of the member's share from the vendor of the property in the associated multi-unit development to the purchaser thereof. The method of transfer will usually be set out in the management company's articles of association and the purchaser's solicitors will usually be involved in ensuring compliance with it.

[10.11] Where the management company was incorporated as a company limited by guarantee not having a share capital, the Companies Act do not specifically deal with the question as to how members can relinquish their membership. In some instances this leads management companies to adopt articles of association which specifically provide for a means by which a member may relinquish membership. For example, the ODCE has come across 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".[122]

[10.12] Perhaps more commonly, some management companies 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, the ODCE has 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

[10.13] In the case of companies limited by shares, the Companies Acts contain specific provisions regulating share certificates.[123]

[10.14] Where, however, a management company was incorporated as a company limited by guarantee not having a share capital the absence of a share capital means that members cannot be furnished with share certificates as such. However, it is quite permissible for such a management company to provide in its articles of

---

122 It should be noted that this is not one of the regulations found in Table C.

123 See paragraph [8.21].

association for members to be provided with membership certificates. Nonetheless, it should be noted that Table C articles do not contain any such regulation. Accordingly, where a regulation along these lines is required by a management company, it must be specifically adopted otherwise than by merely incorporating standard Table C regulations.

[10.15] The ODCE is aware of some instances in which management companies have customarily issued membership certificates even though their articles of association fail to include any provisions dealing with matters such as the issue, recall and cancellation of membership certificates. Where this is the case, it seems to the ODCE that it would be in the interests of the management company's good governance for the articles to be amended to provide specific internal rules of the company governing membership certificates.

Membership of the management company where two or more persons are the joint owners of a unit in the associated multi-unit development

[10.16] This is something that should be dealt with expressly in any management company's articles of association.

[10.17] If the company was incorporated as a private company limited by shares and has adopted regulation 64 of Part I of Table A[124] then—

> "Where there are joint holders, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose, seniority shall be determined by the order in which the names stand in the register."

In the ODCE's view what this means is that if only one of the joint holders attends the meeting, whether in person or by proxy, they are entitled to cast the vote of all the joint members. It is only if both or all of the joint holders are in attendance (whether in person or by proxy) that seniority becomes an issue.

[10.18] No similar provision is included in the Table C articles. Accordingly, where a management company is incorporated as a company limited by guarantee not having a share capital, it is advisable for a regulation along these or similar lines to be included in the company's articles.

[10.19] Sometimes management companies adopt regulations which go further and specify unequivocally that the joint owners of a property shall be treated as having a single membership of the management company. For example. the ODCE has come across regulations along the following lines—

> "Where two or more persons are the joint owners of a unit in the associated

---

[124] See paragraph [9.05] concerning the extent to which the articles of association of any particular management company incorporated as a private company limited by shares may not necessarily include all of the regulations contained in Table A.

multi-unit development they shall together constitute one member and the joint owner whose name appears first in the company's register of members shall exercise the voting and other powers vested in such member."[125]

In the ODCE's view, this sort of a regulation has a different effect to the regulation cited in paragraph [10.17]. What it seems to envisage is that if Ann & John are the joint owners of a property, but they are recorded in the company's register of members as John & Ann, then the voting and other powers in the management company are exercisable only by John: not by Ann, unless John appoints her as his proxy.[126]

---

125 Note that this is not one of the regulations contained in Table A or C.

126 As to proxies see paragraphs [27.01] to [27.16]. Note that, in the ODCE's view, if that is what they wish, it should be possible for John & Ann to ask the company secretary to amend the register of members by reversing the order in which their names are listed.

11.0 THE MANAGEMENT COMPANY'S REGISTER OF MEMBERS

[11.01] Section 116 of the Companies Act 1963[127] has the effect that—

(a) every company must keep a register of the company's members containing details of—

(i) the names and addresses of each member;

(ii) the date at which each member was entered in the register as a member and the date at which any person ceased to be a member, *and*

(b) where the company was incorporated as a company limited by shares, its register of members should in addition contain—

(iii) a statement of the shares held by each member, distinguishing each share by its number so long as the share has a number, and of the amount paid or agreed to be considered as paid on the shares of each member.

[11.02] These entries must be made within 28 days of the person agreeing to become a member.[128] Likewise, any changes whereby a person ceases to be a member should also be recorded within 28 days after the production to the company of "evidence satisfactory to the company of the event whereby [the person] ceased to be a member."[129]

[11.03] As outlined above,[130] the process of becoming or ceasing to be a member of a management company is usually bound up closely with the conveyancing which takes place when someone is selling their unit in a multi-unit development and someone else is buying it from them. Typically the solicitors for at least one of the parties will be in communication with the secretary of the management company informing them of the changes which are afoot at such a time. In practice, this is one of the main ways by which management companies should be enabled to keep their registers of members up to date.

The importance of the register of members

[11.04] In any company, the register of members is an important document. For example it is the primary means a company has for knowing who are its members, so that all those entitled to be notified of AGMs and EGMs can be duly notified and

---

127 As amended by Section 20 of the Companies (Amendment) Act 1982.
128 Section 116(2) of the Companies Act 1963.
129 Section 116(3) of the Companies Act 1963.
130 Paragraph [10.07].

financial statements etc duly forwarded to them. Likewise, it is important in clarifying who is, or is not, entitled to vote at AGMs and EGMs.

[11.05] Accordingly, it is important for members of a management company to ensure that their addresses as recorded in the company's register of member are accurate and kept up-to-date. If not, it is probable that, through their own fault, members may end up failing to receive important documentation which they ought to have.

[11.06] Knowing who is a member of the company is important also for management companies so that they are in a position to be able to send service charge demands to the right people at the right addresses. Accordingly, it is important for management companies, when a unit in the associated multi-unit development is being sold, to be vigilant about checking to ensure that they are given whatever information they need to ensure that their register of members is kept up to date.

[11.07] Another way in which the register of members is important is that it is a means by which members of the management company may seek to ascertain the necessary contact details for one another. An ability for members to get in contact with one another may be essential in order that alliances can be formed amongst members, perhaps with a view to bringing about change in the company; or, at any rate, so that members who seek to bring about change should have at least the means to gauge the extent to which other members might be willing to support them. For example, a member who wishes to become a director of the management company might wish to write to other members (whose names and addresses he/she does not already know) for the purpose of seeking to persuade them that they should vote for him/her at a forthcoming AGM of the company. Alternatively, where some members wish to have an EGM convened for some particular purpose,[131] they may need to try to gain the support of at least some other members so as to satisfy the statutory pre-condition that a members' request for an EGM must come from members whose combined voting rights at general meetings of the management company is at least 10% of the total voting rights of all the company's members.[132]

Details regarding former members must be kept in the register of members

[11.08] It is implicit from the requirement that the register contain "the date at which any person ceased to be a member" that the register should continue to contain details of former members – even long after the date on which a person ceased to be a member of the company. Irish company law does not contain a provision similar to that which applies in the United Kingdom, whereby it is permissible for an entry relating to a former member of a company to be removed from its register of members provided that more than 10 years have elapsed from the date on which the

---

131 *e.g.* to pass an ordinary resolution pursuant to Section 182 of the Companies Act 1963 seeking to have a director removed from office.

132 See paragraphs [25.07] to [25.11].

cessation of membership occurred.[133]

Inspecting the register of members

[11.09] Every company's register of members, including that of a management company, is a public document. In general, it may be inspected free of charge by any member of the company, and by any other person on payment of a small fee.

[11.10] The relevant provisions relating to inspection of the register of members are as follows—

(a) the management company may, on giving notice by advertisement in a newspaper circulating in the district in which the registered office of the company is located, close its register of members at any time or times not exceeding 30 days in total in any calendar year;[134]

(b) except where the management company's register of members is closed in accordance with paragraph (a), the register must during business hours[135] be open to inspection—

- by any member of the company free of charge;
- by any other person on payment of six cent, or such less sum as the company may prescribe.[136]

(c) Any person (whether a member or otherwise) may require that he/she be furnished with a copy of the management company's register of members, or any part thereof, on payment of 4 cent for every 100 words (or fractional part thereof) required to be copied. The copy requested must be sent to the requester within 10 days from the date the request is received.[137]

(d) If any inspection sought is refused, or if a requested copy is not sent, the company and every officer of the company who is in default may be prosecuted;[138] furthermore the High Court may compel an immediate inspection of the register or direct that it be sent to the person requesting it.[139]

---

133 Section 121 of the (UK) Companies Act 2006, replacing Section 352(6) of the (UK) Companies Act 1985 (under which the relevant period was 20 years).

134 Section 121 of the Companies Act 1963.

135 Subject to such reasonable restrictions as the company may in general meeting impose, so that no less than 2 hours in each day are allowed for inspection.

136 Section 119(1) of the Companies Act 1963.

137 Section 119(2) of the Companies Act 1963.

138 Section 119(3) of the Companies Act 1963.

139 Section 119(4) of the Companies Act 1963.

[11.11] The ODCE has heard of instances in which members of management companies have encountered difficulties when seeking to know who are the other members of their company. We have been told of instances in which directors, secretaries or agents have told members that such details are confidential and cannot be disclosed. We think it important to emphasise that this is not so.[140] As outlined above the contents of a management company's register of members is information which is available as of right not only to other members of the company, but to third parties also.[141]

Where the register of members should be kept

[11.12] Ordinarily, a management company's register of members should be kept at the company's registered office.[142] However, if the work of making up the register is done at another office of the company, it may be kept at that other office.[143] Similarly, if the management company arranges with some other person for the making up of its register to be undertaken on behalf of the company by that other person, it may be kept at the office of that other person at which the work is done.[144] In both those latter instances, however, it is essential that the other location at which it proposed to keep the register of members is located with the State.[145]

[11.13] In any case where the register of members is kept at a location other than the management company's registered office, notice must be sent to the CRO detailing the place at which the register is kept.[146]

[11.14] Having regard to these requirements, it is permissible for a management company's register of members to be kept at the offices of its managing agent[147] – provided *either* that the office of the managing agent is also the registered office of the management company, *or* the office of the managing agent can properly be regarded as an office of the management company and the work of making up the register is done at that office - perhaps by the secretary of the company, *or* the management company has arranged with the managing agent that he/she will

---

140 It is possible that this misunderstanding may flow from the fact that where a management company is established as a company limited by guarantee not having a share capital there is a dispensation from the usual requirement that the names and addresses of the company's members be included in the company's annual return filed with the CRO: see paragraph [8.32]. However it must be emphasised that this is a dispensation from a separate statutory obligation. It does not in any way extend to providing also that in such cases there is an equivalent derogation from the normal rules under Section 119 of the Companies Act 1963 which apply to all companies.

141 The ODCE understands, however, that restrictions on the use of such information may arise under the Data Protection Acts. In this regard the Office of the Data Protection Commissioner has drawn our attention to its document entitled "Restrictions on the use of publicly available data for marketing purposes", available at www.dataprotection.ie.

142 Section 116(5) of the Companies Act 1963.

143 Section 116(5)(a) of the Companies Act 1963.

144 Section 116(5)(b) of the Companies Act 1963.

145 Section 116(6) of the Companies Act 1963.

146 Section 116(7) of the Companies Act 1963.

147 This may be possible by agreement with the managing agent.

undertake the task of making up the register on the company's behalf.

[11.15] In the ODCE's view, management companies need to think carefully before concluding that keeping their register of members at their managing agent's office is an appropriate step. It has to be understood that it is the management company's directors and secretary who are primarily responsible for maintaining the register of members,[148] and, accordingly, the register should never be seen as something for which entire responsibility can be devolved to the managing agent.[149]

[11.16] On the other hand, a consideration which management company directors need to bear in mind when determining where their company's register of members is to be maintained is that the location should be one to which ordinarily the public have access for at least two hours a day during business hours on all business days of the year (except those, which cannot exceed 30 days in total in the calendar year, during which the register is lawfully closed). Public access of that sort is required by the statutory provisions outlined in paragraph [11.10] and it is the duty of each director of the company, and its secretary, to ensure that the requirements of the Companies Acts are complied with by the company.[150] Accordingly, in the ODCE's view, it would be a breach of that duty[151] for the directors and secretary of the company to choose for the company's register of members to be kept at a location which was not so accessible by the public to the required extent, or at which – even if the location is physically capable of being accessed – there is no-one in attendance to enable interested persons to effectively exercise the rights of inspection which the Oireachtas has vested in them.

[11.17] If directors opt to leave their management company's register of members with a managing agent it would be prudent for them to ensure that it is expressly stipulated in their contract of engagement with the managing agent that the register of members is and will remain the property of the management company and must be delivered up to the management company's directors upon demand.

---

148 Section 116(9) of the Companies Act 1963 makes it an offence for the company or "any officer who is default" to fail to comply with the requirements of Sections 116(1) to (6). Also 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.

149 However note Section 120 of the Companies Act 1963 under which, if a company's register of members is kept at the office of some person other than the company (e.g. the managing agent in the scenario discussed above) and by reason of any default on his/her part the company fails to comply with *(i)* the requirement that notice be given to the CRO of any change in the place where the register is kept or *(ii)* inspection rights to which anyone is entitled under Section 119 are refused, or there is a failure to duly send someone a copy of the register of extracts from it, that other person (*e.g.* the managing agent in the scenario discussed above) may be prosecuted for the relevant defaults in the same way as if he/she was "an officer of the company who is in default".

150 Section 383(3) of the Companies Act 1963 as replaced by Section 100 of the Company Law Enforcement Act 2001.

151 Though one which, in practice, probably occurs quite frequently.

12.0 THE VOTING POWER OF MANAGEMENT COMPANY MEMBERS

The statutory default position

[12.01] Section 134(e) of the Companies Act has the effect that unless the articles of the company do not make other provision as regards the voting power of members, every member of a management company which was incorporated as a private company limited by shares has one vote in respect of each share held by him/her, while every member of a management company which was incorporated as a guarantee company without a share capital share has one vote.

[12.02] In practice, however, it is almost inconceivable that a management company would ever be incorporated without articles of association which clearly specify the voting power of the members; and where such voting entitlements are specified in articles, it is those entitlements which prevail: not the default "one member one vote" provisions of Section 134(e).

Where standard Table A or Table C articles apply

[12.03] In some instances management companies simply adopt the standard voting provisions of the Table A or Table C regulations.[152] Where so—

(a) If the management company was incorporated as a private company limited by shares, regulation 63 of Part I of Table A provides that ordinarily on a show of hands[153] each member present in person or by proxy[154] shall have one vote (so however that no individual shall have more than one vote) and on a poll[155] every member shall have one vote for each share of which he is the holder.

(b) If the management company was incorporated as a company limited by guarantee not having a share capital, regulation 22 of Table C provides that every member of the management company will have one vote.

The more usual situation during the developer-only phase, or the developer-and-owners' phase: weighted voting in favour of the developer

[12.04] What is more common in practice, however, is that when the developers of multi-unit developments are causing management companies to be incorporated on their behalf, articles of association are adopted in which the default "one member one vote" provisions are replaced by provisions under which additional voting power

---

152 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

153 See paragraph [12.12].

154 See paragraphs [27.01] to [27.16].

155 See paragraphs [12.13] to [12.19].

is reserved to the developer (if he/she intends being a member of the company himself/herself), or to his/her nominees (in the event that the developer does not personally intend to become a member of the management company).

[12.05] For example, suppose that a management company is being incorporated for a multi-unit development that is expected to consist of 100 apartments. This means that once all the apartments are sold, there will be 100 members of the company. However, if the management company is incorporated as a company limited by guarantee not having a share capital, there must also be seven subscriber members of the company.[156] In such a case, the sort of provision which may be put in the management company's articles of association will typically be along the following lines—

> "Every member other than a subscriber member shall have one vote. A subscriber member shall have fifty votes."

[12.06] The effect of a provision like this – and it is just one example of the many different sorts of weighted voting provisions which are found in practice – is that if all 100 unit-owner members turn up at a general meeting of the company along with the seven subscriber members (or a proxy[157] on their behalf) the unit-owner members can muster at most only 100 votes in favour of, or against, any proposed resolution, whereas the developer's nominees have 350 votes. In this way, the developer's nominees will always be able to outvote the unit-owner members.

[12.07] The ODCE is aware of the extent to which weighted voting provisions of this sort are controversial and, in the views of many people, unfair and undesirable. However, from the perspective of company law they are not considered unlawful, impermissible or inherently inappropriate. Indeed, in English law it has been held that it was possible to have weighted voting rights in a company which were specifically tailored to ensure that one member of the company could not be removed from the office of director, even though English company law, like Irish company law, provides a statutory entitlement for members of companies to remove directors from office by ordinary resolution "notwithstanding anything in [the company's] articles [of association]".[158]

[12.08] Moreover, another significant problem faced by members who feel aggrieved when they experience situations in which their voting power, and that of others in their situation, is regularly 'trumped' by the voting power of the developer's nominees under weighted voting provisions in the management company's articles is that it is very often the case that it would have been apparent when they were first entering into a potential legal relationship with the developer and/or the management company that the voting power in the company was divided in such a

---

156 The subscribers are the persons (usually nominees or associates of the developer) who sign the documents by which the management company comes to be incorporated.

157 See paragraphs [27.01] to [27.16].

158 *Bushell v. Faith* [1970] 1 All ER 53. For the usual power of members to remove a director see paragraphs [14.10] to [14.15].

weighted manner. Management companies will usually have been incorporated before the sale of any unit in the multi-unit development, and a solicitor acting for a purchaser of a multi-unit will usually have been furnished with a copy of the management company's articles of association as part of the conveyancing process.

[12.09] The real difficulty here for those who feel aggrieved about weighted voting powers reserved for developers is that they are not unlawful *per se*,[159] and where a person has joined a company in which that is how the voting power is allocated, company law does not usually allow them to seek to have the voting power altered when they afterwards discover that the *status quo* works against their interests.[160]

How votes are taken

[12.10] Where a management company was incorporated as a company limited by guarantee not having a share capital and has adopted regulation 16 of Table C[161] then—

> "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.

---

159 Although the Law Reform Commission has recently recommended that the law should be changed to provide that there be one vote per unit owner in a management company, and a prohibition on weighted voting. See paragraph 3.56 of the Commission's *Report on Multi-Unit Developments* the details of which are at footnote 11.

160 In this regard it is notable that the Law Reform Commission (although having taken the position as outlined in footnote 159 as regards new management companies incorporated *after* any law is brought into effect by the Oireachtas implementing the Commission's recommendation) concluded that "it would not be possible from a constitutional perspective, to limit the property rights of those involved in multi-unit developments to the extent of imposing all the recommendations proposed in Part C to existing developments [including the recommendation about 'one member one vote' and the prohibition on weighted voting]. In particular, the Commission considers that, where the memorandum and articles of association of existing owners' management companies have created weighted voting arrangements which greatly favour a developer – which is not itself prohibited under the current company law code – it is not appropriate to interfere retrospectively with those arrangements. That is so even though they do not appear, in the Commission's view, to conform to good governance standards and as a result the Commission has recommended that future owners' management companies must operate on a 'one unit one vote' basis." See paragraph 3.56 of the Commission's *Report on Multi-Unit Developments* the details of which are at footnote 11.

161 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company incorporated as a company limited by guarantee not having a share capital may not necessarily include all of the regulations contained in Table C.

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."

[12.11] Where a management company was incorporated as a private company limited by shares and has adopted regulation 59 of Part I of Table A,[162] an almost identical provision applies except that an additional sub-paragraph (d) is included which provides—

> (d) by a member or members holding shares in the company conferring the right to vote at the meeting being shares on which an aggregate sum has been paid up equal to not less than one-tenth of the total sum paid up on all the shares conferring that right."

[12.12] Where provisions such as these apply, then the default position is that a vote should be decided on a show of hands. This means simply counting how many people are in attendance at the meeting and entitled to vote, and then counting how many of them choose to vote in favour of the proposition by holding up their hands when asked to do so.

[12.13] The significant difference between voting on a show of hands and voting by a poll is that on the show of hands then, even if some members have different voting entitlements by reason of controlling more shares or having weighted voting privileges,[163] such persons when voting on a show of hands have no more votes than the members who have only one share or vote.

[12.14] So, for example, in the example where there are 100 members who are unit owners, each with one vote, and seven developer's nominees each with 50 votes, then if 10 unit-owners attend the meeting along with only one of the developer's nominees, it will be possible for the outcome of a vote decided on a show of hands to be significantly in favour of whatever viewpoint the unit-owners favour. For example, the outcome of the vote taken on a show of hands may be 10 in favour and 1 against.

[12.15] In that situation, the developer's nominee will almost invariably demand a poll – a step which the regulations above envisage may be made either before or

---

162 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company incorporated as a private company limited shares may not necessarily include all of the regulations contained in Table A.

163 Such as those described in paragraphs [12.04] to [12.06].

immediately after the taking of the vote on the show of hands.

[12.16] What happens then is that the vote is taken by adding up the total of the votes which each person present (whether a member or the proxy[164] of a member) is entitled to cast, and then determining how many of those votes are in favour of the proposition.

[12.17] So, for example, in the hypothetical case above (10 unit owners each with one vote, one developer's nominee with 50 votes) the total possible vote is 60. If the unit owners all vote in favour of the proposition but the developer's nominee votes against, the resolution will be defeated by 50 votes to 10.[165]

[12.18] Where a management company has adopted regulation 62 of Part I of Table A or regulation 19 of Table C,[166] then a poll demanded on the election of a chairman of the meeting, or on a question of adjourning the meeting is required to be taken forthwith. A poll demanded on any other question is to be taken at such time as the chairman of the meeting directs.

[12.19] Where a management company has adopted regulation 60 of Part I of Table A or regulation 17 of Table C,[167] then a poll is ordinarily to be taken in such manner as the chairman of the meeting directs.

Challenges to the voting entitlements of anyone claiming to be entitled to vote

[12.20] Articles of association frequently provide how challenges of this sort are to be dealt with. For example, where the management company has adopted either regulation 67 of Part I of Table A or regulation 24 of Table C[168]—

> "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."

Where there is an equal number of votes both in favour and against the proposition

[12.21] Where a management company has adopted regulation 61 of Part I of Table

---

164 See paragraphs [27.01] to [27.16].

165 Alternatively if the developer's nominee holds proxies from the six other subscriber members he controls a total of 350 votes: compared with the 10 votes held by the unit-members. In that situation the outcome of a vote taken by poll would probably be defeat by 350 votes to 10.

166 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

167 Ditto.

168 Ditto.

A or regulation 18 of Table C[169] then—

> "Where there is an equality of votes, whether on a show of hand 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."

Loss of voting power in the event that a member owes any money to the management company – including any arrears of service charges

[12.22] Where a management company has adopted regulation 66 of Part I of Table A or regulation 23 of Table C[170] then—

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

[12.23] A larger proportion of respondents who contributed to the ODCE's Consultation Process in relation to this aspect agreed that provisions like these are appropriate in the articles of a management company. Among the viewpoints expressed was the perspective that collecting service charges on time is already difficult enough, and that on some occasions provisions like regulation 66 or 23 help to bring in service charges – sometimes even immediately before the beginning of an AGM.[171]

---

169 Ditto

170 Ditto.

171 Management companies may however wish to consider the views of the Law Reform Commission expressed at paragraphs 7.15 and 7.16 of the Commission's *Report on Multi-Unit Developments* (details at footnote 11)—

> "It is common in some jurisdictions to suffer a loss of voting rights in the owners' management company as a result of a failure to pay the service charges. This measure is triggered as a result of default on payment after a specified time. On the one hand, this appears to be a reasonably proportionate solution. A key function of the owners' management company is, after all, to manage the building through the control and expenditure of the service charge and the building investment fund. It could be argued, however, that by buying property in a multi-unit development, the unit owner automatically buys into a range of rights and responsibilities, the nature of which would justify a fine or a restriction on rights in the event of non-payment of the contributions. In any case, such a restriction generally applies only to regular voting and not votes which require a special resolution.
>
> On the other hand however, loss of control over maintenance and upkeep of a unit owner's portion of freehold could be regarded as an unwarranted curtailment of the constitutional right to private property. As a result, the Commission considers that denial of voting rights is not a suitable remedial device."

13.0 How Management Company Directors are Appointed, How Many Directors the Company Can Have, and how that Number Can Be Changed

The first directors

[13.01] In general the first directors of any company are nominated by the persons causing the company to be incorporated. During the incorporation of the company, those persons are required to sign documents containing their consent to become the directors of the company upon its incorporation.[172] Then, once the company is duly incorporated, those persons are deemed to have been appointed as the first directors of the company.[173]

[13.02] In the case of a management company, this has the consequence that the company's first directors are usually the developer of the multi-unit development with which the company is to be associated, and/or persons connected with the developer: such as business partners, employees, etc.

The initial number of directors

[13.03] Every company is required to have at least two directors.[174] Thereafter, there is no upper limit contained in the Companies Acts on how many directors the company may have, although it is usual to find this issue regulated to some extent by the company's articles of association.

[13.04] For example, where the management company's articles incorporate either regulation 75 or Part I of Table A or regulation 32 of Table C[175] then—

> "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."

[13.05] In general, this determination in writing is implicit in the subscribers' act of naming whatever number of directors are listed in the original incorporating documents of the company. Accordingly, in the ODCE's view, if a management company is incorporated with (say) 4 directors it follows that unless and until steps are taken subsequently to alter the maximum number of directors which the company should have – it is authorised to have up to 4 directors.

---

172 Section 3(3) of the Companies (Amendment) Act 1982.

173 Section 3(5) of the Companies (Amendment) Act 1982.

174 Section 174 of the Companies Act 1963.

175 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

Subsequent alterations to the number of the company's directors

[13.06] Articles of association usually provide for the means by which the maximum number of the company's directors may be increased. So, where a management company's articles incorporate either regulation 97 of Part I of Table A or regulation 46 of Table C[176]—

> "The company may from time to time by ordinary resolution increase or reduce the number of directors …"

[13.07] Accordingly, continuing the previous example in which the company was incorporated with 4 directors, if it is desired to increase that number to 7 what is needed[177] is an ordinary resolution of the company members. A members' resolution is needed also if it is sought to reduce the maximum number of directors.

[13.08] However such a resolution is not necessary if the members are content to simply let the maximum number of directors remain at its existing level. So if, as in the last example, the members previously resolved that the number of directors should be 7 it is permissible for the company to operate subsequently with a lesser number of directors.[178] This might occur where, for example, one or more of the directors has retired, died or been removed from office without someone replacing them.

[13.09] It is important to recall however that where a management company is operating with a fewer number of directors than its authorised maximum the company's articles of association may empower the directors to add other people of their own choosing to the board of directors – without any involvement on the part of the members. Continuing the previous example, if the maximum number of directors has been increased to 7, 7 directors hold office for a year or two, but then the number gradually falls back so that it reaches (say) 3, the legal position will usually be that the company has a board of directors which consists of 3 serving directors and 4 vacancies.

[13.10] Many management company's articles of association provide limited power for the company's directors to appoint replacement or additional directors in the case of positions on the company's board which fall vacant in between general meetings of members, or which were left vacant following the last general meeting of members. (Directors appointed in this way are usually said to be *co-opted* to the company's board.) For example where the management company's articles

---

176 Ditto.

177 Assuming the foregoing regulations are part of the management company's articles.

178 Although other complications may arise if the number falls below two, or whatever higher number is prescribed in the company's articles as the necessary quorum of directors. See further paragraphs [23.37] to [23.39].

incorporate either regulation 98 of Part I of Table A or regulation 47 of Table C[179] —

> "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[180] 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 regulations …"

[13.11] For the foregoing reasons, it seems to the ODCE that—

(a) It is advisable where the members of a management company wish to increase the size of a board of directors over its existing level to check that such a higher number is authorised under the company's articles of association – *either* because the company was incorporated with at least as many directors as the company will once again have when the increase takes effect, or because there was previously a resolution of the members increasing the size of the board appropriately which has not since been superseded. If not, the intended increase in number should be authorised by an appropriate ordinary resolution of the members.

(b) Boards of directors before purporting to exercise any powers of co-option vested in them by provisions of a management company's articles of association (such as those found in regulation 98 of Part I of Table A or regulation 47 of Table C[181]) should check what is the highest number of directors authorised under the company's articles of association.

(c) In situations where a board of directors is operating with fewer directors than the maximum permitted number, the management company's members, if they wish to curtail the directors' power to appoint additional persons to be directors, should pass an ordinary resolution reducing the maximum number of directors which the company may have.

[13.12] Determining how many directors a management company ought ideally to have is a question which will depend on the individual circumstances of every case. However in the ODCE's view a number of factors will generally be relevant—

---

179 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

180 A casual vacancy includes any vacancy other than one caused by the passage of time or a director retiring by rotation: Palmer's *Company Law*, (Sweet & Maxwell, 25th edition, 1992 to 2008) paragraph 8.007. Retirement by rotation is dealt with at paragraphs [14.16] to [14.19] and Appendix II.

181 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

(a) Having too few directors may mean that the directors are not sufficiently representative of the membership as a whole *e.g.* if there are only (say) two directors in a multi-unit development consisting of (say) 200 units;

(b) To ensure the best pooling of different viewpoints, it may be desirable to have representation of different "types" of multi-unit owner, *e.g.* at least some persons from categories such as the following—

(i) owner-occupiers;

(ii) investor-owners (i.e., landlords);

(iii) owners (whether occupiers or landlords) who have been involved with the complex for a number of years – and who, accordingly, may have considerable insight and experience into its profile and needs;

(iv) owners who have acquired their properties more recently – and who, accordingly, may come to the board of directors with fresh ideas;

(c) Having too many directors may, on the other hand, lead to its own problems *e.g.* difficulties in convening meetings, or situations in which too many different viewpoints make it harder, rather than easier, to reach a consensus;

(d) Quite separately from the abstract question as to what might be the ideal number of directors, the more usual problem in many management companies is that only a small number of persons are willing to give of their time towards serving on the board of directors.

[13.13] Assuming the number of the company's directors is below the maximum number (if any) authorised by the company's articles of association, it is within the power of the members of a company at any time to appoint additional directors by ordinary resolution, whether at an AGM, EGM or by written resolution. However, where it is desired to do so at an EGM, it is important that the notice convening the meeting should have included the appointment of directors as one of the items of business to be dealt with at the meeting.[182] At an AGM, however, "the election of directors in the place of those retiring" *may* be ordinary business of which advance notice does not have to be specifically given,[183] but this may depend on the company's articles of association. This is the case, however, where the management company's articles incorporate either regulation 53 of Part I of Table A

---

182 See paragraphs [25.26] to [25.29].

183 See paragraphs [24.36] to [24.38].

or regulation 10 of Table C.[184]

[13.14] In many management companies the company's articles of association curtail the extent to which it is possible for a person, other than an outgoing director or someone whose appointment is favoured by the existing directors, to be elected "from the floor" unless certain formalities have been dealt with first. For example, where the management company's articles incorporate either regulation 96 of Part I of Table A or regulation 45 of Table C[185] —

> "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 day appointed for the meeting there shall have 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 person for election and also notice in writing signed by that person of his willingness to be elected."

Where provisions along these lines apply, it is obviously essential for persons who seek to be appointed directors at an AGM or EGM to ensure that they can bring themselves within the relevant rules.

---

184 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

185 Ditto.

14.0 How Management Company Directors Cease To Hold Office

[14.01] A director after he/she has been appointed remains a director until some act occurs whereby they cease to hold office. Companies' articles of association usually set out in detail what are the events whereby such a cessation comes about.

[14.02] For example where the management company was incorporated as a private company limited by shares and its articles incorporate regulation 91 of Part I of Table A[186]—

> "The office of director shall be vacated if the director—
>
> (a) ceases to be a director by virtue of section 180 of the Act; 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 for more than 6 months absent without permission of the directors from meetings of the directors held during that period."

[14.03] Similarly, where the management company was incorporated as a company limited by guarantee not having a share capital and its articles incorporate regulation 39 of Table C[187]—

> "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

---

186 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

187 Ditto.

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."

[14.04] Accordingly, where any of those events occurs in a management company which has adopted regulations along these or similar lines, the relevant director will be deemed to have vacated his office. Notification of that fact should then be made to the CRO within 14 days.

Resignation

[14.05] In practice, the most common of these instances is the straightforward resignation of a director.

[14.06] What is notable about both these regulations,[188] however, is that they envisage that a director's resignation should be by means of a written notice. Accordingly, where such regulations apply, any director who wishes to resign ought to do so in writing and ensure that his/her notice of resignation is duly delivered to the company secretary.

[14.07] In situations where there are only two remaining directors of a management company, a decision by one of them to resign means that the management company would be left with only one director: contrary to the requirement that every company should have at least two directors.[189] However, as noted below,[190] the remaining director in such a situation usually has power under the management company's articles of association to remedy the situation – provided another director, whether a member or a non-member, willing to accept office can be found. Where this is not so, or in the yet more extreme situation where both surviving directors wish to resign, the ODCE's view is that the better and responsible course is for the remaining director(s) or the director(s) who plan to resign to assist in the convening of an EGM of the company for the purpose of appointing new directors

---

188 *i.e.* regulation 91 of Table A, regulation 39 of Table C.

189 Section 174 of the Companies Act 1963.

190 See paragraphs [23.37] to [23.39].

prior to their intended resignation. This will allow the members an opportunity to consider the critical phase into which their company is entering[191] and hopefully to find some persons willing to take on the office of director.

[14.08] It is important to emphasise, however, that the fact that one of the consequences of a director's resignation may be to leave the company with fewer directors than the statutory minimum, is not of itself a legal impediment to the validity of his/her resignation. It is not the case that the "second-last or last" director of the company enjoys any less of an entitlement to resign from his/her office than those directors who opted to resign sooner.[192] The validity of the appointment of a director, or his/her ceasing to hold office, depends on compliance with the company's articles of association, and not from the notice of the appointment/cessation being registered in the CRO.[193]

[14.09] Leaving aside the question of validity, the ODCE takes the view, as expressed above, that in a management company it would be irresponsible for directors to resign and cause the company to operate with less than the statutory minimum of directors without having exhausted in advance the steps permitted by the law to secure replacement directors.

Removal from office

[14.10] Although it is not stated in either of the regulations cited at paragraphs [14.02] and [14.03], it is possible in every instance for a director to be removed from office.[194] Under the Companies Acts (rather merely than individual companies' articles of association) a director may normally be removed by ordinary resolution of the members.[195]

---

191 As noted at paragraph [42.16], the fact that a management company has no directors can of itself provide a basis on which the management company might end up being struck off the Register of Companies.

192 Some confusion may exist here because the CRO ordinarily will not register a Form B10 which purports to record the cessation to hold office of any of a company's directors, the effect of which is to leave the company with fewer directors than the statutory minimum of two. However this is not because of a contention that the underlying resignation / cessation is invalid, but rather because of the requirement under Section 195 of the Companies Act 1963 that such a notice must be sent to the CRO *by the company* – rather than by any individual director thereof. Where a company has only one remaining director such a person ordinarily lacks power to do anything other than, if the articles permit, to co-opt an additional director or directors, or to convene a general meeting of the company: see paragraphs [23.37] to [23.39]. Such a sole director does not ordinarily have power to cause a valid Form B10 to be registered in the CRO.

193 *POW Services Ltd v. Clare* [1995] 2 BCLC 435. But, see also footnote 226.

194 "Removal" in this sense effectively means firing the director concerned against his/her will. It is difficult to imagine that a director who was perfectly willing to cease to hold office where such was the will of the members, or the likely outcome of any vote on their part, would be willing to suffer the indignity of being formally "removed" from office when such an outcome could be avoided by the simple expedient of sending a letter of resignation to the company.

195 Section 182(1) of the Companies Act 1963. (Somewhat more elaborate steps are necessary to remove a director in the case where the company is a private company and

[14.11] Passing a resolution to remove a director from office is however a particularly significant and serious act of the members of a management company. For that reason, the law includes a number of inbuilt safeguards for directors.

[14.12] Firstly, what is needed is an ordinary resolution of the members which must be obtained at a validly convened general meeting of the company *i.e*. one of which the full period of notice must have been validly given to all members of the company entitled to receive notice of the meeting, and to the company's auditors.[196] Accordingly, before a member or group of members of a management company even begins the process of attempting to have one or more of the company's directors removed from office, it is important for them to verify that they are of sufficient number or voting power so as to be entitled, if the need arises, to convene an EGM of the company against the wishes of its directors.[197] A group of members representing less than 10% of the voting power in the company is ordinarily not entitled to require that an EGM be held[198] and this threshold is not reduced simply because the business which such a group wants the EGM to consider is the proposed removal of a director or directors.[199]

[14.13] Secondly, extended notice must be given of the resolution seeking to remove the director[200] - not simply the period of notice which is adequate so far as normal EGMs are concerned.[201] The requirement for extended notice[202] means that, in general,[203] the resolution to remove the director will not be effective unless the proposers of the resolution have given notice of the intention to move it not less than 28 days before the meeting at which it is moved; and the company has then given the members notice of the resolution at the same time and in the same manner as it has given notice of the meeting at which the resolution is subsequently moved.[204]

[14.14] Thirdly, where notice is given of an intended resolution to remove a director, the director concerned may request that the company should circulate to all

---

under its articles of association it is envisaged that the director concerned should hold office for life. It is unlikely that such a director would be found in the typical management company, even where it was incorporated as a private company limited by shares. In the still less likely event that such a director existed in a management company that was incorporated as a company limited by guarantee not having a share capital, the additional statutory complication concerning life directors does not apply because such a management company is not a private company.)

196 See further paragraphs [24.17] to [24.19].

197 See further paragraphs [25.07] to [25.11].

198 Section 132(1) of the Companies Act 1963.

199 *Pedley v. Inland Waterways Association Ltd* [1977] 1 All ER 209.

200 Section 182(2) of the Companies Act 1963.

201 See paragraphs [25.15] to [25.17].

202 See Section 142 of the Companies Act 1963.

203 Except where it is the other directors of the company who have resolved to submit the proposal to the EGM.

204 Alternatively, where giving notice in that way is not practicable, Section 142(1) envisages that notice can alternatively be given "by advertisement in a daily newspaper circulating in the district in which the registered office of the company is situate or in any other mode allowed by the articles, not less than 21 days before the meeting."

members of the company a written statement[205] by the director for consideration by them.[206] Unless such written representations are received by the company too late for it to do so, the company should ordinarily state the fact that such representations have been made in any notice of the resolution given to members of the company, and send a copy of the representations to every member of the company to whom notice of the meeting is sent.

[14.15] Unless there is full compliance with these requirements any purported removal of a director pursuant to that section will likely be invalid and of no legal effect. Accordingly, the ODCE urges that any members contemplating taking such a far-reaching and significant step as to seek to remove a director, should seek appropriate professional advice before commencing to do so.

Retirement by rotation

[14.16] Many management companies adopt articles of association which include regulations providing for the rotation of directors. Where such regulations apply what it essentially means is that each director of the company ordinarily holds office for only a fixed period of time after which they cease to hold office, unless they are re-elected; or are deemed to be re-elected.

[14.17] For example, where the management company has adopted regulations 92 to 95 of Part I of Table A, or regulations 41 to 44 of Table C then the following provisions apply[207]—

> 92. or 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.
>
> 93. or 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.
>
> 94. or 43. A retiring director shall be eligible for re-election.
>
> 95. or 44. The company, at the meeting at which a director retires in manner aforesaid, may fill the vacated office by electing a

---

205 Which must not, however, be of unreasonable length.

206 Section 182(3) of the Companies Act 1963.

207 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

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.

[14.18] Appendix II contains an example of how these sort of provisions work in practice. As may be apparent from a consideration of that example, while the rules are logical and fair, they require to be thought through carefully as regards what is to happen at each AGM – paying careful attention to what has happened at each of the previous two AGMs, and whether any director has been appointed since the last AGM.

[14.19] A question which sometimes arises is what happens if AGMs of a management company are not held at which, if they had happened, serving directors would have been required to offer themselves for re-election in accordance with the rotation of directors rule. Irish law in this regard appears to be that even if a director should have retired at (say) the 2008 AGM, he/she will be regarded as having remained in office in the event that, for whatever reason, the management company did not hold an AGM in 2008.[208] This question can be particularly relevant during the developer-and-owners' phase of a management company where complaints are made that the directors (usually nominees of the multi-unit developer) have failed to convene AGMs – in some cases even for a number of consecutive years. In the ODCE's view, the failure to hold an AGM, while it should not be condoned, does not ordinarily bring about a situation in which those directors should be regarded as having vacated their office.[209]

---

208 *Phoenix Shannon plc v. Purkey* [1998] 4 IR 597.

209 Although every case has to be considered in the light of what is, or is not, contained in the relevant management company's articles of association. If necessary legal advice should be sought in relation to this question.

15.0 THE MANAGEMENT COMPANY'S REGISTER OF DIRECTORS AND SECRETARIES

[15.01] Like every other Irish company a management company must keep a register containing details of its directors and its secretaries.[210]

[15.02] The particulars required in relation to each director are as follows[211]—

(a) his/her forename and surname, together with any former names;[212]

(b) his/her date of birth, usual residential address, nationality and business occupation;

(c) particulars of any other directorships of bodies corporate, whether incorporated in Ireland or elsewhere, currently held by him/her or held at any time within the last ten years.[213]

[15.03] The particulars required in relation to the company secretary are his/her forename and surname, any former names,[214] and his/her usual residential address. Alternatively if the secretary is a company, rather than a natural person, that company's name and registered office must be specified.[215]

[15.04] When a company is incorporated the names and addresses of its first directors and its first secretary are notified to the CRO in the documents by which the company seeks to be registered.[216] Thereafter, whenever there is any subsequent change among the company's directors,[217] or any change in any of the particulars relating to any of them,[218] those changes must be notified to the CRO within 14 days of the happening of the change.[219] It is the duty of each director and

---

210 Section 195(1) of the Companies Act 1963 as substituted by Section 51 of the Companies Act 1990.

211 Section 195(2) of the Companies Act 1963 as substituted by Section 51 of the Companies Act 1990.

212 Former names do not include any names disused for a period of at least 20 years, or a name which was changed or disused before the person reached 18 years of age. Neither is there any need for the name of a married woman used prior to her marriage to be treated as a former name. See Section 195(15) of the Companies Act 1963 as substituted by Section 51 of the Companies Act 1990.

213 Section 195(3) of the Companies Act 1963 as substituted by Section 51 of the Companies Act 1990.

214 See footnote 212.

215 Section 195(4) of the Companies Act 1963 as substituted by Section 51 of the Companies Act 1990.

216 Section 3(1) of the Companies (Amendment) Act 1982.

217 *e.g.* the resignation, retirement or death of a director; the appointment of additional directors; etc.

218 *e.g.* a change in a director's address.

219 Section 195(6) of the Companies Act 1963 as substituted by Section 51 of the Companies Act 1990. Form B10 is the relevant CRO Form, available at www.cro.ie

secretary of a company to give information in writing to the company as soon as may be of such matters as are necessary to enable the company to comply with its obligations in this regard.[220] For example, a director who changes his/her address should notify the company promptly of this change so that it, in turn, can amend its register of directors and forward the appropriate notification to the CRO.

Inspecting the register of directors and secretaries

[15.05] Every company's register of directors, including that of a management company, is a public document. In general, subject to conditions, the register may be inspected free of charge by any member of the company, and by any other person on payment of a small fee.[221]

[15.06] The register is required to be available for inspection (both by members and non-members) during business hours. However the company is entitled to impose 'reasonable restrictions' on the exercise of this right and can do so either in its articles of association, or by an ordinary resolution of its members at a duly convened general meeting. No restrictions may be adopted, however, which limit the availability of the register of directors for inspection during business hours to less than 2 hours in each day. [222]

[15.07] Both members and non-members may also require the company to supply then with copies of the register on payment of a charge. Where such a request is made the company must comply with it within 10 days of the receipt by the company of the request.[223]

The notifications of who is a director of the company sent to the Companies Registration Office do not definitively determine who is, or is not, a director of the company

[15.08] As noted above[224] the validity of the appointment of a company's *first* directors and secretary flows from the relevant papers being filed with the CRO.

[15.09] However, as regards subsequent changes in the composition of a company's board of directors, the validity of someone's ceasing to be an officer of the company, or the validity of their becoming an officer, does not depend critically upon the CRO being notified of the relevant changes having been made in the

---

220 Section 195(11) of the Companies Act 1963 as substituted by Section 51 of the Companies Act 1990.

221 A fee of no more than €1.27 may be charged from non-members seeking to inspect the register. See also footnote 141, however.

222 Section 195(10) of the Companies Act 1963 as substituted by Section 51 of the Companies Act 1990.

223 Section 195(10A) of the Companies Act 1963 as inserted by Section 91(b) of the Company Law Enforcement Act 2001. The requester must pay a fee of 19 cent for every 100 words, or fractional part thereof, required to be copied as a result of the request.

224 See paragraph [15.04].

company's register of directors.[225] A person becomes, or ceases to be, a director or secretary of the company in accordance with the relevant provisions of the company's articles of association: not in consequence of the relevant change being notified to the CRO. In other words, it is possible that a person may have become, or have ceased to be, an officer of the company, even though details of the change have not yet been filed with the CRO.[226]

Where the register of directors and secretaries should be kept

[15.10] A company's register of directors and secretaries must be kept at the company's registered office.[227] In contrast with the position that applies regarding the company's register of members,[228] it may not be kept elsewhere.

[15.11] As noted below,[229] it seems to the ODCE that in view of company directors' duty to ensure that there is compliance with the requirements of the Companies Acts,[230] the location of a company's registered office should be chosen so as to ensure that it is a place to which ordinarily the public at large have access for at least two hours a day during business hours on all business days of the year. Public access of that sort is required to give effect to the statutory entitlement of both members and non-members alike to inspect the register.[231]

---

225 *POW Services Ltd v. Clare* [1995] 2 BCLC 435.

226 However, where a person is seeking to rely upon the claim that they became a director on a certain date, or ceased to be a director on that date, the fact that no consequential notifications were made to the CRO may be evidence used against them if anyone is querying or disputing that claim.

227 Section 195(11) of the Companies Act 1963 as substituted by Section 51 of the Companies Act 1990.

228 See paragraphs [11.12] to [11.17].

229 See paragraphs [34.07] to [34.08].

230 Section 383(3) of the Companies Act 1963 as replaced by Section 100 of the Company Law Enforcement Act 2001.

231 See paragraph [15.05] to [15.07].

16.0 THE PREDOMINANT ROLE OF THE DIRECTORS AS REGARDS THE MANAGEMENT OF THE MANAGEMENT COMPANY

[16.01] Although it is not specifically required to happen by any express provision of the Companies Acts it is almost invariably the case that, under the articles of association of most companies (management companies included) the power to manage the company is vested predominantly in the company's directors. Where so, the members—save in exceptional circumstances—do not have a parallel power to stay involved in taking decisions relating to the management of the company's business.

[16.02] The usual basis on which this occurs is where the articles of association contain a provision along the lines of regulation 80 of Part I of Table A or regulation 35 of Table C.[232] There are minor and insignificant differences of wording between those regulations. Accordingly, what follows is the text of regulation 35 of Table C (with the elements which differ in regulation 80 of Table 80 shown in italics, the differences noted in the footnotes)—

> "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*[233] or by these *articles*[234] required to be exercised by the company in general meeting, subject nevertheless *to the provisions of the Act and of these articles*[235] and to such directions, being not inconsistent with the aforesaid *provisions*[236] 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."

[16.03] While it is open to any management company to adopt articles of association that do not contain one or other of these provisions, it would be very unusual for a company to do so. Moreover it is a step which, in the ODCE's opinion, should be taken only once legal advice has been sought as to the full implications of any departure from what is the norm in the vast majority of Irish companies.

[16.04] The basic effect of provisions such as these have been neatly summarised as follows by one of the leading Irish company law textbook writers—

---

232 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

233 The words "Companies Acts 1963 to 1983" are used in Regulation 80 of Table A.

234 The word "regulations" is used in Regulation 80 of Table A.

235 The words "to any of these regulations, to the provisions of the Act" are used in Regulation 80 of Table A.

236 The words "regulations or provisions" are used in Regulation 80 of Table A.

> "The powers of the directors are those which the company has delegated to them. If, as is usually the case, the articles provide that the directors may exercise all the powers of the company which are not by the Acts or the articles required to be exercised by the company in general meeting (article 80), the delegation is unrestricted, and the board of directors can do whatever the company could do. They cannot, of course, do anything which is illegal or *ultra vires*, any more than the company in general meeting can.
>
> It follows that the company cannot, in general meeting, validly set aside an action taken by the directors within the powers conferred on them by the articles. Equally the company cannot itself in general meeting take any step which by virtue of its articles it has delegated to the directors." [237]

[16.05] However, although provisions like this vest considerable power in the directors to act without regular reference back to the members, this does not mean that the members in general meeting cannot seek to control the directors. Firstly, provided at least 75% of the votes of the members are in favour of doing so, the members in general meeting can pass a special resolution to amend the company's articles of association, thereby limiting the powers of the directors in such manner or to such extent as may be specified in the underlying resolution. Secondly, the members also have power to seek to remove any of the company's directors.[238] (In both these cases, however, it is very advisable for such far-reaching steps to be contemplated only after legal advice has been taken.)

[16.06] This view of the inter-relationship between the directors' usual managerial powers, and the remaining powers of the company's members, was expressed as follows in one of the leading English cases—

> "A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors; certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders."[239]

[16.07] It follows that where provisions such as these are in place, it is not ordinarily within the power of the members of the company to seek to pass resolutions at general meetings of the company purporting to take managerial decisions in relation

---

237 Keane, *Company Law* (4th edition) (Tottel Publishing, 2007), paragraphs [27.87] to [27.88].

238 See paragraphs [14.10] to [14.15].

239 *John Shaw & Sons (Salford) Ltd v Shaw* [1935] All ER Rep 456.

to the company.

[16.08] Regulations 80 and 35 do however contemplate limited circumstances in which the powers of the directors are subject to powers reserved to a general meeting of the company.

[16.09] In particular, they acknowledge that under the Companies Acts certain decisions are required to be taken by the company in general meeting. One leading author[240] notes that one instance where such a decision of the members would be required is under Section 29 of the Companies Act 1990 which requires the members to pass an ordinary resolution to sanction a substantial property transaction between a director and the company.

[16.10] The regulations likewise acknowledge that there may be instances where the company's articles of association expressly require that certain decisions be exercised by the company in general meeting, rather than by the directors alone in the exercise of their usual managerial power. One obvious example would be the power, where regulation 97 of Part I of Table A or regulation 46 of Table C applies[241] to increase or reduce the number of the company's directors.[242]

[16.11] The other area of members' power acknowledged by regulations 80 or 35 is the apparent scope for the members in general meeting to give "directions" which have the effect of influencing the directors' exercise of their power—

> "subject nevertheless … to such directions, being not inconsistent with the aforesaid *provisions*[243] as may be given by the company in general meeting."

[16.12] At first glance, it might be thought that this is a wide-ranging power for the members of a company (assuming a sufficient number of them are minded to pass the necessary resolutions) to give specific instructions to the directors as to how particular aspects of the company's affairs are to be managed. On further analysis, however, it soon appears that such an interpretation would normally be a mistaken one.

[16.13] The key point to be noted here is that any such "directions" given by the members in general meeting must be not inconsistent with—

(a) the requirements of the Companies Acts;

---

240 Courtney, *The Law of Private Companies* (2nd edition, Tottel Publishing, 2002) paragraph [8.008].

241 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

242 As to which see paragraphs [13.06] to [13.08].

243 The words "regulations or provisions" are used in Regulation 80 of Table A.

(b) the requirements of any of the other provisions of the company's own articles of association.

[16.14] Although aspects of the law in this area remain somewhat less than fully defined by the Irish courts,[244] it would seem that the second of these limitations is—in practice—one which significantly constrains the extent to which members can simply issue instructions to the directors as to how particulars matters are, or are not, to be managed.

[16.15] For example one textbook writer[245] notes that if the direction from the members required the company to expend money[246]—

> "its fulfilment may be thwarted by the fact that the application of reserves is the concern of the directors [under Article 119 of Part I of Table A[247]] or by the fact that whether or not to borrow is their decision [under Article 79 of Part I of Table A, Article 34 of Table C]."

[16.16] This is a difficult area of company law[248] and one in respect of which, if/when it arises in any management company, it is advisable that specific legal advice be taken: whether by the members seeking to interfere with the directors' ordinary powers of management, or by directors confronted with members' resolutions purporting to do so. It is not the purpose of this handbook to analyse it any more extensively. Accordingly, for present purposes, we will conclude this section by stating again that the usual norm in most management companies is that—

(a) the power to manage the business of the company is predominantly vested in the directors;

(b) largely to the exclusion of any corresponding power on the part of the members;

(c) subject, however, to such controls as flow from the power of the members (assuming there is a sufficient majority of them with power to vote who actually vote in favour of such a step) to remove the directors, and to replace them with others, in circumstances where the members

---

244 See the detailed analysis in Courtney, *The Law of Private Companies* (2nd edition, Tottel Publishing, 2002) paragraphs 8.007 – 8.013.

245 Ussher, *Company Law in Ireland* (Sweet & Maxwell, 1986).

246 The very sort of direction which it is likely that members of a management company might be minded to give where they felt that the directors of their company were managing the multi-unit development differently than the members thought appropriate.

247 Note that there is no equivalent provision in Table C.

248 See, for example, the commentary by Courtney *The Law of Private Companies* (2nd edition, Tottel Publishing, 2002) paragraphs [8.014] to [8.018] as to the circumstances in which there may be a *"resurgence of the member' powers"*: such as *(i)* "where there are no directors capable of acting", *(ii)* "where the directors exceed their delegated authority", and *(iii)* "where directors act in breach of their duties".

are dissatisfied with the way in which the directors are or have been managing the affairs of the company.

[16.17] It is important, however, to emphasise that what we are talking about here is the managerial power of the directors vis-à-vis the power of the general meeting in circumstances where a conflict emerges as between the directors and the members as to how the affairs of the company should be managed. The fact that the predominant *power* is ordinarily that of the directors does not mean that members cannot express their views as to how the business of the company should be managed, or that the directors should entirely disregard any such views.[249] It is entirely appropriate for members to seek to communicate their views even if, as a matter of law the articles of the company are such that the directors are not bound to implement those viewpoints. Likewise, it is eminently sensible for directors to listen carefully to the viewpoints of members and to pay careful regard to them before exercising the managerial power entrusted to them under the company's articles.

[16.18] Even in situations where there is a positive engagement between members and directors along the lines sketched in the foregoing paragraph, it is important also for directors to realise that from a company law perspective it is they—and not the members—who are legally responsible for how the managerial and other powers of the directors are exercised. Accordingly, while directors may take comfort in the fact that the steps they propose taking have been asked for by the members, it is not necessarily always the case that implementing the wishes of the members constitutes a proper exercise of the directors' powers to manage the company. To this extent directors always need to think for themselves as to what is in the best interests of the company as a whole – something which does not always coincide with the viewpoint which the most vocal members of the company may articulate from time to time.

[16.19] The sort of instance in which this conflict might typically arise in a management company is, for example, where the members are unhappy with the firm of managing agents engaged by the directors to deal with the day-to-day management of the multi-unit development for which the management company has responsibility. As the ODCE sees it, the power to hire a contractor (such as a managing agent) is part of the business of the management company which, where Article 80 or 35 applies, ought ordinarily to be managed by the directors: not by the members in general meeting. Accordingly, even if the members in general meeting were to purport to issue a direction instructing the directors to replace the managing agent with another firm, it is at least questionable whether this is a permissible interference with the directors' managerial powers as regards the business of the company. As such, the directors might take the view[250] that they were not bound to

---

249 However if a situation were to develop in which any member or members were "persons in accordance with whose directions or instructions the directors of the [management] company [were] accustomed to act", this would make those members shadow directors of the management company: Section 27(1) of the Companies Act 1990.

250 Although it might be desirable that they should take legal advice before reaching a conclusion in this regard.

give effect to the resolution.

[16.20] In the ODCE's view, an alternative but also unsatisfactory approach would be if the directors were simply to adopt an uncritical *"OK so"* approach in response to such a step by the members. Arguably, this might constitute an abdication by them of their duty to act in the best interests of the company as a whole, if they did not honestly and reasonably believe that, in the circumstances, replacing the managing agents was the right thing for the company.

[16.21] Similarly, it seems to be the case that other conflicts of the sort that may typically arise in a management company amount to the management of its business with the result that, ordinarily it is the directors' decision which must govern the outcome, rather than any purported decision-making by the members. For example, it does not seem to the ODCE that it would ordinarily be competent for the members to seek to stipulate the maximum level of what service charges the company should levy, or how the service charges collected ought to be spent. Those are decisions which ought properly to be made by the directors and, if a majority of the members with sufficient voting power is unhappy with the directors' choices, their most advisable course is to seek to use their voting power to remove the directors and to replace them with other directors in whose likely managerial choices they feel more confident.

[16.22] One of the respondents to the ODCE's consultation process remarked that management company directors who are uncomfortable about making decisions often feel it necessary to convene an EGM every time a non-routine matter requires a decision. While certainly there is no prohibition on EGMs being convened whenever the directors think it appropriate to do so,[251] and while the ODCE certainly favours directors remaining in touch with the views of company members and being properly accountable to them, we think it proper to say that where a company's articles of association have entrusted the management of the business of the company to its directors, the power and privilege thereby vested in the directors brings with it a duty to actually exercise that power (guided however by the directors' fiduciary and common law duties, especially the duty to act in the company's best interests). Reverting to the members too frequently, or because of a timorous approach on the directors' part, runs somewhat contrary to a regulation such as regulation 80 of Part I of Table A or regulation 35 of Table C.

[16.23] It seems to the ODCE that where an approach such as that described in the first sentence of the last paragraph has become the norm in a management company, the solution may be for the directors to recognise regulation 80 or 35[252] as something which empowers them perhaps more than they previously recognised. Equally important, however, the members of such a management company also need to acquaint themselves with the extent of the power they vest in their directors

---

251 See paragraphs [25.04].

252 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

and accordingly to recognise that the election of directors is an act whereby significant power is thereby vested in those directors; not simply an entitlement to take preliminary steps towards the possible exercise of a power, the ultimate decision in relation to which must ultimately be brought back and forth to the members as a matter of course.

17.0 THE REQUIREMENT FOR THE DIRECTORS TO ACT COLLECTIVELY, OR THROUGH COMMITTEES DULY AUTHORISED BY THE FULL BOARD

[17.01] It is important to note that where a management company's articles contain a provision corresponding to, or along the lines of, regulation 80 of Part I of Table A, or regulation 35 of Table C,[253] the power to manage the business of the company is vested in the directors as a whole.[254] Accordingly, the directors should generally act at duly convened board meetings of which all of them have been given notice.[255]

[17.02] However, it is possible for the company's articles of association to permit this general rule to be relaxed to such extent as the articles specifically provide. For example, where the management company's articles incorporate either regulation 105 of Part I of Table A or regulation 54 of Table C[256] then—

> "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."

[17.03] The use of the phrase "member or members" suggests that, where such a regulation exists, it is permissible for the board of directors to delegate certain of their powers to even just one director alone. However as the regulation make clear, whether power is delegated to one or more than one director, it must be exercised in conformity with "any regulations that may be imposed". The ODCE suggests that the word regulations is used here in the sense of "conditions or stipulations".

[17.04] It has been noted by leading commentators with reference to regulation 105 of Part I of Table A and regulation 54 of Table C that—

> "the power to delegate to a committee must not be used for the purpose of excluding a particular director from participating in the management of the company's affairs."[257]

[17.05] The complaint that some management company directors can find themselves on occasions 'frozen out' from proper participation in their company's

---

253 See paragraphs [16.01] to [16.23].

254 *Re Haycraft Gold Reductions and Minings Company* [1900] 2 Ch 230; *Mitchell & Hobbs (UK) Ltd v Mill* [1996] 2 BCLC 102.

255 See paragraphs [23.09] to [23.14].

256 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

257 See *Companies Acts 1963 – 2006*, General Editors Lyndon MacCann and Thomas B Courtney (Tottel Publishing, 2007) citing *Kyushu v. Alturas Gold Ltd* (1888) 4 TLC 331.

affairs is one that has been made to the ODCE with regrettable frequency.[258]

[17.06] In the ODCE's view, it is altogether wrong for some or a majority of a management company's directors to act in such an exclusionary way towards any of their fellow directors. Quite simply, it is not the prerogative of any one or more of a management company's directors to ignore or marginalise any of the company's other directors.

[17.07] As the ODCE sees it, where differences of view exist within a board of directors, the better course is to first seek to establish if further discussions at board level can help to establish if there is any common ground between the differing views. In some instances, the result of such discussions may even be to reveal that while there is no basis on which either side can agree to adopt the other's starting point, nor even to reach agreement on an intermediate position, some 'third way' may nonetheless exist – fundamentally different to the position from which either side started, but which on reflection can be seen to be in the management company's overall best interests, and a solution which everybody is willing to accept.

[17.08] Discussions of this sort clearly need to be carried on with full respect on everyone's part for the legitimate entitlement of different directors to see things differently.

[17.09] If, after appropriate discussions, it is clear that there remains an irreconcilable difference of view amongst the directors, the proper way forward, as envisaged in most management company's articles of association,[259] is for a vote of the directors to be taken – and for the viewpoint which commands the majority of the directors' votes to then be accepted by all concerned as the relevant decision of the management company board.[260]

[17.10] In the extreme situation where irreconcilable differences exist between directors, to the point where one or more of them feels unable to work with another director or directors, it seems to the ODCE that stark choices are potentially faced by everyone involved. If all attempts at reconciliation, mediation, etc have failed (and there is no basis for them to be re-attempted) the situation ultimately comes down to this. Each of the directors concerned has the option of resigning as a director.[261] Alternatively, if individuals are anxious to remain on as directors, but to rid themselves of the faction with whom they cannot get along, it is their ultimate prerogative to seek to convene an EGM of the management company's members[262] for the purpose of considering resolutions[263] brought by the directors who wish to

---

258 However similar complaints arise regarding companies involved in other fields. Accordingly the underlying problem is not peculiar to management companies.

259 See paragraphs [23.26].

260 Disappointed directors are, of course, quite entitled to have their dissenting viewpoint recorded in the minutes of the relevant meeting.

261 See paragraphs [14.05] to [14.09].

262 For EGMs see paragraphs [25.01] to [25.32].

263 Section 182 of the Companies Act 1963. See further paragraphs [14.10] to [14.15].

remain in office, providing for the removal from office of the director(s) with whom they cannot work. It is then a matter for the management company members to vote as they see fit on that proposition having considered the representations of the directors whose removal from office is contemplated.[264]

[17.11] Yet another possibility which company law may afford a director who finds themselves so excluded is the entitlement, assuming that the director is also a member of the management company,[265] to bring an application before the High Court on the grounds that the other directors of the management company are conducting its affairs, or exercising their powers, in an oppressive manner.[266]

[17.12] Regrettable though it would be for a situation to deteriorate to the point where steps had to be taken along any of the lines detailed in the two preceding paragraphs, it seems to the ODCE that, as compared with the strategy of seeking to freeze-out fellow directors, it is probably the less unsatisfactory outcome. Describing it any more favourably than this ("less unsatisfactory") is not something which we think appropriate because, in the ODCE's view, it is eminently unfortunate for relations between directors (who may often be neighbours to in the same multi-unit development) to ever reach an impasse such as this.

---

264 It would seem to be within the competence of a management company to adopt articles of association under which an express power was given to the board of directors to remove from office one of the directors. See West, *Companies Limited by Guarantee* (Second Edition, Jordan Publishing Limited, 2004) at section 5.7.1 where the author observes that any such power "is given to the directors in a fiduciary capacity and so must be exercised in the best interests of the company as a whole." However neither the regulations contained in Table A nor Table C include any such power for the directors of a management company to which either of those sets of regulations apply. Accordingly unless the management company has adopted a bespoke set of articles which assign such a power to the directors, it is a power which they do not otherwise have.

265 As will almost invariably be the case in most management companies.

266 *Re Murph's Restaurants Ltd* [1979] ILRM 141. See Courtney *The Law of Private Companies* (2nd edition, Tottel Publishing, 2002) paragraph [19.014]. See paragraphs [40.06] to [40.11] below concerning this remedy available to management company members under Section 205 of the Companies Act 1963.

18.0 THE DUTIES OF MANAGEMENT COMPANY DIRECTORS

[18.01] 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".[267] Almost all of the material in that Booklet is relevant to the directors of a management company. However, to assist users of this handbook, matters which are especially pertinent will be repeated here.

[18.02] Company directors' responsibilities are wide and diverse. Their duties arise primarily from two sources: firstly, statute (i.e., Acts of the Oireachtas, Statutory Instruments, EU Regulations, etc) and, secondly, the common law.

[18.03] It is beyond the scope of this handbook to deal with every duty and responsibility which a company director may have under the entirety of the common law and under every legislative code.[268] Instead, having regard to the ODCE's particular role regarding company law,[269] we will concentrate on the topic of directors' duties within the conventional company law framework.

[18.04] A company director stands in a special relationship to the company of which he/she is an officer. This special position is known as a 'fiduciary position' and the director is known as a 'fiduciary'. This essentially means that the director is regarded as holding a position of trust and confidence, and required in consequence to act in a manner which places the company's interests ahead of the director's own interests.

[18.05] A simple way of illustrating the nature of this fiduciary obligation is to take the example of a management company director who is the owner of (say) a property in a multi-unit development consisting of four apartment blocks. Suppose that the management company has a program of repainting the internal common areas of one apartment block each year. Suppose also that this director knows that within the next few months he/she will wish to sell his/her apartment. In those circumstances it might be in the director's personal interest to seek to use his/her position as a director to arrange to have his/her block repainted ahead of its scheduled turn. However because of his/her fiduciary obligations, the director must refrain from using his/her position in this way, for his/her own personal benefit – rather than that of the company as a whole.

---

267 Available at www.odce.ie/publications/decision.asp.

268 Although, in paragraphs [43.01] to [43.05] we draw attention to some of the other legislative codes which may often be of some especial relevance so far as many management companies are concerned.

269 See paragraph [1.02].

Directors' common law duties

[18.06] In analysing the extent of directors' common law duties it is usual to distinguish between so called *duties of loyalty based on fiduciary principles* and *duties of skill, care and diligence.*

Duties of loyalty

[18.07] Directors must exercise their powers in good faith and in the interests of the company as a whole. Directors must not abuse their powers. They must exercise their powers in what they honestly believe to be the interests of the company as a whole rather than in the interests of a particular member or members, or in their own interests, or in the interests of any third party.

[18.08] A rather stereotypical example of a situation in which a management company director might have to remind himself/herself of this duty might be where there are differences of view as between those members of the company who are owner occupiers in the related multi-unit development, and those who are investors with their apartments rented out. Suppose for example that the owner occupiers are suggesting that service charges ought to be raised so that more money can be spent on cleaning, gardening, security etc. Because they do not live in the complex, some of the landlords might be less attracted to the tangible benefits of such additional services, and focussed more on the question of to what extent (if any) the additional services would allow the landlords to charge increased rents for their properties. In that situation the duty of the director who happens to be a landlord is to put aside the issue of how the determination effects him/her personally, and to seek to discern what is in the interests of "the company as a whole."

[18.09] The concept of "the interests of the company as a whole" is somewhat difficult to define. However, as noted by one leading commentator[270]—

> "In essence, this concept means, in the first place, the company as a separate legal entity, and in the second place, the shareholders as a whole."

[18.10] In England it has been suggested that *the company* "did not mean the sectional interest of some (it may be a majority) of the present members, but of present and future members of the company" and that, on the basis that the company is to continue as a going concern the directors "should balance a long-term view against short-term interests of present members."[271]

---

270 Courtney, *The Law of Private Companies* (2nd edition, Tottel Publishing, 2002) para [10.025].

271 See Palmer's *Company Law*, (Sweet & Maxwell, 25th edition, 1992 to 2008) paragraph 8.505 and the reference therein to the Second Savoy Hotel Investigation, Report of June 14, 1954, by Milner Holland QC.

[18.11] Likewise in another English case the judge observed that—

> "The [company] is, of course, an artificial legal entity, and it is not very easy to determine what is in the best interests of the [company] without paying due regard to the members of the [company]. The interests of some particular section or sections of the [company] cannot be equated with those of the [company] and I accept the interests of both present and future members of the [company] as a whole, as being a helpful expression of a human equivalent."[272]

[18.12] In another English case the question posed, when considering if a step could be regarded as having been taken 'bona fide for the benefit of the company as a whole' was whether what had been proposed was, in the honest opinion of those who voted in its favour, for the benefit of "an individual hypothetical member".[273]

[18.13] Another of Ireland's leading company law commentators has observed that—

> "Since the duty is owed to the company as a whole, it is not fulfilled where the directors act in the interests of a section only of the members. Nor is it sufficient to act in the short-term interests of the company alone without regard to its long-term interests on the basis that the duty is confined to the existing body of members: the directors must take into account the long-term and short-term interests of the company." [274]

[18.14] Having regard to these principles it seems to the ODCE that when the directors of management companies are thinking of "the interests of their management company as a whole", they need to look beyond the short-term viewpoints of individual members (perhaps even if those members are a majority), and have regard also to longer term interests, including those of people who will be the future owners of the properties in the associated multi-unit development. Generally speaking, it seems to us, those interests will include matters such as ensuring that the long-term economic values of housing units in the associated multi-unit development are not diminished for the want of proper management of the whole of the development over the years, including by the collection of adequate amounts of service charges in relation to the development, and spending it wisely and effectively. Likewise it seems to us that the hypothetical member of a management company will presumably want the associated multi-unit development to be managed so as to ensure that it retains its amenities, and the standards of

---

272 *Gaiman v. National Association for Mental Health* [1970] 2 All ER 362.
273 *Greenhalgh v. Arderne Cinemas Ltd* [1950] 2 All ER 1120.
274 Keane, *Company Law* (4th edition) (Tottel Publishing, 2007), paragraphs [27.93].

residential excellence which most people normally expect in their homes, or in properties in which they hope to be able to make a good return on their investment.

[18.15] A second element of these duties of loyalty is that directors are not allowed to make a secret profit from their position as directors and must account for any profit which they secretly derive from their position as director. In the typical management company the sort of situation which might sometimes require directors to be mindful of this duty is where, for example, there is a question of the management company requiring some services which a business connected with one or more of the directors is able to provide. It would be a breach of duty for such directors to secretly bring about a situation in which the relevant contract was awarded to the business with which they are connected when, for example, there were (or were likely to have been) other service providers who would have been willing to provide the same service on more favourable terms.

Duties of skill, care and diligence

[18.16] In general directors are obliged to carry out their functions with skill and diligence. However a director need not exhibit in the performance of his or her duties a greater degree of skill than may reasonably be expected from a person of his or her knowledge and experience.[275] Neither is the director bound to bring any special qualifications to his or her office,[276] and so if the members of a company are content to appoint a person without any special skills or previous experience as a director of their company, they cannot afterwards complain that the director was not as skilful as they might have liked. On the other hand where a person has particular skills or competencies they are bound to bring them to the boardroom table of any company of which they are a director. So, for example, if one of the directors is a qualified accountant, he will be under a somewhat higher duty than the non-accountant directors to ensure that the accounting obligations of the company are properly discharged.

[18.17] So far as duties of diligence are concerned it is generally possible to say that directors are under a duty to attend board meetings whenever in the circumstances they are reasonably able to do so, but are not bound to attend all such meetings.[277] Likewise the High Court[278] has endorsed a proposition which evolved in English law that—

---

275 *Re City Equitable Fire Insurance Company Ltd* [1925] Ch 407.

276 *Re Brazilian Rubber Plantations & Estates Ltd* [1911] 1 Ch 407.

277 *Re City Equitable Fire Insurance Company Ltd* [1925] Ch 407.

278 Including in *Re Vehicle Imports Limited*, High Court, unreported, 23 November 2000, Murphy J and *Kavanagh v. Delaney* [2005] 1 ILRM 34.

> "each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them"[279]

but this formulation has not yet received approval at Supreme Court level.[280]

Directors' statutory duties under the Companies Acts[281]

[18.18] Directors have a number of duties under the Companies Acts many of which are dealt with elsewhere throughout this handbook. For example—

(a) A general duty to ensure that the requirements of the Companies Acts are complied with by the company.[282]

(b) Duties as regards the holding by the company of AGMs[283] and, on occasion, EGMs.[284]

(c) Duties as regards the keeping and preservation of the company's accounting records.[285]

(d) Duties as regards the preparation and circulation to members of the company's annual financial statements[286] and its directors' report.[287]

(e) Duties to ensure that appropriate records concerning the company are filed with the CRO.[288]

(f) Duties to ensure that relevant details concerning the company are publicised on its documents and website.[289]

---

279 *In re Barings plc (No.5)* [1999] 1 BCLC 433.

280 See *Re Tralee Beef & Lamb Limited (in liquidation)* [2008] IESC 1. This was the appeal heard by the High Court from the case of *Kavanagh v. Delaney* referred to in footnote 278.

281 As noted at paragraph [18.03] this handbook does not cover directors duties under other legislative codes.

282 Section 383(3) of the Companies Act 1963, as replaced by Section 100 of the Company Law Enforcement Act 2001.

283 See paragraphs [24.01] to [24.05].

284 See paragraphs [25.06] to [25.11].

285 See paragraphs [29.01] to [29.21].

286 See paragraphs [31.01] to [31.14].

287 See paragraphs [33.01] to [33.10].

288 See paragraphs [36.01] to [36.10].

289 See paragraphs [35.01] to [35.05].

(g) A duty not to be party to the carrying on of the business of the company with intent to defraud creditors of the company, or creditors of any other person, or for any fraudulent purpose.[290]

(h) A duty to avoid being knowingly false in any—

- o questions answered,
- o explanations provided,
- o statements made or completed, and
- o returns, reports, certificates, balance sheets etc signed *or* produced *or* lodged *or* delivered

in purported compliance with any provisions of the Companies Acts, and a duty to avoid being reckless regarding any such matters.[291]

(i) A duty to ensure that the company's register of members,[292] register of directors and secretaries[293] and minutes books[294] are properly kept and duly available for inspection.

[18.19] Moreover on the basis that it is always possible that any company could sometime end up insolvent and being wound-up, there is indirectly the equivalent of a statutory duty on all company directors to act "honestly and responsibly in relation to the conduct of the affairs of the company." This is the criteria by which the High Court will determine whether the directors of any such company should, or should not, be the subject of a restriction declaration.[295] In determining that question the Court will inevitably examine closely the more specific duties outlined above, and others. Accordingly, the duty to act "honestly and responsibly" is something of an overarching duty.

---

290 Section 297(1) of the Companies Act 1963, as substituted by Section 137 of the Companies Act 1990.
291 Section 242(1) of the Companies Act 1990.
292 See paragraphs [11.01] to [11.17].
293 See paragraphs [15.01] to [15.11].
294 See paragraphs [23.27] to [23.31], [24.68] to [24.72] and [25.32].
295 Under Section 150 of the Companies Act 1990.

19.0 THE EXTENT TO WHICH A MANAGEMENT COMPANY DIRECTOR MIGHT BE PERSONALLY LIABLE FOR ACTIONS OR OMISSIONS

[19.01] From the ODCE's experience of dealing with management companies[296] many members seem very apprehensive that if they were to become directors of the company they would thereupon become personally responsible for all its liabilities.

[19.02] While it would be wrong for the ODCE to pretend that there are no circumstances in which a director of a company may have to bear responsibility for his/her actions or omissions as a director, we think it important to emphasise the extent to which any such personal liability is very much the exception rather than the rule – at least as regards directors who behave honestly and responsibly, and operate mindful of their duty to act in their company's best interests.[297]

Contracts

[19.03] So far as the company's contracts are concerned the general rule is that these give rise to liabilities on the part of the company – not of the company's directors (unless some separate personal guarantees are entered into specifically by the directors with the other party to the company's contract). Usually the directors are merely the company's agents in entering into contracts on the company's behalf.[298]

[19.04] Complications can arise, however, if the directors (or some of them) enter into a contract which they are not authorised to make. However this situation is not likely to occur often where, as is usually the case in most management companies,[299] the company's articles of association vest the directors with wide-ranging powers to manage the business of the company.

[19.05] Complications can arise also if directors appear to enter into contracts in their own names, not disclosing unambiguously that they do so on their company's behalf. Accordingly, the party to the contract should always be stated to be the company itself, and any director signing should expressly indicate something along the lines of—

> "John Murphy,
> for and on behalf of 16 Parnell Square Management Company Ltd."

---

296 As well as other comparable companies.

297 See paragraphs [18.01] to [18.19].

298 See *Ferguson v. Wilson* (1866) L.R. 2 Ch. 77. For the possibility of liability on the part of the company's members in a situation where the number of members of a company limited by guarantee not having a share capital falls below seven, see paragraph [8.09].

299 See paragraphs [16.01] to [16.23].

[19.06] A further example of this form of liability (which a director may owe to persons who were left unaware that they were dealing with a company) arises under Section 114(4) of the Companies Act 1963. In so far as relevant for present purposes, this provides that—

> "If an officer of a company or any person on its behalf—
>
> ….
>
> (b) issues or authorises the issue of any business letter of the company or any notice or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque or order for money or goods wherein its name is not mentioned in manner aforesaid, …
>
> he shall be guilty of an offence and liable to a fine not exceeding [€1,904.61], and shall further be personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount thereof unless it is duly paid by the company."
>
> (underlining added)

Liability to third-parties for tort

[19.07] Torts are wrongful acts or omissions, other than breaches of contract, in consequence of which the person wronged can be awarded damages in the civil courts to compensate them for their injuries or loss. The most common tort which is commonly sued for is negligence but there are also other common torts such as trespass, nuisance and defamation.

[19.08] Here again, the usual rule is that where a third-party has suffered loss by reason of an alleged tort on the part of a company,[300] the company's directors are not liable simply by virtue of the office they hold.[301] However, liability may possibly arise if the directors authorised, directed and procured the commission of the tort by the company – and it is possible for this to happen even though the director did not know that the underlying acts were tortious, or was reckless in the sense that he/she did not care whether or not they were.[302]

---

300 *e.g.* a person who has suffered personal injuries when falling on part of the company's property.

301 *Rainham Chemical Works Ltd v. Belvedere Fish Guano Co Ltd* [1921] All ER 48.

302 *C Evans & Son Ltd v. Spritebrand Ltd* [1985] 2 All ER 415. Note that in the same case it was held that "a director of a company is not automatically to be identified with his company for the purpose of the law of tort, however small the company may be and however powerful his control over its affairs. Commercial enterprise and adventure is not to be discouraged by subjecting a director to such onerous potential liabilities. In every case where it is sought to make him liable for his company's torts it is necessary to

[19.09] The English courts have also stated that a company director will not usually be treated as liable along with the company for its torts if he/she has done no more than—

> "to carry out his constitutional role in the governance of the company – that is to say, by voting at board meetings."[303]

However, the English court went on to emphasise that where a person happens to be a director of a company, there is no reason why he/she should not be liable along with the company for its torts—

> "if he/she is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director ….. In other words, if, in relation to the wrongful acts which are the subject of complaint, the liability of the individual as a joint [wrongdoer] with the company arises from his participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control."[304]

Liability for breaches of duty under the Companies Acts

[19.10] As a general rule, company directors' common law duties[305] are considered to be owed to the company of which they are directors, rather than to the individual shareholders thereof.

[19.11] This has the consequence that, ordinarily, it is not permissible for an individual member or group of members to sue a director for an alleged breach of his/her duties.[306] Accordingly, in general it is only where the company itself seeks to sue one of its directors (or former directors) that liability for breaches of these types of duties may be an issue. This is an uncommon occurrence, and seldom happens to a serving director of a company. However occasionally it may arise where a company has become insolvent, and where the company's liquidator considers that an action for breach of duty should be brought against the former directors. It can happen also where control of the company's board has transferred to a new group of directors who are of opinion that their predecessors failed to properly discharge their duties.

---

examine with care what part he played personally in regard to the act or acts complained of."

303 *MCA Records Inc v Charly Records Ltd* [2003] 1 BCLC 93

304 *MCA Records Inc v Charly Records Ltd* [2003] 1 BCLC 93. Note that this element of the English court's statement was specifically adopted by the Irish High Court in *Tommy Hilfiger Europe Inc and another v McGarry and others* [2005] IEHC 66.

305 See paragraphs [18.06] to [18.17].

306 Foss v. Harbottle (1843) 2 Hare 461. However there are some exceptions to this rule for which see Courtney, *The Law of Private Companies* (2nd edition, Tottel Publishing, 2002) paragraphs [19.097] to [19.127].

[19.12] However, if such proceedings are brought, it is possible that even if the court concludes that the defendant has breached his duty, the court may grant relief in whole or in part if the court is satisfied that this is appropriate in all the circumstances, and that the director concerned had acted honestly and responsibly. This is the consequence of a statutory provision which provides that—

> "If in any proceeding for negligence, default, breach of duty or breach of trust against an officer of a company or a person employed by a company as auditor, it appears to the court hearing the case that that officer or person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly from his liability on such terms as the court may think fit."[307]

Liability for criminal offences under the Companies Acts

[19.13] Many of the statutory obligations outlined in this handbook, *e.g.* at paragraph [18.18] are capable of giving rise to criminal liability on the part of the company's directors in the event of non-compliance.

[19.14] In many instances this potential liability is rooted in the concept of the directors of the company's being *persons in default* as regards the actions or omissions of the company. As regards those offences—

> "an officer who is in default is any officer who authorises or who, in breach of his duty as such officer, permits, the [relevant] default"[308],

and—

> "an officer shall be presumed to have permitted a default by the company unless the officer can establish that he took all reasonable steps to prevent it or that, by reason of circumstances beyond his control, [he] was unable to do so."[309]

Liability for criminal offences under other legislative codes

[19.15] As stated elsewhere it is beyond the scope of this handbook to deal with every duty and responsibility which a company director may have under other

---

307 Section 391(1) of the Companies Act 1963.

308 Section 383(1) of the Companies Act 1963, as replaced by Section 100 of the Company Law Enforcement Act 2001.

309 Section 383(2) of the Companies Act 1963, as replaced by Section 100 of the Company Law Enforcement Act 2001.

legislative codes.[310] Accordingly, we urge that persons concerned about the extent to which, as a director of a management company, they might face potential criminal liability under any other legislative code, in the event of non-compliance with the relevant legal duties, should seek their own professional advice.

---

[310] Although, in paragraphs [43.01] to [43.05] we draw attention to some of the other legislative codes which may often be of some especial relevant so far as many management companies are concerned.

20.0 STEPS MANAGEMENT COMPANY DIRECTORS CAN TAKE TO LIMIT ANY PERSONAL LIABILITIES WHICH THEY MIGHT POTENTIALLY FACE BY REASON OF ANY ALLEGED DEFAULT, BREACH OF DUTY ETC

[20.01] The first thing which needs to be said here is that despite the prevalence of fears on the part of unit-owners that they are likely to face personal liabilities in the event that they become directors of their management company, it is not at all common for steps to be taken under which anyone seeks to have a management company's directors – especially where they are unit-owners – made personally responsible for alleged breaches of duty.[311]

[20.02] To some extent this stems from the fact that because management companies are incorporated under the Companies Acts they are so-called legal entities separate from their members and directors – with power to sue *and be sued* in their own corporate name. The position which follows accordingly is that as regards many (though not all) of the management company's obligations, it is the management company itself which an aggrieved third-party will have to sue, or seek to have prosecuted: not the individual directors thereof.

[20.03] Nonetheless there are instances in which a breach of duty or obligation by a company's director may provide a basis on which claims may be brought against them personally. Even though that may not occur often, the ODCE understands why it is something about which many management company directors may be quite apprehensive.

Better understanding

[20.04] The first way in which it seems to the ODCE that steps can be taken to minimise such risks is for management company directors to seek to gain a better understanding of what is expected of them. Publications like this, we hope, should go some way towards assisting in that process.

Funding management companies adequately, so that they can obtain the professional assistance which they reasonably require

[20.05] It also seems to the ODCE that another of the steps necessary to reduce the extent to which management company directors are left apprehensive as to what personal liabilities they might face is for management company members to become more accepting of the proposition that management company directors should not be expected to operate on a substantially underfunded and amateur basis. As the ODCE sees it, management company members, in return for having the benefit of some of their fellow members undertaking the responsible role of company director,

---

311 For example as regards the ODCE's *general* approach to complaints of alleged breaches of the Companies Acts against management company directors who are unit owners see paragraph [44.09].

need to be willing to pay what may indeed be increased service charges so that funds exist from which the directors are in a position to take all the expert professional advice which they reasonably require. In the ODCE's view, greater availability of professional advice for management company directors should lead not only to directors being able to act with greater assurance of what they are expected to do, but also with the comfort of knowing that they have reputable professional advice that the steps they are taking are right and proper, which should protect them against the possibility of someone afterwards being able to claim that they were in breach of their duties and should be held personally liable.

[20.06] Undoubtedly, service charges might rise if it becomes the norm for management company directors to expect that their members should routinely provide the funds out of which, as the directors need it, they can engage solicitors, accountants, engineers, insurance advisers, chartered surveyors, health & safety consultants, fire protection consultants, etc. However, the ODCE makes no apology for offering this suggestion. On the contrary, the ODCE feels that we would be doing both management company members and directors a disservice if we were to pretend that the typical multi-unit development can function quite adequately and effectively without its directors being able to draw upon the services of skilled professionals. Indeed, we would go so far as to say that the duty of the management company directors under company law to act honestly and responsibly in the company's best interests, has to be matched by some concomitant obligation on the part of the management company's members to ensure that the directors are financially empowered to be able to discharge those duties.

[20.07] At the same time, management company directors should take a balanced approach to their need for professional advice. They should only take advice when it is highly desirable that they do so, and they should strive to spend company funds prudently on such advice and assistance. It might be the case that some of their own members in the multi-unit development possess professional expertise which they would be in a position to offer to their management company without charge or at a reduced rate. The directors should be guided at all times by the need to obtain value for money in their expenditures in this area, in the overall interests of the management company and its members.

Insurance for management company directors

[20.08] The next way in which it may be possible to alleviate some of the concerns which a management company's directors might have about their potential personal liabilities is through *directors' & officers' liability insurance policies*. These are policies designed to cover directors for any personal liability which they might have for any actual or alleged breach of duty, breach of trust, negligence error, misstatement, omission, breach of warranty or authority, libel/slander or any other act committed by board members in the course of carrying out their duties as a management company director.[312]

---

312 Paragraph 16.9 of the National Consumer Agency's *Buying and Living in a Multi-Unit Development Property in Ireland* the details of which are at footnote 25.

[20.09] Since 2003 the Companies Acts have specifically permitted any company, management companies included—

> "to purchase and maintain for any of its officers .. insurance in respect of [any liability which by virtue of any rule of law would attach to him/her in respect of any negligence, default, breach or duty or breach of trust of which he may be guilty]".[313]

[20.10] Here again, it seems to the ODCE that in general a stipulation on the part of the management company's directors that they want to have the benefit of insurance policies of this sort is *prima facie* fair and reasonable. Accordingly, we tend to the view that if this means that service charges have to rise to pay the premiums on such policies, that is a price which management company members ought to be willing to bear.

---

[313] Section 200(2) of the Companies Act 1963 as amended by Section 56 of the Companies (Auditing and Accounting) Act 2003.

21.0 THE SITUATION WHERE NO-ONE IS WILLING TO BECOME A DIRECTOR OF A MANAGEMENT COMPANY

[21.01] The ODCE has heard of instances in which it happens that no-one is willing to allow their name be put forward for election as a director of a management company. The typical situation in which this may happen is at the end of the developer-and-owners' phase, when the nominees of the developer of the associated multi-unit development indicate their intention to resign as directors of the management company. Alternatively, it could happen that the two or three unit-owners who, perhaps for many years, have served as its directors (in a situation where all the other members were content to simply 'leave them at it') feel that they have done enough, and that they wish to divert elsewhere the time and commitment they were giving to the management company.

[21.02] The Companies Acts impose no obligation on anyone to ever become a director of any company. What is required, however, is that every company should have at least two directors[314] and it is provided also that where CRO records indicate that no-one is serving as a company's director, that this is a basis on which the CRO can proceed to strike the company off the register.[315]

[21.03] Aside from these legal considerations there is of course a business necessity for every company to have directors to manage and control its business. Even in the typical management company where the bulk of the day-to-day business is co-ordinated by a firm of managing agents, it is essential that there be supervision by the management company's directors of the agents' discharge of their contractual obligations, as well as periodic decision-making as to whether, or upon what terms, existing contracts should be renewed. Likewise, from the perspective of the managing agents, they clearly need directors of the management company to whom they can turn for instructions as to how particular tasks are, or are not, to be done; and for strategic direction generally as to what their customer (i.e. the management company) requires.

[21.04] Accordingly, both from a legal and commercial perspective, it is simply not feasible for the members of a management company to hope that it can continue to exist adequately without directors.

[21.05] As the ODCE sees it, if a situation arises in which there is a reluctance on the part of enough management company members to become directors of the company, it is incumbent on *all* the members to reflect seriously on the extent to which this has the potential to cause serious and long-term problems for their company, and for the proper discharge of the functions assigned to it as regards the maintenance and upkeep of the multi-unit unit development with which the management company is associated. While the contract under which the company's

---

314 Section 174 of the Companies Act 1963.

315 Section 48 of the Companies (Amendment) (No.2) Act 1999.

existing managing agents are engaged will not necessarily be terminated by the management company ceasing to have directors, it is perhaps unlikely that the managing agents will be willing to remain involved with the multi-unit development in the medium term, at least on a conventional basis. As indicated elsewhere,[316] the managing agent's relationship with the management company is essentially a contractual one. Managing agents might reasonably take the view that the management company's lack of directors makes their position, at the very least, legally precarious. From a company law perspective, for example, if the managing agent ended up discharging functions which ought to be being carried out by the directors of the management company,[317] this might have the effect in law that they would come to be seen as *de facto* directors of the company,[318] something which the agents might well wish to avoid.

[21.06] One possibly radical option which would be open to management companies who find themselves in the situation where none of their members wishes to serve as director is to consider seeking non-members to act as the company's directors, on an appropriately remunerated basis. Ultimately, the management of the affairs of a management company, by serving as one of its directors, is capable of being seen as a profitable economic activity – even if, conventionally, it is a task usually undertaken on an unremunerated basis by members of the company. While it is entirely a matter for the members of a management company to consider for themselves what they wish to do in a situation where none of them is willing to serve as the company's directors, it seems to the ODCE that one option is that they could agree to pay suitably qualified outsiders to do so.

[21.07] Undoubtedly, "buying in" external directors in this way would usually mean having to increase service charges, to fund the directors' remuneration. However, as the ODCE sees it, the members need, when assessing that immediate cost, to balance it against the medium to long-term costs which they are going to suffer in the value of their individual properties (including, perhaps, difficulties in being able to sell them) if the quality and amenity of the multi-unit development begins to deteriorate for the want of a management company which remains duly incorporated and functioning properly.

[21.08] Sometimes a management company's articles of association may include a regulation which stipulates that only members may serve as directors. If needs be, however, this is a regulation which (like any other) can always be amended by special resolution of the members.

---

316 See paragraph [7.08].

317 *e.g.* the ultimate determination of the appropriate level of service charges (as distinct from merely advising on what, in their professional opinion, is the appropriate level); decision making on their own initiative about the commencement of legal proceedings in the management company's name; etc.

318 For the meaning of *de facto* directors see *In Re Lynrowan Enterprises Limited* [2002] IEHC 90.

[21.09] So far as remunerating directors is concerned, again this is something usually dealt with, or is capable of being dealt with, in the company's articles of association. For example where the management company's articles include either regulation 76 of Part I of Table A or regulation 33 of Table C[319] then—

> "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 meeting of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company."

---

[319] See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

22.0 THE COMPANY SECRETARY

[22.01] Company law requires that every company should have a company secretary. It is permissible for one of the company's directors to serve also as its secretary.[320]

[22.02] 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.[321]

[22.03] 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.

[22.04] The first secretary of the company is the person named as such in the documents filed with the CRO.[322] The subsequent appointment of a company secretary is in accordance with the articles of association of the company which typically provide along the lines of what appears in regulation 113 of Part I of Table A or regulation 59 of Table C[323]—

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

Managing agents as company secretaries

[22.05] In the case of some management companies, the directors decide to appoint their managing agent as the company secretary. However, this can obviously 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 also in the role of company secretary.

[22.06] It may be perceived that having the managing agent as secretary of the management company brings with it some practical advantages. For example, the managing agent, unlike an individual unit-owner who is a member of the company will presumably have office facilities available at which the company's records can be kept, and from which communications to members can be issued, etc.

---

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

321 Available at www.odce.ie/en/media_decision_notices.aspx

322 Section 3 of the Companies (Amendment) Act 1982.

323 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

[22.07] However, others[324] take the view that it is not best practice for a management company's managing agent to hold office as the management company's secretary – on the basis that it may give rise to unnecessary conflicts of interest and/or a blurring of responsibilities, as well as contributing to the confusion that exists between management companies and managing agents.

[22.08] For the moment, it is a matter for the directors of management companies to decide for themselves whether they think it appropriate or not to have their managing agent as company secretary.[325]

Resigning as a company secretary / removing a company secretary

[22.09] Although the Table A or C regulations do not provide so explicitly, the ODCE suggests that a company secretary can always resign in the same way as can a director of the company.[326] The fact that the secretary has resigned, and details concerning his/her successor must then be entered in the company's register of secretaries, and notified also to the CRO.[327]

[22.10] Contrary to the position as regards directors,[328] the Companies Acts do not contain statutory rules as to how a company secretary can be removed from office.[329] However where a company has adopted regulations along the lines cited in paragraph [22.04], the directors have an express power to remove the company secretary. [330]

Information available from the National Consumer Agency

[22.11] The position of a management company's company secretary is covered also in Section 11 of *Buying and Living in a Multi-Unit Development Property in Ireland* published by the National Consumer Agency.[331]

---

324 Including some respondents to the ODCE's Consultation Process.

325 However directors may wish to note that the Law Reform Commission has recommended that the law should be changed to prohibit property managing agents "from exercising the role of secretary in an owners' management company." See paragraphs 5.29 and 5.30 of the Commission's Report, the details of which are at footnote 11.

326 See paragraphs [14.05] to [14.09].

327 Section 195 of the Companies Act 1963 as substituted by Section 51 of the Companies Act 1990.

328 See paragraphs [14.10] to [14.15].

329 In some instances the secretary may have an employment relationship with the company - although this is not likely in the case of most management companies. In that event, any removal of the secretary will have to be conducted within the framework of the company's employment law obligations.

330 The directors may be required, however, to have regard to usual rules of fair procedures, such as to inform the secretary of why it is that they are contemplating removing him/her from office, allowing the secretary a opportunity to argue their case as to why they should not be removed, and giving real and careful consideration to any submissions so made by or on the secretary's behalf.

331 See footnote 25.

23.0 DIRECTORS' MEETINGS

[23.01] It is a basic requirement of the conduct and supervision of any company's affairs that its directors should meet together regularly to discuss issues of relevance to the company, take decisions and arrange for them to be implemented.

[23.02] The management company'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.

[23.03] Typical provisions commonly found in many company's articles are along the lines of those in regulations 101 to 109 of Part I of Table A (which are identical to those in regulations 50 to 58 of Table C).[332]

The general power to meet and regulate directors' meetings

[23.04] If regulation 101 of Part I of Table A or regulation 50 of Table C has been adopted by the management company then both those provisions begin with the sentence[333]—

> "The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they see fit."

How frequently should the directors' meet

[23.05] There can be no hard-and-fast rule as to how often the directors of a management company should meet. Essentially it is a matter for the directors to decide themselves.[334]

---

332 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

333 Ditto.

334 In the *Draft Guidance* appended to the ODCE's Consultation Paper D/2002/2 we suggested that for management companies "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." A number of respondents who made observations on the draft Guidance indicated that in their view the ODCE should not make a suggestion as to how often the board of a management company should meet – and should leave it to boards to decide for themselves. After some consideration we have concluded that this is the correct position for the ODCE to take.

Convening directors' meetings

[23.06] If the management company's articles of association include regulation 101 of Part I of Table A or regulation 50 of Table C[335] then even any one director on his/her own initiative can summon a meeting of the directors. Alternatively, the secretary must summon a meeting of the directors if requested by a director to do so. These propositions follow from the fourth sentence of the relevant regulations which in each case provides that—

> "A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors."

[23.07] In the ODCE's view, it is preferable that individual members of a board of directors should resort to their entitlements under this sort of regulation only exceptionally; and that the directors should agree instead that they will meet on scheduled dates throughout the year which, as the need arises, can be supplemented by additional meetings if/when necessary. In this way, an individual director with any particular concerns will be able to make his/her own judgment as to whether their concerns can be safely left until the next scheduled meeting, or whether the situation really merits the step of convening a meeting on their own initiative, or requiring the company secretary to do so.

[23.08] In the ODCE's view, it is also sensible that a director contemplating the step of seeking to convene a meeting, or requiring one to be convened, should first discuss the matter with the company secretary, with the chairperson of the board of directors (if there is a chairperson) or alternatively with at least one other of their colleagues on the board of directors.

Giving notice of directors' meetings

[23.09] None of the regulations in Table A or C specify what ought to be the notice period which directors must be given in respect of any intended meeting. As the ODCE understands it, this is a deliberate omission because in every company circumstances can occasionally arise where it is necessary to convene a directors' meeting at very short notice: in case of emergency, for example.

[23.10] However, under the common law it has long been held that reasonable notice must be given to all directors, which gives the directors some opportunity of attending the meeting, if they so desire.[336] As stated in one of the leading Irish cases—

---

335 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

336 *Re Homer District Consolidated Gold Mines* (1888) 39 Ch D 546.

> "due notice is what is required and this is usually established by practice among the parties."[337]

[23.11] It is also advisable that when seeking to convene a directors' meeting regard should be had to choosing a time and venue[338] which is likely to suit as many as possible of the directors; and that the power to determine where/when the meeting is to be held should not be abused by choosing a time or location which is calculated to render it unnecessarily difficult or impossible for certain board members to attend.

[23.12] In general, notice should be given to all directors. As stated in one of the older English cases—

> "As a general rule, every director who is within reach ought to have notice of every board-meeting of the company."[339]

[23.13] So far as the concept of a director being "within reach" is concerned if regulation 101 of Part I of Table A or regulation 50 of Table C has been adopted by the management company[340] then, as per the last sentence of both those regulations—

> "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."[341]

[23.14] In general, notice may be given to directors by any reasonable means: including verbally – e.g., by telephone, or simply by an announcement at the previous directors' meeting (which is capable of being good notice, so far as concerns the directors present at that last meeting). However, it is sensible for notice

---

337 *Holland & Others v. McGill and Others*, High Court, unreported, 16 March 1990, Murphy J.

338 Some management companies find it possible to arrange their directors' meetings to take place in one or other of the directors' own residences within the associated multi-unit development. Others opt to meet in locations such as nearby hotels, while others opt for the offices of their managing agents.

339 *Halifax Sugar Refining Co. Ltd v. Francklyn* (1890) 62 L.T. 563.

340 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

341 The ODCE wonders however if, even where this provision applies, directors should nonetheless treat it as something of a relic from an era before modern telecommunications and travel options became as advanced as they are nowadays: and to endeavour to give notice (if necessary by email, telephone or text message) even to a director who is known to be abroad – on the basis that, unless the meeting is happening within the next few hours, it is conceivable that they will have returned to Ireland by the time the meeting is scheduled to be held.

to be given somewhat more formally, such as by letter or email.

Notification of intended business / Agendas

[23.15] Contrary to the position which exists as regards special business intended to be discussed at a general meeting of the members of a company,[342] it is ordinarily not essential that board members be informed in advance of the nature of the business which they will be asked to transact at a board meeting.[343]

[23.16] However even if it is not strictly essential, having an agenda for the meeting and circulating it in advance to board members is an eminently sensible step which the ODCE would encourage management companies to observe in practice. As has been stated by the High Court—

> "There is no requirement to provide an agenda for directors' meetings, though in practice it may be desirable that it be done occasionally if not frequently."[344]

[23.17] Where board members wish to have particular matters discussed at board meetings it is good practice for them to make their views known to both the secretary and the chairperson of the board. This will give them an opportunity to ensure that those items can then be included on the agenda for the next board meeting. Good practice suggests that the agenda for a board meeting should be agreed in advance between the secretary and the chairperson.[345]

Suggested form of a notice of a directors' meeting

[23.18] While obviously it is a matter for each management company to decide on what is appropriate for it, the ODCE suggests that something along the following lines should usually be enough—

> ***16 Parnell Square Owners Management Company Limited***
> ***Company Number: 987654321***
>
> ***Registered Office: 16 Parnell Square, Dublin 1***
>
> *To each of the directors*
>
> A meeting of the board of directors of the company will be held in

342 As to which, see paragraphs [24.51] to [24.55].
343 Unless the management company's articles of association provide otherwise.
344 Murphy J in *Holland & Others v. McGill and Others*, unreported, 16 March 1990.
345 Doyle, *The Company Secretary* (Second Edition, Thomson Round Hall, 2002), at section 3.4.1.

Room 3.10, 16 Parnell Square, on Monday the 12th day of January 2009 at 8:15 p.m.

It is intended that the business outlined in the agenda below will be discussed.

Signed _____
Company Secretary

Agenda

(1) Minutes of meeting held on 5 December 2008.

(2) Applications for membership from ___ and ___: intended purchasers of apartments 37 and 98.

(3) Problems with CCTV cameras.

(4) Authorisation to arrange for re-painting of common areas of Block F.

(5) Report of Health & Safety inspection recently carried out.

(6) Debt recovery proceedings against members whose service charges are more than 12 months in arrears.

(7) Renewal of contract with managing agents (due to expire on 31 May 2009).

(8) Any other business properly arising.

The consequences of a directors' meeting not being validly convened

[23.19] Where a directors' meeting has not been validly convened (because, for example, notice has impermissibly not been given to one or more of the directors) then the meeting is irregular and any purported decisions taken by it are invalid.[346]

How many directors is enough to enable a validly convened meeting to proceed?

[23.20] Provided that due notice of the meeting has been given to the other directors entitled to receive notice, it is not essential that all the directors are in

---

346 *In Re Portuguese Consolidated Copper Mines Limited* (1889) 42 Ch D 160.

attendance for the meeting to proceed. Again, this is a matter usually dealt with in a company's articles. If regulation 102 of Part I of Table A or regulation 51 of Table C has been adopted by the management company[347] then—

> "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."

[23.21] Since this provision contemplates that the directors may decide on a figure other than two it is advisable that, occasionally, the directors should decide whether in the light of experience they wish to fix a number other than two as the appropriate quorum for their meetings.[348]

The duty of directors to attend board meetings

[23.22] A director is not obliged to attend all board meetings, though he should attend whenever, in the circumstances, he is reasonably able to do so.[349]

Who chairs a meeting of the directors?

[23.23] If regulation 104 of Part I of Table A or regulation 53 of Table C has been adopted by the management company[350] then—

> "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 [meeting], the directors present may choose one of their number to be chairman of the meeting."

[23.24] Even in the somewhat informal context which often prevails at management company board meetings, the role of a chairperson is very important. It is in everyone's interests that meetings should move along with the optimum speed, efficiency, courtesy and fairness. 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 a meeting; and for the chairperson to preside at the meeting in such a way as

---

347 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

348 However care should be taken not to fix a number so high that it will give rise to practical difficulties about convening meetings in the situation where any appreciable number of the directors are unable or unwilling to attend.

349 *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407.

350 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

justifies his/her co-directors' decision to honour him/her with that role.

Procedure during a meeting

[23.25] Good practice at any directors' meeting includes the following:[351]

(a) To ensure that a quorum of directors is present.

(b) To ensure that someone (usually the secretary) is taking full notes of what transpires at the meeting so that the minutes can be made up afterwards.

(c) To ensure that this note records the names of all directors present; and any apologies sent by any directors who have indicated their inability to attend the meeting.

(d) To read the minutes of the previous directors' meeting (or see if they can be taken as read). To deal with any queries regarding those minutes and, once they are agreed (having been amended if necessary) to ensure that they are signed by the chairperson of the meeting.

(e) To go through each of the items of business on the agenda for the meeting.

(f) To ensure that there is a full and adequate discussion of all issues – especially those in relation to which there may be differing views.

(g) To keep a record of the decisions made by the board. If they are made unanimously this fact should be recorded. If they are taken following a vote not only should the outcome of the vote be recorded in the minutes, but also details of who voted for or against the proposition, or who opted to abstain.

(h) To ensure that documents needing to be executed, e.g. cheques, contracts, membership certificates, are dealt with.

Decision making at a directors' meeting: voting provisions

[23.26] It goes without saying that decision making by directors should be preceded by an open and informed discussion about whatever is the issue in relation to which a decision of the directors is required. However, once a full discussion has been had, company law envisages that the directors have to take a decision, and

---

351 The suggestions which follow borrow significantly from, Doyle, *The Company Secretary* (Second Edition, Thomson Round Hall, 2002), at section 3.4.3.

recognises also that the directors may be divided as to what is the appropriate decision to take. In this situation, if regulation 101 of Part I of Table A or regulation 50 of Table C has been adopted by the management company[352] then—

> "Questions arising at the 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."

Records of directors' meetings

[23.27] Minutes must be kept of all directors' meetings in books kept for that purpose.[353] The minutes should be signed by the chairperson of the meeting to which the minutes relate, or by the chairperson of the next succeeding meeting. If so, they will be regarded in law as evidence of the proceedings.[354] Where there is non-compliance with this requirement both the company "and every officer of the company who is in default"[355] may be found guilty of an offence.[356]

[23.28] Where regulation 89 of Part I of Table A or regulation 38 of Table C has been adopted by the management company[357] these specify in further detail some of what must be recorded in the minutes of directors' meetings—

> "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."

[23.29] In order to comply with these obligations, it is good practice for the chairperson of the meeting and/or the secretary of the company to ensure that one

---

352 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

353 Section 145(1) of the Companies Act 1963.

354 Section 145(2) of the Companies Act 1963.

355 An "officer who is in default" includes any director or secretary "who authorises or who, in breach of his duty as such officer, permit, the default": Section 383(1) of the Companies Act 1963 as replaced by Section 100 of the Company Law Enforcement Act 2001.

356 Section 145(4) of the Companies Act 1963.

357 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

of the items of business dealt with at each directors' meeting is the agreement and signature of the minutes of the previous meeting. To minimise the scope for any disagreements, it is also good practice for the draft minutes of the previous meeting to be circulated to directors in advance of the meeting at which they are to be agreed so that directors have an opportunity to formulate any changes they require to be made, and/or discuss such issues in advance with one another and/or with the secretary and/or chairperson.

[23.30] One leading writer in this area has noted that—

> "Minutes … are meant to record decisions, rather than discussions … For this reason, a disagreement among the directors, if no vote is called for, will not as a rule be recorded in the minutes; but if a director specifically asks that his disagreement be recorded, this should be done." [358]

[23.31] In contrast with the position as regards minutes of AGMs and EGMs,[359] the minutes of a directors' meeting are not documents which the public have any right to inspect, nor usually the company's members.[360] However, there is an express statutory right for the ODCE to inspect the minutes of the company's directors' meetings.[361]

Any Other Business

[23.32] The extent to which a management company board should be willing to make decisions in relation to issues that have not been included in the agenda for their meeting is essentially one to be determined in the first instance by the chairperson of the meeting. He/she will undoubtedly take full regard of the extent to which any members of the board might reasonably feel that they would prefer to have had more notice of the proposed business, so that they could better consider what position they wish to take in relation to it. On the other hand, as noted above,[362] it is not strictly necessary that advance notice of issues to be discussed at a board meeting should have been given to directors; accordingly, the absence of notice is not by itself a reason why non-notified business should never be discussed.

[23.33] For example issues may arise which are either sufficiently uncontroversial or of such urgency that, even though they were not included on the agenda for the meeting, the chairperson may reasonably take the view that they ought to be decided upon there and then. Where he/she is in doubt, however, it may be good

---

358 Doyle, *The Company Secretary* (Second Edition, Thomson Round Hall, 2002), section 3.4.3.

359 As to which see paragraphs [24.68] to [24.72] and [25.32].

360 Unless the company's articles provide otherwise.

361 Section 145(3A) of the Companies Act 1963, as inserted by Section 19 of the Company Law Enforcement Act 2001.

362 See paragraphs [23.15] to [23.17].

practice for him to rule that the items should be postponed for decision at the next meeting.[363]

[23.34] In the unlikely situation where the chairperson concludes that such an item should be decided upon by the meeting, but where a majority of the meeting are unhappy with that decision, it is open to the directors to take a vote in favour of postponing the issue to be decided upon at a future meeting.

The power of a board of directors to take decisions without actually meeting together in person

[23.35] Situations will sometimes arise in which a decision of the directors is required, but where it is perhaps inconvenient for the board members to hold a conventional meeting about the matter, and where it may be felt that such a meeting would be superfluous because all the directors are in agreement about the proposed decision which they are being asked to make. For example if the management company is opening a new bank account a board resolution will usually be required by the bank. Assembling all the board members together to ratify that sort of a decision may be considered a little excessive if it is confidently known that none of them will be opposing the proposal.

[23.36] In circumstances like this, if regulation 109 of Part I of Table A or regulation 58 of Table C has been adopted by the management company,[364] then—

> "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."

Such a resolution should, of course, be recorded in the directors' minute book.

The power of a board of directors to act with less than its full complement of members, and the limits of that power

[23.37] It sometimes happens that the number of directors of a management company decreases due, for example, to the death, resignation or removal from office of one or more of the directors.

[23.38] The position in such a situation, if the management company has adopted regulation 103 of Part I of Table A or regulation 52 of Table C[365] is as follows—

---

363 Which, if the issue is an urgent one, can always be convened for an early date, such as within a few days of the meeting at which the issue unexpectedly arose.

364 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

365 Ditto.

"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 regulations 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."

[23.39] In effect, this means that once the number of directors falls below the critical level of the number equal to the quorum required at a directors' meeting[366] then the only powers which remains vested in the directors is their power to increase the number to the minimum level, or to summon a general meeting of the members of the company.[367] In such a situation, the surviving member or members of the board are not competent to take other steps, such as to authorise spending of the company's money, or to enter into any agreements on behalf of the company.

Board Committees

[23.40] Where a management company has adopted regulation 105 to 107 of Part I of Table A or regulation 54 to 56 of Table C,[368] then there is power for the board of directors to form committees to exercise any powers of the directors which the board as a whole wishes to delegate to the committee. These regulations provide as follows—

105 or 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.

106 or 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.

107 or 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 where there is an equality of votes, the chairman shall have a second or

---

366 See paragraphs [23.20].

367 At which, presumably, it would be open to the members to resolve that additional directors be appointed. See paragraph [13.13].

368 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

casting vote.

[23.41] It is entirely a matter for a management company's board of directors to decide which of their powers, if any, they wish to delegate to any committees. However, there may be circumstances in which the board might find it convenient to do so. For example, suppose the directors ordinarily meet together only about once every two months but are embarking on the process of seeking to engage a new managing agent. Such a board might perhaps conclude that this task should be delegated to a sub-committee of two or three members (who would be in a position to meet together more frequently) with full powers to conclude the contract on the company's behalf.

Particular issues which it may be advisable for the directors of a management company to consider routinely

[23.42] While it is not the role of the ODCE to prescribe what should be the business of a management company's board of directors, it seems to us that the somewhat peculiar nature of such companies and the extent to which their boards of directors tend to be comprised of persons without special or previous expertise as regards property management, means that we should at least give some outline of some of the sorts of issues which we think should be run through on occasions when new directors first join the board of directors of a management company.

[23.43] Typically this will occur on occasions such as the following—

- at the first meeting of the directors after the transfer of the common areas from the developer to the management company, when the multi-unit developer's nominees resign as directors of the management company and the representatives of the multi-unit development owners first take over sole responsibility for the management company's affairs;

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

[23.44] It seems to the ODCE that, on occasions such as these, it may be wise for the directors to 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 term of office (or, if the matter is sufficiently serious, bring to the attention of members: perhaps by means of a general meeting of the members, or through a communication such as in the directors' report[369]).

[23.45] 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

---

369 See paragraphs [33.01] to [33.10].

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 management company as contained in its articles of association;

(b) to note who are the company's solicitors;[370]

(c) to note the location of the management company's title deeds;

(d) to ascertain whether the management company's solicitor has confirmed that the company holds good and enforceable title to all of the common areas in the multi-unit development;

(e) to identify and note the management company's privileges and obligations under the conveyancing documents by which multi-unit development owners hold their individual properties;

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

(g) to clarify the up-to-date balance in those accounts and who has signing authority in relation to them;[371]

(h) to note the identity of the management company's insurance broker;

(i) to verify what insurance cover currently exists in relation to the complex;[372]

(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 management company's contract with its managing agent;[373]

(l) to examine the management company'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

---

370 See paragraphs [38.01] to [38.10].

371 See paragraphs [37.01] to [37.07].

372 For further information about insurance see Section 16 of the National Consumer Agency's publication *Buying and Living in a Multi-Unit Development Property in Ireland* the details of which are at footnote 25.

373 See paragraphs [7.06] to [7.08].

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 management company's compliance with its other legal obligations.[374]

[23.46] 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.

[23.47] The other issue to which management company directors will have to give considerable attention during at least one of their meetings each year is in setting the company's budget for the following year. This is a process in which fundamental choices have to be about the level and extent of the services which will be provided to the associated multi-unit development in the year ahead – how much to spend on renovations, how much to put aside for the future (contributions to the sinking fund or business investment fund, for example), whether or not to have 24-hour security for example. The outcome of these decisions determines the level at which the management company will then have to levy service charges on the owners of the units in the multi-unit development. In approaching this task[375] management companies will undoubtedly find useful the information about management company budgets contained in Section 14 of *Buying and Living in a Multi-Unit Development Property in Ireland* published by the National Consumer Agency.[376]

---

374 Such as those adverted to in paragraphs [43.01] to [43.05].

375 Which is usually best done in conjunction with the management company's managing agent and other advisers such as the company's insurance broker, engineer, chartered surveyor, etc.

376 See footnote 25.

24.0 ANNUAL GENERAL MEETINGS (AGMS)

[24.01] The primary legal requirements in relation to the holding of companies' AGMs appear in Sections 131 and 148(7) of the Companies Act 1963. The key rules are as follows—

(a) as the name suggests an AGM must ordinarily be held by every company in each *calendar* year;

(b) 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 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 2008, there is no need for an AGM in 2008 or 2009: provided the first AGM is duly held on or before 31 January 2010;[377]

(c) after its first AGM, subsequent AGMs of the company must take place in each succeeding calendar year. However, no longer than 15 months should elapse between the date of one AGM and that of the next.

Accordingly, continuing the previous example, if the company held its first AGM on 15 January 2010, its next AGM would have to be held on some date between 1 January 2011 and 14 April 2011;

(d) The 15-month rule cannot be used however to authorise the non-holding of an AGM during any whole calendar year which intervenes.

So, for example, where a company holds its AGM on 8 November 2009, it is not permissible for it to seek to take advantage of the 15-month rule to defer the holding of any AGM in 2010: on the basis that 15 months from 8 November 2009 runs to 7 February 2011. The obligation to hold an AGM in each calendar year 'trumps' the 15-month rule, with the result that the company's next AGM must be held sometime within the calendar year 2010.

(e) In every case the AGM should be held within 9 months of the date to which any accounts have been made up which are to be considered at that AGM.

---

377 On the other hand, if the same company had been incorporated on 1 April 2008 the special rules allow for the AGM to be skipped during one calendar year only: 2008. A 2009 AGM is required because the 18-month rule allows the company to defer its first AGM to a date no later than 30 September 2009.

The convening of an AGM

[24.02] The questions of who is empowered to call an AGM and where it should be held are usually dealt with in the company's articles of association. Where the company has adopted regulation 48 of Part I of Table A or regulation 5 of Table C[378] then—

> ".. the annual general meeting shall be held at such time and *at such* place *in the State* as the directors shall appoint."[379]

[24.03] Read literally and in isolation, regulations such as these appear to give the company's directors considerable discretion as to where/when the AGM should be held. However, on closer consideration it will be seen that this discretion is probably not so unfettered as might at first appear.

[24.04] Firstly, the discretion cannot be exercised so as to defeat the requirements of any other provision of the company's articles, or of the Companies Acts. This has at least two consequences as regards the timing of the meeting—

(a) The discretion must be exercised subject to the statutory requirements in paragraph [24.01] which place limits on the latest date within the calendar year by which the AGM must be held.

(b) One of the major items of business to be dealt with at any AGM is the consideration of the company's accounts.[380] The management company's directors are required to lay these before the AGM of the company "within 9 months of the balance sheet date".[381] In practice, this means that in fixing the date of the management company's AGM its directors are further limited in selecting a date, because they must choose one which lies within 9 months of the end of the preceding financial year. Suppose, for example, a management company's financial year runs from 1 October in each calendar year to the following

---

378 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

379 The italicised words appear in regulation 5 of Table C, but not in regulation 48 of Table A. They add nothing however, because the requirement that all general meetings of the company be held in the State are separately stipulated in regulation 47 of Table A, and are repeated in regulation 4 of Table C. Note, however, that although Table A and C articles require general meetings to be held in the State, Section 140 of the Companies Act 1963 permits an AGM to be held outside the State where the articles do not require it to be held in the State, and where either *(i)* all the members entitled to attend and vote at the meeting consent in writing to it being held elsewhere, or *(ii)* an appropriate resolution has been passed at the preceding AGM.

380 See paragraphs [24.39] to [24.45].

381 Section 148(7) of the Companies Act 1963 as amended by Regulation 4 of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005, S.I. 116 of 2005.

30 September; in such a case the company's 2009 AGM will be being asked to consider a balance sheet made up to 30 September 2008. In order to comply with the 9-months rule, the AGM must accordingly be held no later than 29 June 2009.

[24.05] Secondly, as with all their other powers, the directors of a management company must exercise this discretion mindful of their duty to act in good faith and in the interests of the company as a whole.[382] Accordingly, in the view of the ODCE, directors should aim to arrange AGMs so that they can be held at locations and times which, in all the circumstances, are likely to be reasonably convenient for as many as possible of the members of the company who may wish to attend the AGM.[383]

Consequences of an AGM not being held

[24.06] Where an AGM is not held as required by the Companies Acts, an offence is committed both by the company and by any of its officers who authorised or permitted the default.[384] In this instance, an officer of a company is presumed to have permitted a default by the company unless the officer can establish that he/she took all reasonable steps to prevent it or that, by reason of circumstances beyond his/her control, he/she was unable to do so.[385]

[24.07] 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 ODCE asking it "[to] call or direct the calling of a general meeting of the company".[386]

Notice of the AGM

[24.08] This is usually dealt with in the management company's articles of association.[387] So, for example, where a management company has adopted regulation 51 of Part I of Table A or regulation 8 of Table C[388] then—

---

382 See further, paragraph [18.07] to [18.15].

383 We appreciate however that where anything more than a very small number of people are involved, choosing a time which suits all or even just many people can be notoriously difficult! Accordingly in expressing this opinion we are not attempting to set down an inflexible rule. What we hope, however, is to dispel any perception that under company law it is entirely legitimate for directors to convene AGMs for times and locations which they know, or ought reasonably to foresee, are needlessly unsuitable as regards a very large number of the company's members.

384 Section 131(6) of the Companies Act 1963.

385 Section 383(2) of the Companies Act 1963.

386 Section 131(3) of the Companies Act 1963.

387 Subject, however, to Section 133(1) of the Companies Act 1963 which ensures that the articles cannot purport to permit the calling of an AGM by less than 21 days' notice in writing; and subject also to Section 133(2) which provides that if the articles do not provide otherwise then an AGM may be called by 21 days' notice in writing.

388 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

> ".. an AGM shall be called by 21 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 the 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 *regulations*[389] of the company, entitled to receive such notices from the company."

[24.09] A number of issues are raised by a regulation of this sort and, to understand it fully, it is necessary to look also at the meaning of some of the other provisions usually found in a management company's articles.

[24.10] First, there is reference to the notice being "exclusive of the day on which it is served or deemed to be served". To understand this concept it is necessary to look at what the management company's articles say about service of notices generally.

[24.11] Many management companies adopt articles along the lines of regulation 133 of Part I of Table A or regulation 68 of Table C.[390] Where either of these regulations applies then—

> "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 the 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."

[24.12] In summary, this means that if notice of an AGM is given personally to a member it is to be treated as having been served on that member on the day on which it was physically handed to him/her. Alternatively if it is sent by post to the member it is deemed to have been served on the member 24 hours after it was posted.

[24.13] Returning to regulation 51 of Part I of Table A and regulation 8 of Table C, it will be recalled that these stipulate that the 21 days' notice of an AGM is to be "exclusive of the day on which [the notice] is served or deemed to be served and of the day for which it is given".

---

389 The word 'regulations' appears in regulation 51 of Table A. The equivalent word used in regulation 8 of Table C is 'articles'.

390 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

[24.14] Accordingly—assuming some at least of the notices convening the AGM are to be served by post—this means that in calculating when the AGM can take place, allowing for 21 days' notice, one must ignore both the day on which the letters are posted, the following day[391] and the day of the intended meeting.

[24.15] An example of what this means is that if the directors of a management company wish to hold an AGM on 28 September the 21-day notices convening such a meeting must be posted to members no later than 5 September: not 7 September.

[24.16] In practice, a simple and effective way for management companies to make sure that they do not fall foul of these somewhat tricky rules is to simply add at least a week for good measure! So, for example, if it is desired to hold the AGM on 14 November, serving the notice on (say) 14 October is a foolproof method of ensuring that there is no risk of mistakenly falling short of the required notice period. Giving longer notice will also facilitate members in keeping that time free of other commitments.

To whom notice should be given

[24.17] Normally, a management company's articles of association will stipulate to whom notice of general meetings of the company (including AGMs) should be given. For example where the company's articles of association include regulation 136 of Part I of Table A or regulation 69 of Table C[392] then—

> "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."

---

391 Being the day on which they are deemed to have been served.

392 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C. Note also however that under Section 134(a) of the Companies Act 1963 if the company's articles do not make other provision regarding the giving of notices, the extent to which Table A may operate by default is further reinforced by the provision that "in so far as the articles of the company do not make other provision in that behalf … notice of the meeting of a company shall be served on every member of the company in the manner in which notices are required to be served by Table A and for the purpose of this paragraph "Table A" means that Table as for the time being in force."

[24.18] The stipulation in paragraph (c) of regulation 136 of Part I of Table A or regulation 69 of Table C, whereby a company's auditors must be given notice of general meetings, reinforces the provisions of Section 193(5) of the Companies Act 1990 under which—

> "The auditors of a company shall be entitled to attend any general meeting of the company and to receive all notices of, and other communications relating to, any general meeting which any member of the company is entitled to receive and to be heard at any general meeting which they attend on any part of the business of the meeting which concerns them as auditors."

[24.19] At paragraph [6.10] we referred to the fact that the management companies intended to have a role in relation to some multi-unit developments are structured in such a way that the membership of the unit-owners does not commence until after the common areas of the development have been transferred by the developer: where, in effect, there is no developer-and-owners' phase. If that is the case, the unit-owners are not members prior to transfer of the common areas and so, during that period, even if there are articles such as regulation 136 of Part I of Table A or regulation 69 of Table C, they are not entitled to receive notice of the company's AGMs.

The documents which must accompany notice of an AGM, or be otherwise sent at least 21 days before the AGM

[24.20] Copies of the balance sheet, profit and loss account, directors' report intended to be laid before an AGM, together with the related auditors' report, must ordinarily be sent to every member of a company not less than 21 days before the date of its AGM. [393]

[24.21] Where the management company is a private company limited by shares, this obligation applies even in those rare instances where there are members of the company not entitled to receive notice of the AGM.[394] However if the management company is a company limited by guarantee not having a share capital there is no obligation to send these documents to any members of the company *not* entitled to receive notices of general meetings of the company.[395]

[24.22] The most usual situation, however, is one in which all the members of the company are entitled to receive notice of all its general meetings. Where that is so, all the members are correspondingly entitled to receive the documents listed in paragraph [24.20], irrespective of whether the management company was

---

393 Section 159(1) of the Companies Act 1963.

394 Section 159(1) of the Companies Act 1963.

395 Section 159(2) of the Companies Act 1963. However even in that event Section 159(4) of the Companies Act 1963 provides that <u>any</u> member of a company, even if he/she is not entitled to have the relevant documents sent to him/her as of right, may nonetheless *request* that copies of the most recent documents be sent to him/her and the company is obliged to comply with such a request.

incorporated as a private company limited by shares or a company limited by guarantee not having a share capital.

[24.23] Where the management company's articles of association include regulation 129 of Part I of Table A or regulation 66 of Table C,[396] this statutory obligation is reinforced by the following provision—

> "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."

[24.24] Strictly speaking it is possible for the balance sheet, directors' report, etc to be sent to members separately from the notice convening the related AGM. However, in practice most companies opt to send them together.

Ensuring that it is specified in notices that the intended meeting will be the AGM

[24.25] The notice by which an AGM is convened must expressly state that the meeting is to be the company's AGM.[397]

Convening an AGM at less than 21 days' notice

[24.26] This is difficult to achieve, but not impossible.

[24.27] One of the effects of Section 133(3) of the Companies Act 1963 is that an AGM of a company shall be deemed to have been duly called, even though less than the usual period of notice has been given, if *but only if* it is so agreed by—

(a) all the members of the company entitled to attend and vote at the meeting,[398] *and*

(b) the statutory auditors of the company.[399]

Consequences of any failure to give proper notice of the AGM

[24.28] It is a basic principle of company law that all members of a company should

---

396 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

397 Section 131(1) of the Companies Act 1963.

398 Not simply all the members who attend the meeting called at short notice: unless this happens to represent also the entirety of those members who were *entitled* to be present there (and to vote at it).

399 The auditors' agreement must be obtained even if is expected that they would be unlikely to wish to attend the meeting.

be adequately notified of meetings of which they are entitled to receive notice[400] 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.

[24.29] Under the common law, any failure to give due notice of a meeting to any person entitled to it renders the decisions of the meeting invalid.[401]

[24.30] However, in most management companies this rule does not apply inflexibly because their articles of association include a provision such as regulation 52 of Part I of Table A or regulation 9 of Table C.[402] These provide that—

> "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."

[24.31] It is important to note, however, that a provision such as this is not a means by which the directors or secretary of a management company can, with impunity, opt not to give notice of meetings to members entitled to receive notice. The provision applies only in the case of *accidental* omission: not deliberate omission.

The necessary quorum for an AGM

[24.32] This is usually dealt with in the management company's articles of association.

[24.33] For example, if the management company was incorporated as a company limited by guarantee and has adopted regulation 11 of Table C[403]—

> "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."

[24.34] The corresponding figure is 2 where the management company was incorporated as a private company limited by shares and has adopted regulation 5 of Part II of Table A.[404]

---

400 Note, however, that it is possible to create classes of membership which do not entitle the relevant members to have voting rights, nor a right to notice of the company's meetings.

401 *Smyth v. Darley* (1849) 2 HLC 789; *Young v. Ladies' Imperial Club* [1920] 2 KB 523.

402 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

403 Ditto.

404 Which applies in lieu of regulation 54 of Part I of Table A. See paragraph [9.05] concerning the extent to which the articles of association of any particular management company incorporated as a private company limited by shares may not necessarily include all of the regulations contained in Table A Part II.

[24.35] Often articles of association go on to provide what is to happen in the event that a quorum is not present. For example, if the management company has incorporated either regulation 55 of Part I of Table A or regulation 12 of Table C[405]—

> "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."

The business of an AGM

[24.36] Certain provisions of the Companies Acts indicate the business which is required to be transacted at an AGM. Those matters are what are usually described as the "general business" of the AGM. Usually they are alluded to as such in the company's articles of association. For example, where a management company has adopted regulation 53 of Part I of Table A or regulation 10 of Table C[406] then—

> "All business shall be deemed special .. 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."

[24.37] Where such a provision is included in the management company's articles the general business of an AGM is accordingly—

(a) consideration of the company's balance sheet and profit & loss account;

(b) consideration of the directors' report;

(c) consideration of the statutory auditors' report;

(d) the election of directors in place of those retiring;

(e) the re-appointment of the retiring statutory auditors;

(f) the fixing of the statutory auditors' remuneration; and,

---

405 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

406 Ditto.

(g) the declaration of a dividend.[407]

[24.38] Where a provision such as regulation 51 of Part I of Table A or regulation 8 of Table C applies[408] then, to the extent that they call only for the notice of an AGM to outline "the general nature of special business [intended to be transacted at an AGM]", strictly speaking it is not necessary for intended general business to be expressly set forth in the notice of the AGM. However it is undoubtedly good practice that this should be done, even if it is not strictly necessary.

Consideration of the company's accounts and the directors' and statutory auditors' reports

[24.39] A common perception which appears to exist in relation to many management companies is that one of the functions of the members assembled at an AGM is to approve or adopt the company's financial statements.

[24.40] From a company law perspective, this is not so. What company law requires is that the company's financial statements be prepared by the directors,[409] that they be approved by the board of directors[410] and then signed on behalf of the board by two of the directors. Approval by the members is not required by the Companies Acts.[411]

[24.41] Instead what the Companies Acts require is that the accounts, when finalised as outlined above, must be *laid before* the relevant AGM of the company.[412]

[24.42] In the same way, the directors' reports must be *laid before* the AGM[413] while the statutory auditors' report must be *read* at the AGM (and be open to inspection by any member).[414]

[24.43] Nonetheless, it would be a mistake to conclude from the immediately preceding paragraphs that the laying of these documents before the AGM is a mere formality. In relation to the corresponding UK provisions, one of the leading professional bodies stated some years ago—

"It is important to note that the laying of the accounts in a general meeting is

---

407 Something which, in practice, is likely to occur rarely if ever in the life of most management companies.

408 As cited at paragraph [24.08].

409 Section 148(1) of the Companies Act 1963 as amended by Regulation 4 of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005, S.I. 116 of 2005.

410 Section 157(1) of the Companies Act 1963.

411 Palmer's *Company Law*, (Sweet & Maxwell, 25th edition, 1992 to 2008) paragraph 7.405.

412 Section 148(7) of the Companies Act 1963 as amended by Regulation 4 of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005, S.I. 116 of 2005.

413 Section 158(1) of the Companies Act 1963.

414 Section 193(2) of the Companies Act 1990.

not a purely symbolic act. Doing so makes them part of the business of the meeting and therefore a proper subject for debate. In addition, the Notice and or Articles of most companies refer to "consideration" of the Report and Accounts by the members, which implies that there should be discussion."[415]

[24.44] In order that this discussion can be conducted meaningfully and efficiently the ODCE recommends that management companies should perhaps consider adopting a procedure along the lines of that suggested by English textbook writers—

> "At the meeting, the chairman usually comments on the accounts, then explains the position of the company, giving such further information concerning its affairs as he thinks proper. He concludes by moving that the reports and accounts be adopted. This is usually seconded by another director. The members present at the meeting are then free to comment on or criticise the reports, accounts and the chairman's speech. As long as this is consistent with their fiduciary duties, the directors should answer all questions about the accounts and the company's affairs. However, they are not bound to answer any questions which they consider undesirable, in the best interests of the company, to answer.[416]

[24.45] At the end of this discussion it often happens that a motion is put before the members to adopt or approve the accounts – even though, as outlined above, company law does not require any such adoption or approval. Such an item of business has its advantages, however, because—even if adoption or approval is not essential—it does allow members dissatisfied with the accounts and reports prepared by the directors an opportunity to vote against the proposal. What should happen in the event of the meeting deciding to reject such a proposal is not laid down in the Companies Acts. In the ODCE's view, it would be very desirable that, in such an event, all concerned should take legal and/or accounting advice as to how best matters should be advanced.

The election of directors in place of those retiring

[24.46] The question of how directors come to be elected at general meetings is discussed in paragraphs [13.13] to [13.14].

The re-appointment of the retiring statutory auditors and the fixing of the auditors' remuneration

[24.47] In most AGMs these are items of business in relation to which there is seldom any disagreement. In that event, they are matters generally capable of being dealt with fairly speedily.

---

415 Institute of Chartered Secretaries and Administrators, *A Guide to Best Practice for Annual General Meetings*, 1996.

416 Davies *et al.*, Modern Law of Meetings (Jordan Publishing Limited, 2005) at paragraph 5.23.

[24.48] Indeed, so far as the first issue is concerned, there is usually no need for any resolution of the members at all – unless someone has given notice of an intended resolution that the outgoing auditor be replaced with someone else. This is the consequence of Sections 160(2) and (3) of the Companies Act 1963 which provide as follows—

> (2) Subject to subsection (3), at any annual general meeting a retiring[417] auditor, however appointed, shall be re-appointed without any resolution being passed unless—
>
> (a) he is not qualified for re-appointment; or
>
> (b) a resolution has been passed at that meeting appointing somebody instead of him or providing expressly that he shall not be re-appointed; or
>
> (c) he has given the company notice in writing of his unwillingness to be re-appointed.
>
> (3) Where notice is given of an intended resolution to appoint some other person or persons in place of a retiring auditor, and by reason of the death, incapacity or disqualification of that person or of all those persons, as the case may be, the resolution cannot be proceeded with, the retiring auditor shall not be automatically re-appointed by virtue of subsection (2).

[24.49] So far as the fixing of the statutory auditors' remuneration is concerned, the usual rule is that the remuneration of the auditors of a company "shall be fixed by the company at the [AGM] or in such manner as the company at the [AGM] may determine."[418]

[24.50] It is fairly common in most Irish companies that, rather than the members assembled at an AGM getting into the business of agreeing with statutory auditors what should be their remuneration for the following year, the members adopt a resolution giving the directors authority to deal with that question – a possibility which is quite permissible having regard to the words "or in such manner as the company at the [AGM] may determine". Accordingly, in many management companies this item will be dealt with on the agenda of the AGM by an item of business which asks the members "to authorise the directors to fix the remuneration of the auditors."

Dealing with special business at an AGM

[24.51] As noted above,[419] it is typically the case in most management companies

---

417 'Retiring' here is used in the sense of 'outgoing'. An outgoing auditor who wishes to *retire* in the conventional sense needs to bring himself/herself into the classification which the Oireachtas adopted in subsection (2)(c) – an auditor "who has given the company notice in writing of his unwillingness to be re-appointed."

418 Section 160(8)(b) of the Companies Act 1963.

419 Paragraphs [24.08].

that any business of the AGM other than the matters listed in paragraph [24.37] is to be classified as 'special business' and the general nature of that special business must have been outlined in the notice convening the AGM.

[24.52] If there has been a failure to give notice in this manner the ordinary rule is that it is not within the power of the AGM to purport to take decisions in relation to any items of such business which a member or members seeks to raise at the meeting – even if it claimed that they are of an important and pressing nature.

[24.53] The purpose of this rule is not to frustrate the ability of an AGM to take decisions which those members who attend it wish to have considered. It is grounded instead on the principle that the business of the management company should not be conducted on the basis of 'decision-making by surprise'. Each member must be given a meaningful opportunity to make an informed decision as to whether he/she wishes to personally attend an AGM, or to send someone else as their proxy.[420] Such a decision can only properly be made if the member knows in advance what are the questions which the meeting is going to be asked to decide. A member who receives notice of the AGM, scrutinises it and concludes that the issues on the agenda are not of sufficient concern to warrant the member attending the meeting,[421] has to be entitled to do so secure in the knowledge that no other business will be allowed to make its way onto the agenda of the meeting, of which the member has not had advance notice. Had such additional business been specified on the notice of the meeting it is possible that at least some of those who opted not to attend the meeting on the basis of the notice actually given would have made their minds up differently.

[24.54] However this rule does not apply where[422] all the members entitled to attend and vote on the question are present at the meeting and are unanimously in agreement that a decision should be taken in relation to the proposed question.[423] However, where even *one* member only is missing, or even *one* only of those present is opposed to a decision being taken without proper notice, this exception cannot be relied upon. 100% agreement is needed and it is not enough to say that, the minority being so small, it is almost inevitable that the decision would have been carried if the proper formalities had been gone through.

[24.55] What these rules seek to prevent is decision making[424] by those gathered at an AGM about special business not specified in the notice convening the meeting. They do not forbid the meeting proceeding to discuss any matters not expressly referred to in the notice by which the meeting was convened. Whether or not to have such a discussion is a decision which lies within the decision-making powers of the chairman of the meeting and, in some instances, it may well be advisable for the chairman to allow such a discussion. The outcome of such a discussion, for

---

420 See further paragraphs [27.01] to [27.16].
421 Or sending a proxy on his/her behalf.
422 As will rarely be the case, however.
423 *i.e.* the proposal of special business *not* outlined in the notice convening the meeting.
424 *i.e.* the passage of resolutions by the meeting concerning such business.

example, might be a conclusion that a decision is indeed needed and that *either* the item will and should be placed on the agenda for the following year's AGM *or* that a decision is needed more quickly and that, accordingly, an EGM should be convened for some convenient date in the meanwhile. Alternatively in some instances the result of the discussion might be to bring about an appreciation that the proposal which the member or members wish to have decided is one which actually lies within the decision-making powers of the board of directors, rather than of the members assembled in general meeting. For example, this might be the case if what the member or members was seeking to raise was an issue concerning the business of the company which—where the management company has adopted either regulation 80 of Part I of Table A or regulation 35 of Table C[425]—is required to be managed by the directors, rather than by the members.[426]

Deciding what items of special business should be dealt with at AGMs, especially requests by members to have items included in the notice convening the AGM

[24.56] Although the question does not appear to have been decided by the Irish courts in any reported case, the ODCE's understanding is that, unless the company's articles provide otherwise,[427] the ordinary rule of law is that "the business specified in the notice will be that which the convenors of the meeting think ought to be transacted".[428]

[24.57] Because AGMs are ordinarily convened on the authority of the management company's directors[429] it follows that the directors can always ensure that whatever items of special business they believe should be dealt with by an AGM are included on the agenda for the meeting.

[24.58] However even in the event where members of the company have specifically asked that items be listed as special business to be dealt with at the company's next AGM, it would seem that the directors have a discretion not to include them on the agenda.[430] However it would seem that if members wish to do so they can opt to arrange themselves for their proposals to be duly notified to other members. According to one leading writer in this area—

---

425 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

426 As outlined further at paragraphs [16.01] to [16.23].

427 The regulations in Table A and C do not.

428 This phrase is taken from Impey & Davies, *Company Meetings* (24th Edition, Jordans, 1999) at page 43. However note that the phrase does not appears to have been used in the 25th Edition, renamed *Modern Law of Meetings*, the publication details for which are at footnote 416.

429 See paragraph [25.02].

430 *Pedley v. Inland Waterways Association Ltd* [1977] 1 All ER 209. However if the members have sufficient voting power, it will usually be possible for them to seek to have an EGM convened to consider the special business they want considered. See paragraphs [25.06] to [25.11].

> "Where a meeting has been duly convened on a proper notice by the directors, they are not obliged to circulate any resolutions of which the company is given notice to the general body of members. If the members proposing such resolutions wish to ensure that adequate notice is given of their proposals, they must undertake themselves the somewhat expensive and time-consuming process of circulating their fellow members." [431]

[24.59] Here again, however, it seems to the ODCE that the directors' discretion to *not* notify members of business which other members wish to have considered, is one which needs to be exercised thoughtfully and carefully by the directors.[432] Moreover, as with all other powers of the management company's directors, the discretion is one which needs to be exercised by the directors mindful of their duty to act in good faith and in the interests of the company as a whole.[433]

[24.60] Although the position may sometimes be otherwise, it seems to the ODCE that in most cases it would be prudent for management company directors to begin a consideration of how to respond to a request from a member that an item be placed on the agenda for a forthcoming AGM by operating on the basis that they will respond positively to the request unless there is a compelling principled reason not to do so.[434]

Suggested form of a notice convening an AGM

[24.61] While obviously it is a matter for each management company to decide on what is appropriate for it, the ODCE suggests that something along the following lines should usually be enough—

> ***16 Parnell Square Owners Management Company Limited***
> ***Company Number 987654321***
>
> ***Registered Office: 16 Parnell Square, Dublin 1***

---

431 Keane, *Company Law* (4th edition) (Tottel Publishing, 2007), paragraph [25.34].

432 Mindful of the fact that, when the AGM eventually takes place, any refusal by the directors may well be the subject of criticism by the disappointed member and his/her supporters; which might then find support from other members, including perhaps some who—although not themselves in favour of the underlying proposition—might nonetheless think that fairness all round would have been better served by allowing the matter to be properly placed on the agenda of the meeting.

433 See further, paragraphs [18.07] to [18.15].

434 Likewise if the request comes from members who collectively have enough voting power to require that an EGM of the company be held, common sense would suggest that the directors should bow to the inevitable and permit the special business to be dealt with at the forthcoming AGM – rather than exposing the company to a situation in which it may needlessly be put to the inconvenience and expense of having to convene a separate EGM.

YOU ARE HEREBY NOTIFIED that the Annual General Meeting of the above-named company will be held at *[insert the relevant address*] on *[insert the relevant day of the week]* the *[insert the relevant date]* day of *[insert the relevant month and year]* at *[insert the relevant time]* p.m. and that the intended general and special business of the meeting will be as follows—

General Business

(1) To receive and consider the accounts of the company relating to the financial year of the company which ended on the *[insert the relevant date]* together with the report of the company's directors attached to those accounts;

(2) To allow for the reading and consideration of the report of the auditors of the company to the members of the company on the accounts referred to at paragraph (1) above;

(3) to re-elect the following directors who, in accordance with the company's articles of association, are due to retire by rotation—

- Ms _____;
- Mrs _____, and
- Mr _____;

(4) *(to be included only where it is sought to appoint as auditors someone other than the outgoing auditors)*

to deal with the appointment of auditors to hold office from the conclusion of the meeting hereby directed until the conclusion of the next annual general meeting of the company;

(5) *(delete one or other of these options)*

to fix the remuneration of the company's auditors

or

---

435 Section 136(3) of the Companies Act 1963 requires that a note along these lines should be included in the case of a notice calling an EGM of a management company which is incorporated as a private company limited by shares. An equivalent note is not necessarily required where the management company is a company limited by guarantee not having a share capital. However if (as is usually the case) such a company's articles permit members to appoint proxies to it would seem sensible that a similar note should also be included in the Notice convening any EGM of such a company. For further information about proxies, and the extent of their entitlements, see paragraphs [27.01] to [27.16].

436 Include a blank proxy form along the lines required by the company's articles of association. See paragraphs [27.01] to [27.16].

437 The terms of this stipulation should accord with whatever is provided in the company's own articles of association. See paragraphs [27.01] to [27.16].

to authorise the directors to fix the remuneration of the auditors;

Special Business

(6) *(for example)* pursuant to regulation 46 of the company' articles of association to provide that there may at any one time be up to 9 directors of the company

(7) *(for example)* to hear and consider the opinions of members in relation to the directors' assessment of what capital expenditure is likely to have to be incurred by the company during the period from 2010 to 2012.

By order of the Board

Signed _____
Company Secretary

Important Notes:

(1) A member entitled to attend and vote is entitled to appoint a proxy to attend, speak and vote in his stead. A proxy need not be a member of the company.[435]

(2) A proxy should be in the form that accompanies this notice, or as near thereto as circumstances permit.[436]

(3) An instrument appointing a proxy should be deposited at the company's registered office not less than 48 hours before the time stipulated above for holding the EGM.[437]

Directors' attendance at an AGM

[24.62] From the perspective of good corporate governance, it is essential that at least some of the management company's directors are in attendance at its AGM. Ideally as many as possible should do so.

[24.63] However, from a purely legal perspective, there is in fact no provision of the Companies Acts which expressly requires that any of the directors should be in attendance at an AGM.

[24.64] It is of course very unsatisfactory for an AGM to have to proceed in the absence of the management company's directors. Moreover, in the ODCE's view,[438] it may amount to a breach of duty on the part of the management company directors

---

[438] Although we know of no judicial authority for this proposition.

having regard to their general duty to act in good faith and in the interests of the company as a whole. Even if the directors directly or indirectly control the bulk of the voting power in the management company, in our view the interests of the company as a whole require that the members should be afforded an opportunity to have a meaningful consideration of matters such as the management company's financial statements and its directors' report.

[24.65] Ordinarily the power to determine the time and place at which an AGM is held is vested primarily in a management company's directors.[439] In the circumstances this makes all the more flagrant any significant non-attendance on the directors' part, because it is the directors who had the chance to select a time, date and venue which ought to have been convenient for at least some of themselves.

[24.66] During the developer-and-owners' phase of many management companies[440] the bulk of the voting power in the company is often controlled by nominees of the developer of the associated multi-unit development, who are also the management company's only directors. In the event that the management company's directors decide not to attend its AGMs—and respondents to our consultation process have complained that this occasionally happens in practice—the tactic by which they will seek to protect themselves from any adverse consequences of non-attendance is by ensuring that a proxy attends on their behalf with power to vote the entirety of the developer's nominees' votes in accordance with the developer's wishes.

[24.67] In many companies the sanction which directors who routinely declined to attend the company's general meetings might expect to have visited upon them would be a loss of confidence on the part of the company's members; which might ultimately make its way into votes against the re-appointment of the directors, or even votes seeking to have them removed from office. However if the directors can control the bulk of the voting power in a management company[441] this may not be a potent threat.

Records of AGMs

[24.68] Minutes must be kept of all AGMs in books kept for that purpose.[442] The minutes should be signed by the chairperson of the meeting to which the minutes relate, or by the chairperson of the next succeeding meeting and—if so—they will be regarded in law as evidence of the proceedings.[443] Where there is non-compliance with this requirement both the company "and every officer of the company who is in

---

439 See paragraphs [24.02] to [24.05].
440 See paragraph [5.03].
441 See paragraphs [12.04] to [12.09].
442 Section 145(1) of the Companies Act 1963.
443 Section 145(2) of the Companies Act 1963.

default"[444] may be found guilty of an offence.[445]

[24.69] In order to comply with these obligations, it is good practice for the company secretary to keep careful notes of the proceedings at an AGM and to work them up into draft minutes fairly soon after the meeting concludes. Ideally, this should be done in conjunction with the chairman of the meeting.

[24.70] It is not necessary that the finalisation of minutes should await the following year's AGM. Instead as noted by one leading writer in this area[446]—

> "It is common for the chairman to sign the minutes of AGMs as soon as they have been prepared and submitted to the board [of directors] …".

[24.71] Any member of a management company is entitled to inspect the company's books containing the minutes of AGMs and other general meetings of the company.[447] Those books must be kept at the company's registered office and, during business hours[448] be open to the inspection of any member without charge.[449]

[24.72] Any member is entitled to be furnished with a copy of any such minutes within 7 days after he has made an appropriate request to the management company.[450]

---

444 An "officer who is in default" includes any director or secretary "who authorises or who, in breach of his duty as such officer, permits, the default": Section 383(1) of the Companies Act 1963 as replaced by Section 100 of the Company Law Enforcement Act 2001.

445 Section 145(4) of the Companies Act 1963.

446 Doyle, *The Company Secretary* (Second Edition, Thomson Round Hall, 2002), section 3.2.5.

447 Section 146(1) of the Companies Act 1963.

448 "subject to such reasonable restrictions as they company may by its articles or in generally meeting impose, so that not less than 2 hours in each be allowed for inspection".

449 The public at large have no entitlement to inspect the minutes of a general meeting of any company. However there is an express statutory right for the ODCE to do so: Section 145(3A) of the Companies Act 1963, as inserted by Section 19 of the Company Law Enforcement Act 2001.

450 The management company is entitled to insist on the member paying towards the costs of it meeting this obligation: but the charge is not allowed to exceed six cent for every 100 words: Section 146(2) of the Companies Act 1963.

25.0 EXTRAORDINARY GENERAL MEETINGS (EGMS)

[25.01] Apart from a company's AGMs, the Companies Acts do not require that any other "mid-year" general meetings of a company's members be held as a matter of course.[451]

[25.02] However, the law also recognises that occasions may arise where members may need to meet together formally on other occasions, in between AGMs. Such general meetings of the company are known as *extraordinary general meetings* of the company (EGMs).

[25.03] It is important to note that the term *extraordinary*, when used in relation to members' meetings, is not meant to signify that EGMs can/should be held only in the most remarkable, exceptional or unusual circumstances. The word *'extraordinary'* is used merely to distinguish such meetings from the company's AGMs[452] and this is reflected in a provision which appears in most management company's articles of association along the following lines—

> **"**All general meetings other than annual general meetings shall be called extraordinary general meetings."[453]

Who can convene an EGM?

Directors on their own initiative

[25.04] Where the management company's articles contain a provision along the lines of regulation 50 of Part I of Table A or regulation 7 of Table C[454] then the management company's directors have a general power to convene EGMs on their own initiative. Both of those provisions provide as follows—

> "The directors may, whenever they think fit, convene an [EGM] … 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 [EGM] in the same manner as nearly as possible as that in which meetings may be convened by the directors."

As few as two members where insufficient directors remain in the State

[25.05] In the exceptional circumstances where fewer directors of the company

---

451 See paragraphs [24.01] to [25.24].

452 Historically AGMs were sometimes referred to as the *ordinary general meetings* of the company.

453 Regulation 49 of Part I of Table A; Regulation 6 of Table C.

454 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

remain in the State than are capable of forming a directors' quorum,[455] an EGM may be convened by as few as "any two members of the company" where regulation 50 of Part I of Table A or regulation 7 of Table C applies.[456]

Specified numbers of members: even against the wishes of the directors

[25.06] Where a management company is a company limited by guarantee not having a share capital, then—

> "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."[457]

[25.07] Where a management company is a company limited by guarantee not having a share capital, then—

> "The directors … shall, on the requisition of members of the company holding at the date of the deposit of the requisition not less than one-tenth of such of the paid up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company … forthwith proceed duly to convene an [EGM] of the company."[458]

[25.08] In either case, 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".[459]

[25.09] On receipt of such a requisition the company's directors are generally required to convene an EGM within 21 days from the date on which the requisition was deposited at the company's registered office, such EGM to be held within 2 months from that same date.[460]

[25.10] However in some unusual circumstances it may be permissible for directors who receive such a requisition to decline to convene an EGM if it has been requested for a purpose which, in the directors' view, the company cannot lawfully

---

455 See paragraph [23.20] to [23.21].

456 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

457 Section 132(1) of the Companies Act 1963.

458 Section 132(1) of the Companies Act 1963.

459 Section 132(2) of the Companies Act 1963.

460 Section 132(3) of the Companies Act 1963.

implement.[461] However, it is advisable for directors to take legal advice before adopting such a position because, if they fail to convene a properly requisitioned EGM, they not only breach a statutory duty, but also their failure may be a basis on which the costs incurred by the requisitionists in convening the meeting themselves may fall to be recouped from certain sums due to the directors by the management company.[462]

[25.11] If within 21 days from the date of the deposit of a requisition properly seeking an EGM, the directors have not proceeded to duly convene such a meeting, the requisitionists (or any of them representing more than half of the total voting rights of all of them), may themselves convene a meeting. That meeting must be held within 3 months from the date of deposit of the requisition.[463] Any reasonable expenses incurred by the requisitionists in so convening an EGM (by reason of the failure of the directors to do so on foot of a requisition) must be repaid to the requisitionists by the company.[464]

The High Court

[25.12] In certain limited circumstances the High Court may order that an EGM of a company be held. However, this applies only when—

> "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]."[465]

[25.13] Such an application can be brought before the High Court by any director of the management company or any member of the management company who would be entitled to vote at the meeting.

Not the ODCE

[25.14] It is sometimes thought that the ODCE has power to direct the holding of an EGM of a company. This is not correct. The ODCE's only power to direct a general

---

461 *Rose v. McGivern* [1998] 2 BCLC 593. However the fact that the directors are merely not supportive of the purpose which the requisitionists wish to achieve is not a sufficient basis on which to decline to hold an EGM in compliance with the directors' statutory duty under Section 131(1).

462 This follows from Section 132(5) of the Companies Act 1963 which contains a stipulation that any such sums are to be retained by the management company out of any sums due or expected to fall due from the company by way of fees or other remuneration in respect of their services due to such of the directors as were in default. However, as fees and remuneration are not usually paid to management company directors, this stipulation is not likely to be of any relevance in so far as most management companies are concerned.

463 Section 132(3) of the Companies Act 1963.

464 Section 132(5) of the Companies Act 1963.

465 Section 135(1) of the Companies Act 1963.

meeting of any company is our power to direct AGMs.[466]

The notice which must be given of an EGM

[25.15] This is usually dealt with in the management company's articles of association but those articles must be consistent with minimum limits set out in the Companies Acts.[467] Those minimum limits are 21 days notice in the case of an EGM convened to pass a special resolution, and for other EGMs,14 days notice where the company is limited by guarantee and does not have a share capital, and 7 days where the company is a private company limited by shares.

[25.16] It is possible for a company to adopt articles of association which provide for longer periods of notice. However it is the minimum limits which apply where the management company's articles include regulation 4 of Part II of Table A, or regulation 8 of Table C.[468]

[25.17] The articles cited in paragraph [25.16] contain the statement that—

> "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, they day and the hour of the 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 regulations[469] of the company, entitled to receive such notices from the company."

The meaning and scope of this type of regulation has been discussed above in paragraphs [24.08] to [24.19].

Describing the intended business of the EGM

[25.18] As outlined in paragraph [25.17], where a management company has adopted regulation 51 of Part I of Table A or regulation 8 of Table C then the notice is required to specify "in the case of special business, the general nature of that business".

[25.19] Where the management company has adopted regulation 53 of Part I of Table A or regulation 10 of Table C then—

> "All business shall be deemed special that is transacted at an [EGM] …".

---

466 See paragraphs [24.07].

467 See Section 141 of the Companies Act 1963 concerning EGMs convened to pass special resolutions and Section 133(1)(b) concerning other EGMs.

468 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

469 The word 'regulations' appears in regulation 51 of Table A. The equivalent word used in regulation 8 of Table C is 'articles'.

[25.20] Accordingly, where regulations of this sort are applicable, it is essential that the notice of an EGM should specify the general nature of the business which the EGM is going to be asked to transact. Where the intended business is the passing of a special resolution, the intention to propose the resolution as a special resolution should be expressly specified[470] and the entire text or the entire substance of the proposed resolution should be set forth. That level of formality is not necessarily required as regards proposed ordinary resolutions. As noted by leading commentators—

> "… it suffices that the notice calling the meeting gives sufficient details as to the nature of the business to be transacted to enable members to decide whether or not they should attend"[471]

but those same commentators go on to note that—

> "the company may be restrained from holding a general meeting (whether for the purpose of passing ordinary resolutions or special resolutions) where the notice convening it, or any accompanying circular is inaccurate or misleading."[472]

Convening an EGM at less than the usual period of notice

[25.21] In the typical management company, this is difficult to achieve, but not impossible.

[25.22] One of the effects of Section 133(3) of the Companies Act 1963 is that an EGM of a company can always be deemed to have been duly called, even though less than the usual period of notice has been given, if it is so agreed by—

(a) all the members of the company entitled to attend and vote at the meeting,[473] and
(b) the statutory auditors of the company.[474]

[25.23] Furthermore where the purpose of the meeting is to pass a special resolution (but not, however, an ordinary resolution) the resolution may be validly proposed and passed at an EGM of which less than 21 days' notice in writing has been given if it is so agreed—

---

470 Section 141(1) of the Companies Act 1963..

471 See pg 268 of *Companies Acts 1963 – 2006*, General Editors Lyndon MacCann and Thomas B Courtney (Tottel Publishing, 2007) and the various cases cited there.

472 Ditto.

473 Not simply all the members who attend the meeting called at short notice: unless this happens to represent also the entirety of those members who were *entitled* to be present there (and to vote at it).

474 The auditors' agreement must be obtained even if is not expected that they would be likely to wish to attend the meeting.

(a) in the case of a private company limited by shares, by a majority in number of the members having the right to attend and vote at the meeting, being a majority together holding 90% or more in nominal value of the shares giving rise to the right to attend and vote at the meeting, or

(b) in the case of a company limited by guarantee not having a share capital, by a majority in number of the members together representing 90% or more of the total voting rights at that meeting of all the members.

Even in this case, however, it remains the case that the statutory auditors of the company must be given notice of the meeting.[475]

Consequences of any failure to give proper notice of the EGM

[25.24] The considerations here are largely the same as those which apply in respect of AGMs.[476]

The necessary quorum for an AGM

[25.25] Here again the position is largely the same as that which applies in the case of a company's AGM.[477]

The EGM is limited to dealing with the special business specified in the notice convening the meeting

[25.26] As noted above,[478] it is typically the case in most management companies that all business transacted at an EGM is to be classified as 'special business' and the general nature of that special business must have been outlined in the notice convening the meeting.

[25.27] Accordingly, where an EGM has been convened to transact the business specified in the notice of the meeting, the ordinary rule is that it is not within the power of the EGM to purport to take decisions in relation to any other items of such business which a member or members seeks to raise at the meeting – even if it claimed that they are of an important and pressing nature.

[25.28] The rationale for this rule is the same as for the corresponding rule regarding the discussion of special business at AGMs, details of which have not been specified in the notice convening the AGM.[479]

---

475 Section 141(4) of the Companies Act 1963 and Section 193(5) of the Companies Act 1990.

476 See paragraphs [24.28] to [24.31].

477 See paragraphs [24.32] to [24.35].

478 Paragraphs [25.18] to [25.20].

479 See paragraph [24.53].

[25.29] However, as with AGMs, this rule does not apply at EGMs where all the members entitled to attend and vote on the question are present at the EGM and are unanimously agreeable to dealing with the proposed additional special business. However, as noted at paragraph [24.54] and [24.55] this will rarely be the case and the unavailability of this derogation where even one person is opposed to dealing with the matter, or is not present, should be noted carefully.

Suggested form of a notice to convene an EGM

[25.30] While obviously it is a matter for each management company to decide on what is appropriate for it, the ODCE suggests that something along the following lines should usually be enough—

> ***16 Parnell Square Owners Management Company Limited***
> ***Company Number 987654321***
>
> ***Registered Office: 16 Parnell Square, Dublin 1***
>
> **YOU ARE HEREBY NOTIFIED** that an Extraordinary General Meeting of the above-named company will be held at *[insert the relevant address*] on *[insert the relevant day of the week]* the *[insert the relevant date]* day of *[insert the relevant month and year]* at *[insert the relevant time]* p.m. and that the intended business of the meeting will be as follows—
>
> (1) to consider and if thought fit to pass the following ordinary resolutions—
>
> (a) "that, pursuant to regulation 48 of the company's articles of association, Teresa O'Connor be removed as a director of the company";
>
> (b) "that, pursuant to regulation 49 of the company's articles of association, Paul McCarthy be appointed a director of the company in place of the said Teresa O'Connor";
>
> (2) to consider and if thought fit to pass the following special resolutions—
>
> (c) "that the company's articles of association be amended by insertion therein between regulation 7 and regulation 8 by an additional regulation numbered 7A in the following terms—
>
> (7A) General meetings of the company shall take place at a location which is not more than 10 kilometres from the multi-unit development at Parnell Square in the City of Dublin with which the company is associated."
>
> (d) "that the company's articles of association be amended by the deletion of regulation 23 (which currently provides that no member shall be entitled to vote at any general meeting of the company unless all moneys immediately payable by him to the company have been paid)".

By order of the Board[480]

Signed _____
Company Secretary

Important Notes:

(1) A member entitled to attend and vote is entitled to appoint a proxy to attend, speak and vote in his stead. A proxy need not be a member of the company.[481]

(2) A proxy should be in the form that accompanies this notice, or as near thereto as circumstances permit.[482]

(3) An instrument appointing a proxy should be deposited at the company's registered office not less than 48 hours before the time stipulated above for holding the EGM.[483]

Directors' Attendance at an EGM

[25.31] Just as it is not legally obligatory that management company directors attend an AGM,[484] so neither is it mandatory for them to attend an EGM. However, in the ODCE's view deliberate non-attendance by management company directors at EGMs is as problematic as non-attendance at AGMs, and we repeat the comments made at paragraph [24.64].

Records of EGMs

[25.32] The rules regarding the keeping of minutes of EGMs, and the entitlement of management company members to inspect such minutes are essentially the same as those which apply in the case of minutes of AGM.[485]

---

480 Obviously this is appropriate only if the EGM is being convened on the authority of the board of directors. If the EGM is being convened by members pursuant to their powers under Section 133(3) the notice should be amended appropriately.

481 Section 136(3) of the Companies Act 1963 requires that a note along these lines should be included in the case of a notice calling an EGM of a management company which is incorporated as a private company limited by shares. An equivalent note is not necessarily required where the management company is a company limited by guarantee not having a share capital. However if (as is usually the case) such a company's articles permit members to appoint proxies to it would seem sensible that a similar note should also be included in the Notice convening any EGM of such a company. For further information about proxies, and the extent of their entitlements, see paragraphs [27.01] to [27.16].

482 Include a blank proxy form along the lines required by the company's articles of association. See paragraphs [27.01] to [27.16].

483 The terms of this stipulation should accord with whatever is provided in the company's own articles of association. See paragraphs [27.01] to [27.16].

484 See paragraphs [24.62] to [24.67].

485 See paragraphs [24.68] to [24.72].

26.0 CHAIRING A MANAGEMENT COMPANY'S AGMS OR EGMS

[26.01] It is a basic principle of the law of meetings that for any sort of a formal meeting to take place someone must chair the meeting. The chairperson of a meeting occupies a position of both privilege and responsibility by virtue of which they have overall power to control the conduct of the meeting.

[26.02] So far as management companies are concerned the starting point is that, unless the company's articles provide otherwise, any member elected by the members present at a meeting may be the chairperson thereof.[486] However almost invariably the management company will have adopted articles of association which do provide otherwise, by setting out specific rules regarding who is to chair the meeting.

[26.03] For example, where the company has adopted regulation 56 of Part I of Table A or regulation 13 of Table C,[487] then—

> "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."

[26.04] However, a regulation of this sort does not cater for the possibility of none of the company's directors being present at the meeting. But this eventuality is covered where the management company has adopted regulation 57 of Part I of Table A or regulation 14 of Table C[488]—

> "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."

[26.05] If these are the provisions which apply in respect of a management company, they would seem to preclude the possibility of a non-member purporting to chair an AGM of EGM of the company's members. Either a director of the management company must chair the meeting, or if no director is available to do so, a member must do so. The regulations do not envisage that the meeting should be chaired by an external nominee of the directors: such as, for example, a managing

---

486 Section 134(d) of the Companies Act 1963.

487 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

488 Ditto.

agent.[489]

[26.06] Where a person sees themselves as the person rightfully entitled to chair the meeting on the basis that he/she is the chairman of the board of directors of the management company, it is useful for them to open the meeting by indicating who they are, the fact that they are the chairman of the management company's board of directors and, accordingly, that in accordance with the management company's articles of association they will be chairing the meeting.[490]

[26.07] Alternatively, if the situation is one in which the board of directors does not have a chairperson, or that he/she is unwilling to act, or is not present within 15 minutes after the meeting is scheduled to start, the directors present at the meeting should (as between themselves) elect one of their number to be chairperson of the meeting.[491] That person should then open the meeting by introducing himself/herself and briefly stating that in accordance with the management company's articles of association they will be chairing the meeting by agreement with the other management company directors present.

[26.08] In the event that none of the directors present at the meeting is willing to act as chairperson, or that no director is present within 15 minutes of the scheduled starting time, the members present should then choose one of themselves to be chairperson of the meeting. This can be done merely by someone present at the meeting saying something like "I move that Ms Murphy take the chair" and someone else saying "I second that motion." If nobody else objects to that proposal this is a sufficient basis for Ms Murphy to then take the chair at the meeting.

[26.09] Often, it may be difficult enough to persuade any member to take on the duty of chairing the meeting; although usually someone will to do so if only because of their realisation that if no-one is willing to chair the meeting, the meeting will have to be abandoned, with no decisions taken in relation to whatever were the reasons for which the meeting was called, and with everyone present having wasted their time by attending.

[26.10] In rare situations, however, it is possible that two or more persons will be proposed and seconded to act as chairperson. That is most likely to occur where different factions have developed amongst the membership. In such an event, a vote is necessary to decide between the candidates. In order that the meeting should not become bogged down by endless disagreement the best thing here may be for all the rival contenders to adopt a common sense approach and to urge their

---

489 But see paragraph [26.11] as to how the failure to promptly object to such a chairperson may be fatal to any subsequent claim that the proceedings of the meeting were irregular.

490 Obviously, it may be appropriate to dispense with these sort of formalities in a situation where everyone present at the meeting knows everyone else; *e.g.* in a small multi-unit development where a good community atmosphere has evolved.

491 If the directors know beforehand that the chairperson of their board will not be attending it is quite permissible for the directors to have reached agreement between themselves (by election if necessary) *before* the AGM or EGM commences – perhaps even at their previous directors' meeting – as to which of the directors should chair the meeting.

supporters to agree that a member who is not aligned with either candidate should act as temporary chairman simply for the purpose of supervising that vote.

[26.11] It is important to note that if a person is on the point of becoming chairperson of a meeting, or has begun to act as presumed chairperson, any member who objects that the person is not authorised to do so (because of some alleged irregularity concerning their entitlement or appointment) must make their objection forthwith. If this does not happen, or the objection is not persisted with, the meeting will be presumed to have acquiesced in the validity of the chairperson's appointment, and his/her position cannot ordinarily be impugned afterwards.[492] On this basis even if it the case that a management company's AGM or EGM was chaired by someone not authorised to do so under the management company's articles of association, the meeting and any decisions taken at it will nonetheless be valid if there was acquiescence on the part of those present at the meeting.

[26.12] Once appointed, the chairperson should take control of the meeting. From the outset it is important for him/her to be conscious of the dignity and privilege of his/her position and the extent to which it is now up to him/her to ensure that the meeting is conducted both efficiently, properly and fairly. He/she must act in good faith for the benefit of the company as a whole.[493]

[26.13] The chairperson's principal duties are not set out in the Companies Acts but have evolved over the years from basic principles of fairness. They include the following duties—

(a) to see that the meeting is conducted in an orderly and courteous manner,

(b) to maintain compliance with the law generally and the internal rules of the management company as embodied in its articles of association;

(c) to see that as far as practicable all those present at the meeting who wish to do so are given a reasonable opportunity to express their viewpoint; and,

(d) to see that the meeting proceeds to deal with all the items of business on its agenda.

[26.14] So far as orderliness and courtesy are concerned this is, of course, primarily dependent on the conduct all the members present at the meeting. On occasions,[494] it is possible that the extent of disagreement and unhappiness amongst the participants may prove problematic and in that event it helps greatly if the chairman is someone who is able to persuade people that no benefit will be gained from

---

492 *Cornwall v. Woods* (1846) 4 Notes of Cases 555.

493 Doyle, *The Company Secretary* (Second Edition, Thomson Round Hall, 2002), section 3.68.

494 Hopefully rare.

people resorting to discourteous conduct towards one another, or by trying to disrupt the meeting. Ultimately, if there is such unruly conduct at a meeting as to prevent the continuation of its business, the chairman has a common law right to adjourn the meeting so as to give all persons entitled a reasonable opportunity of speaking and voting at the meeting.[495] However, obviously, it is undesirable that a chairman should have to resort to that extreme step, and he should not do so unilaterally if it is possible to perhaps get agreement from the members that the meeting be adjourned in accordance with the usual provisions of the company's articles of association. This indeed may be a step worth taking in some instances where, for example, the suggestion of a short adjournment (for, say, 10 or 15 minutes) may be helpful in dissipating any emerging tensions.

[26.15] In so far as maintaining compliance with the law generally and the internal rules of the management company (as embodied in its articles of association) are concerned, what is at issue here ranges from ensuring that votes are conducted as required by the articles of association, to stopping speakers who attempt to use their entitlement to speak at the meeting as a means of collaterally attacking someone in relation to something irrelevant to the business of the meeting. It would be impossible for the ODCE to describe this role exhaustively and accordingly, it is always very helpful if the management company's solicitors are available to attend the meeting to advise the chairperson as he/she thinks necessary, especially if the possibility of any degree of hostility on the part of any of the participants is envisaged.

[26.16] While the chairperson should endeavour to see that participants are given a reasonable opportunity to express their views as far as practicable, the chairperson has power to regulate this in the overall interests of the meeting, provided he does so impartially. It is neither possible nor desirable for the ODCE to attempt to set out all the principles relevant to this task but amongst those which might be considered are the following—

(a) All members who wish to speak about a proposed resolution should be afforded a reasonable opportunity to do so.

(b) If the chairperson thinks it would be worthwhile to do so, he/she should perhaps consider asking the meeting to adopt a rule that no speeches will be allowed to continue for longer than (say) 10 minutes; a rule which, of course, it is perfectly in order for someone to propose that the meeting should modify or relax in the event that the sense of the meeting is that some member or members should be allowed to speak for longer.

(c) Even if the chairman has strong personal views in relation to whatever are the issues under discussion, he/she should ensure that the viewpoints of both supporters and opponents of the proposition are

---

495 *Byng v. London Life Association Ltd* [1989] 1 All ER 560.

accorded equal respect; especially where there is a significant imbalance between the emerging majority and minority viewpoints.

27.0 How Management Company Members Can Opt To Be Represented At AGMs or EGMs By Proxies or Representatives

Proxies

Where the management company was incorporated as a private company limited by shares

[27.01] Where a management company was incorporated as a private company limited by shares then under Section 136(1) of the Companies Act 1963—

> "any member of [the management company] entitled to attend and vote at a meeting of the [management company] shall be entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of him, and a proxy so appointed shall have the same right as the member to speak at the meeting and to vote on a show of hands and on a poll."

[27.02] Where the management company has adopted articles of association which include regulations 68 and 69 of Part I of Table A,[496] this statutory entitlement is further confirmed by the statement therein that—

> "Votes may be given either personally or by proxy."[497]

and,

> "A proxy need not be a member of the company."[498]

[27.03] Furthermore if the management company has adopted articles of association which include regulation 72 of Part I of Table A[499]—

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

[27.04] If the management company has adopted articles of association which include regulation 69 of Part I of Table A, then the document by which the member appoints his/her proxy must generally be in writing and signed by the member.[500] Regulation 71 of Part I of Table A – where it has been adopted – stipulates the form of the proxy.

---

496 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company incorporated as a private company limited by shares may not necessarily include all of the regulations contained in Table A.

497 Regulation 68.

498 Last sentence of regulation 69.

499 See footnote 496.

500 Or a person who holds a valid power of attorney from the member.

[27.05] By way of illustration the following example shows how a form of proxy along the lines of that in Regulation 71 of Part I of Table A might look[501] in relation to a hypothetical meeting of a hypothetical company where the member wishes to give specific instructions to his proxy, but to leave the proxy with discretion on how to vote as regards other issues.

> **16 Parnell Square Management Company Limited.**
>
> I ~~/We~~, **Mary Murphy**
>
> of **Apartment 37, 16 Parnell Square, Dublin 1**
>
> in the ~~County of~~ **City of Dublin**
>
> being a member/members of the above-named company,
>
> hereby appoint **John Ryan**
>
> of **Apartment 25, Leinster House Apartments, Dublin 1**
>
> ~~or failing him, ...*[insert name of alternative proxy]* .....~~
>
> ~~of ..... *[address of alternative proxy]* .....~~
>
> as my ~~/our~~ proxy to vote for me ~~/us~~ on my ~~/our~~ behalf at the ~~(annual or extraordinary, as the case may be)~~ **annual** general meeting of the company to be held on the **25th** day of January **2009** and at any adjournment thereof.
>
> Signed this **20th** day of December **2008**
>
> This form is to be used **(1)** *in favour of ~~/against~~ the resolution **that Sean Smith be re-appointed a director of the company, (2) against the resolution that John O'Brien be re-appointed a director of the company**.
>
> Unless otherwise instructed, the proxy will vote as he thinks fit.
>
> ~~* Strike out whichever is not desired."~~

[27.06] It is usual for the management company's articles of association to contain rules specifying what formalities must be attended to in advance of the meeting in order for a proxy to be entitled to participate at it. So, where the management company has adopted regulation 70 of Part I of Table A[502]—

---

501 It is of course permissible for the form of proxy to omit altogether the elements which we have shown struck-through in the above example. However, for illustrative purposes we have included them to show how the completed proxy was made up from the template specified in regulation 71 of Part I of Table A.

502 See footnote 496.

> "The instrument appointing a proxy … 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."[503]

Where the management company was incorporated as a company limited by guarantee not having a share capital

[27.07] Where a management company was incorporated as a company limited by guarantee not having a share capital, the provisions of Section 136(1) do not apply unless the management company's articles otherwise provide.[504]

[27.08] Obviously, it is possible for such a management company to have adopted articles of association which provide expressly that the provisions of Section 136(1) are to apply.

[27.09] However where a management company limited by guarantee not having a share capital has merely adopted the regulations contained in regulations 25 to 30 of Table C[505] then it seems to the ODCE that while such regulations acknowledge the entitlement of a member to appoint another person (who need not be a member of the company[506]) as his/proxy to attend and vote instead of him,[507] they do not appear to provide that such a proxy shall have the same right as the member to speak at the meeting. Accordingly, if these are the only regulations which the management company has adopted, it may be doubtful whether member's proxies are entitled pursuant to the Companies Acts or the company's articles to speak at AGMs or EGMs– although they can vote there.

[27.10] In the ODCE's view, it would be desirable for management companies whose articles contain this possible lacuna to remedy the matter by amending their articles to add an additional regulation providing something along the following lines—

---

503 The omitted words located at the section of this quotation marked "……" dealt with additional formalities which must be attended to where the proxy has been given by *(i)* someone acting under a power of attorney given by a member, or *(ii)* a member which is a body corporate, rather than an individual. These additional formalities should be studied in any case where they are relevant.

504 Section 136(2)(a) of the Companies Act 1963.

505 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company incorporated as a company limited by guarantee not having a share capital may not necessarily include all of the regulations contained in Table C.

506 Final sentence of regulation 26 of Table C.

507 Regulation 25 of Table C contemplates votes being given by proxy. This necessarily implies an entitlement on the proxy's part to attend the relevant meeting.

> "Notwithstanding Section 136(2)(a) of the Companies Act 1963 any member of the company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of him, and a proxy so appointed shall have the same right as the member to speak at the meeting and to vote on a show of hands and on a poll."

[27.11] We must emphasise, however, that, desirable though we might think such a change might be, the ODCE does not have power to insist that such a change be made in the articles of any management company. It is a matter for each management company to determine what should, or should not, be in its articles of association. Likewise, notwithstanding the ODCE's view as expressed above, it would be prudent for any management company contemplating such a change in its articles of association to seek advice from its own lawyers beforehand.

[27.12] Assuming that the articles of a management company which is a company limited by guarantee not having a share capital are drafted so as to not confer an entitlement to speak on a member's proxy there is perhaps one practical solution. Even if the member's proxy does not have an *entitlement* to speak, there is nothing in the articles which indicates that he/she is precluded from being allowed speak. Accordingly, if the chairperson of the meeting senses that allowing the member's proxy to speak is something to which the members will not object, the chairperson might conclude that this is an appropriate way of dealing with the situation.

[27.13] In other respects the rules regarding proxies in companies limited by guarantee are generally the same as those which apply in companies limited by shares. For example where the company has adopted articles of association which include regulation 29 of Part I of Table A[508]—

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

[27.14] Likewise If the management company has adopted articles of association which include regulation 26 of Table C then the document by which the member appoints his/her proxy must generally be in writing and signed by the member.[509] Regulation 28 of Table C – where it has been adopted – stipulates the form of the proxy.

[27.15] Similarly if the management company has adopted regulation 27 of Table C this provides similarly to regulation 70 of Part I of Table A, quoted at paragraph [27.06] above.

[27.16] In the circumstances the proxy for a management company incorporated as a company limited by guarantee not having a share capital will probably resemble

---

508 See footnote 505.

509 Or a person who holds a valid power of attorney from the member.

closely the proxy in a company limited by shares, i.e. it will likely be along the example of that shown in paragraph [27.05].

Representatives

[27.17] Where a member of a management company is itself another company[510] it is open to that second-mentioned company, in lieu of appointing a proxy to act on its behalf at meetings of the management company, to instead pass a resolution authorising a person to act as its representative at any meeting of the management company.[511]

[27.18] A person so authorised is entitled to exercise the same powers on behalf of the company which nominated him/her and that company could exercise if it were an individual member of the management company.[512]

---

510 As, for example, where a number of people opt to invest in property, and to hold it through a limited company of which they are the members, and where through that company they have purchased a unit in a multi-unit development.

511 Section 139(1)(a) of the Companies Act 1963.

512 Section 139(2) of the Companies Act 1963.

28.0 DECISION MAKING BY MANAGEMENT COMPANY MEMBERS OTHERWISE THAN AT A GENERAL MEETING: THE WRITTEN RESOLUTION PROCEDURE

[28.01] In circumstances where it is sought to pass a resolution of a management company's members which it is envisaged will be supported by all of the members entitled to attend and vote at a general meeting of the company, it may be possible to do so without having to go through the business of convening an actual meeting of the members. However authority to do so must have been provided for in the company's articles of association.

[28.02] Such authority will exist if the company has adopted regulation 6 of Part II of Table A[513] or regulation 20 of Table C.[514] These provide that—

> "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."

[28.03] It should be noted however that this written resolution procedure cannot be availed of where there is even one member with power to vote who objects to the proposal.[515]

[28.04] Secondly, a written resolution of this sort cannot be used to pass a resolution seeking to remove a director from office. Neither can a written resolution be used to appoint someone as the management company's auditors, or to seek to remove an auditor from office.[516]

[28.05] Any such resolution is deemed to have been passed at a meeting held on the date on which the resolution was signed by the last member to sign.[517] The terms of the resolution should, of course, be entered in the company's minute book.

---

513 Which appears as regulation 74A in the consolidated version of Table A Part II in Appendix III.

514 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

515 The fact that such a member will very likely be overwhelmingly outvoted if/when a general meeting is convened is not a basis on which his/her opposition can be ignored and a written resolution passed nonetheless. Such a written resolution would be invalid and of no legal effect.

516 Section 141(8)(c) of the Companies Act 1963.

517 Section 141(8)(b) of the Companies Act 1963.

29.0 THE MANAGEMENT COMPANY'S ACCOUNTING RECORDS

[29.01] In any business it is essential to have available comprehensive, accurate and up-to-date financial information. For example, in a typical management company, basic questions of the following sort are likely to arise periodically—

(a) what money have we received?
(b) who paid it to us?
(c) who owes us money at the moment?
(d) who do we owe money to?
(e) how much did we pay for insurance last year?
(f) how much do we have in the bank account at present?
(g) how much are we likely to have in the bank next month when this year's insurance premium falls due?

[29.02] 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 one of ensuring that questions like those above can be readily and properly answered.

[29.03] Like all other companies, management companies are required to keep "proper books of account, *whether in the form of documents or otherwise*".[518] 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 '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".[519]

[29.04] 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 they think fit.[520]

Proper books of account: the legal requirements

[29.05] Management companies are generally companies whose business involves the provision of services.[521] As such, company law requires that their accounting records—

(a) should correctly record and explain the transactions of the company;[522]

---

518 Section 202(1) of the Companies Act 1990.
519 Section 202(7) of the Companies Act 1990.
520 Section 202(5) of the Companies Act 1990.
521 Rather than "dealing in goods": see Sections 202(3)(c) and (d) of the Companies Act 1990.
522 Section 202(1)(a) of the Companies Act 1990.

(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;[523]

(c) contain entries from day to day of all sums of money received and expended by the company;[524] each entry should show both the date of the transaction, the amount of money spent or received, and details of the transaction;[525]

(d) include details of all the assets and liabilities of the company;[526]

(e) include a record of all services provided and of all the invoices relating thereto;[527]

(f) should enable—

(i) the financial position of the company to be determined at any time with reasonable accuracy;[528]

(ii) the directors to ensure that the annual accounts of the company comply with the relevant requirements of company law;[529]

(iii) the annual accounts of the company to be readily and properly audited.[530]

Who can examine the company's accounting records

[29.06] Company law provides that the accounting records must be freely available for inspection "at all reasonable times" by the officers of the company.[531] This usually means the directors and the secretary. The company's statutory auditors have a similar right of access.[532]

[29.07] 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

---

523 Section 202(2) of the Companies Act 1990.

524 Section 202(3)(a) of the Companies Act 1990.

525 Usually these details will consist of at least two elements: *(i)* the name of the person or business from whom the money was received or to whom it was paid and *(ii)* the reason or purpose of the transaction, e.g., "John Smith, Apartment 37 / 2006 Service Charges" or "ESB / Electricity Bill"

526 Section 202(3)(b) of the Companies Act 1990.

527 Section 202(3)(d) of the Companies Act 1990.

528 Section 202(1)(b) of the Companies Act 1990.

529 Section 202(1)(c) of the Companies Act 1990.

530 Section 202(1)(d) of the Companies Act 1990.

531 Section 202(8) of the Companies Act 1990. A director may avail of this entitlement by having such an inspection undertaken on his/her behalf by an accountant: *Healy v. Healy Homes Limited* [1973] IR 309.

532 Section 193(3) of the Companies Act 1990.

general obligation to keep themselves informed as to the company's business and of verifying or scrutinising any financial transactions about which they have any concerns.

[29.08] Company law does not provide the members of a company with a statutory right to inspect its accounting records. However management companies' articles of association frequently provide along the lines of either regulation 127 of Part I of Table A or regulation 64 of Table C[533] which are both in the following terms—

> "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."

[29.09] A provision such as this envisages not only that the directors may accord members the right to inspect the company's accounts, but also that such an entitlement might be granted by an ordinary resolution at a general meeting of the company.

For how long must the records be preserved?

[29.10] 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.[534] However, there is nothing to stop management companies from keeping their accounting records for a longer period and there may sometimes be advantages in doing so.

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

[29.11] The primary obligation to keep proper books of account rests with the management company itself.[535] Failure to comply with the obligation is an offence for which the management company may be prosecuted.[536]

[29.12] The directors of the company have a parallel obligation.[537] Where a management company has failed to keep proper accounting records, an offence is also committed by any director—

---

533 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Tables A or C.

534 Section 202(9) of the Companies Act 1990.

535 Section 202(1) of the Companies Act 1990.

536 Section 202(10) of the Companies Act 1990.

537 Section 202(10) of the Companies Act 1990.

(a) who failed to take all reasonable steps to secure compliance by the company with its primary obligation, or

(b) who has, by his or her own wilful act, been the cause of any default by the company with its primary obligation.

[29.13] However the law provides a defence for any director who can prove—

(a) that he or she had reasonable grounds for believing;

(b) and did actually believe;

(c) that a "competent and reliable person" was charged with the duty of ensuring that the company complied with its primary obligation;

(d) and that such a "competent and reliable person" was in a position to discharge that duty.[538]

[29.14] In practice, this means that it is permissible for a management company to arrange for its accounting records to be kept and preserved by its managing agent. However, this is a decision in relation to which the directors should give careful consideration.[539] Furthermore, if directors decide to engage their managing agent to perform this task it is prudent for the directors to periodically review the adequacy of his/her performance of this duty.

[29.15] Where the managing agent is asked to discharge this role, it is critical to ensure that what the managing agent will be keeping are *the accounting records of the management company as such*, as distinct from *the managing agent's own records relating to the management company*. The former category of records are and must remain the property of the management company and must be freely available for inspection by the directors, secretary and statutory auditor of the management company.[540]

[29.16] Moreover, the management company'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 he/she is in a position to discharge that duty.

[29.17] In the ODCE's view, this means that the directors of a management company 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

---

538 Section 202(10)(a) of the Companies Act 1990.

539 Supplemented, perhaps, by advice from their auditors and/or solicitors.

540 If necessary provision should be included in the management company's contract with their managing agent to ensure that this is so.

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 statutory auditors in the context of each annual audit and to address any shortcomings about which the auditors may have concerns.

The supervisory role of the management company's statutory auditors[541]

[29.18] Statutory auditors have an important role in verifying that proper accounting records are kept by a management company.

[29.19] Company law provides that in their audit report, the statutory auditors of every company must state specifically whether in their opinion proper books of account have been kept by the company.[542] Where proper books of account have not been kept, the statutory auditors are required to report that default to the ODCE[543] and they may also be required to bring it to the attention of the public by means of a notice filed with the CRO.[544]

[29.20] In the event that a statutory 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 statutory auditors and the management company'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 management company members, when they receive their company's audited accounts, to look at the statutory auditor's report and to check what he/she has to say about the books of account kept by the management company. Any shortcomings identified by the statutory auditor should be raised and discussed at the company's AGM.

The requirement for the directors' report to contain reference to the company's compliance with these requirements

[29.21] As noted below,[545] every company's annual directors' report must routinely contain *(i)* a statement of the measures taken by the company's directors to secure compliance with the requirements of the Companies Acts in relation to accounting records and *(ii)* a statement of where exactly those books are kept.[546]

---

541 See further paragraphs [30.01] to [30.08].

542 Section 194(4B)(b) of the Companies Act 1990, as amended by Regulation 8 of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005, S.I. 116 of 2005.

543 Section 194(5) of the Companies Act 1990, as inserted by Section 74 of the Company Law Enforcement Act 2001.

544 Section 194(1) of the Companies Act 1990.

545 Paragraph [33.02].

546 Section 158(6A) of the Companies Act 1963, as inserted by Section 90 of the Company Law Enforcement Act 2001.

30.0 THE MANAGEMENT COMPANY'S STATUTORY AUDITORS

[30.01] Except where a management company is entitled to avail of audit exemption[547] (which is never possible as regards a management company which was incorporated as a company limited by guarantee not having a share capital) the Companies Acts require that management companies, like other companies, must subject their financial statements to audit by a person qualified to do so in accordance with the Companies Acts.[548]

[30.02] The statutory audit is undertaken in order that the auditor might report to the management company's members, as a body, in accordance with Section 193 of the Companies Act 1990.[549] The audit procedures and the audit working papers are designed and created solely for the purpose of enabling the auditor to form and state an opinion to the company's members as a body, in accordance with the statutory requirements on audit, on whether the financial statements of the company, which are the responsibility of the directors of the company, give a true and fair view of the state of affairs of the company as at the end of the relevant financial year and of the profit or loss for the period then ended. The auditor's auditing procedures are designed to enable the auditor to express an opinion on the company's financial statements as a whole and not, for example, on individual account balances, financial amounts, financial information or the adequacy of financial, accounting or management systems.

[30.03] The objectives of an audit of financial statements as stated in ISA (UK and Ireland) 200 – *Objective and General Principles Governing an Audit of Financial Statements*—

> "is to enable the auditor to express an opinion on whether the financial statements are prepared, in all material respects, in accordance with an applicable financial reporting framework. Although the auditor's opinion enhances the credibility of the financial statements, the user cannot assume that the audit opinion is an assurance as to the future viability of the [company] nor the efficiency or effectiveness with which management has conducted the affairs of the [company]."

The statutory auditor of the management company performs his/her audit in accordance with International Standards on Auditing (ISAs) (UK and Ireland) as issued by the Auditing Practices Board. The audit is planned to enable the statutory auditor to form as to whether the financial statements of the company provide a true and fair view of the company's affairs for the reporting and on other matters required

---

547 See paragraphs [32.01] to [32.14].

548 Section 187 of the Companies Act 1990 contains the principal provisions dealing with when a person or firm is qualified for appointment as auditor of a company.

549 As amended by Regulation 8 of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005, S.I. 116 of 2005.

by Irish company law. The circumstances of each individual audit will determine the work which the statutory auditor deems appropriate to meet the audit objective.

[30.04] The first statutory auditor of a management company is usually appointed by the company's directors and thereafter the statutory 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. However, special provisions exist whereby an outgoing statutory auditor may be re-appointed without the need for a formal resolution of the company.[550]

[30.05] Once appointed, a statutory auditor enjoys a considerable number of statutory privileges although there is a means by which, following an appropriate process, a company may resolve to remove its statutory auditor.[551]

The management company's relationship with its statutory auditor

[30.06] It is important to note that the primary relationship which exists is between the management company and the statutory auditor. In this context, the statutory auditor may on occasions meet with the members as a group (such as if he/she avails of his/her entitlement to attend AGMs or EGMs of the company) while on other occasions the statutory auditor will meet with the management company's directors.

[30.07] In some management companies, a relationship may also exist between the managing agent and the statutory auditor. However, it is important to note that the directors should not consider it enough to allow that relationship replace that which ought to exist between them and the statutory auditor. In particular, the management company's directors should satisfy themselves as to the statutory auditor's independence. If, for instance, the statutory auditor was already engaged by the managing agent in some other capacity, this could give rise to suspicions of a conflict of interest. Accordingly, it may be prudent for the management company's directors to engage a statutory auditor unconnected with their managing agent in order to avoid any such perceptions.

[30.08] The ODCE suggests that it is important that the directors of a management company should personally engage with their company's statutory 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 a statutory auditor's report, there may also be other issues in relation to which a discussion between the directors and the statutory auditors would prove useful.

---

550 Section 160(2) of the Companies Act 1963. See paragraphs [24.47] to [24.50].

551 Section 161 of the Companies Act 1963.

31.0 THE MANAGEMENT COMPANY'S ANNUAL ACCOUNTS

[31.01] Like the directors of all other companies, the directors of management companies are required under the Companies Acts to prepare regular financial statements.

[31.02] The management company's first set of accounts must be prepared no later than 18 months after the incorporation of the company. Subsequently, accounts must be prepared for the company once at least in every calendar year for each financial year of the company.[552]

A company's financial year

[31.03] The term "financial year" means, in relation to any management company, the period in respect of which any profit and loss account of the company laid before it in general meeting is made up, whether that period is a year or not.[553] The first financial year of a company commences on its date of incorporation and each subsequent financial year commences on the day after the end of the previous financial year.[554]

[31.04] What all this means is that it is possible for companies to operate a financial year which may, from time, be more or less than a period of 12-months. However, most management companies generally operate on the basis of a 12-month financial year, though not all of them have their financial year coinciding with the calendar year. For example, some management companies may have their financial year running from 1 April in one year to 30 March in the next. Ultimately it is a matter for management companies[555] to chose what sort of a financial year makes sense for their own needs.

The source of the law relating to financial reporting

[31.05] Most of the law relating to companies' financial reporting obligations is contained in the Companies (Amendment) Act 1986 as amended.[556] The detailed

---

552 Section 148(1) of the Companies Act 1963 as amended by Regulation 4 of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005, S.I. 116 of 2005.

553 Section 2(1) of the Companies Act 1963 as amended by Regulation 9 and amendment (a)(viii) of Item 1 in Part I of Schedule I of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005, S.I. 116 of 2005.

554 Section 2(1A) of the Companies Act 1963 as amended by Regulation 9 and amendment (b) of Item 1 in Part I of Schedule I of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005, S.I. 116 of 2005.

555 Usually in conjunction with their accountants and/or auditors.

556 In the ODCE's Draft Guidance we expressed the view that management companies might fall outside the scope of the 1986 Act on the basis that they might be "[companies] not

requirements of both the law and accounting practice in relation to the preparation of a management company's financial statements are very technical and largely outside the scope of this handbook. To that extent, we regret that we can offer little in the way of assistance to the directors of any management company who, assuming their management company was incorporated as a private company limited by shares and so is potentially entitled to do so,[557] are contemplating that they should avail of audit exemption and dispense with the engagement of accountants to assist them in the preparation of the company's financial statements.

[31.06] However, to get some introductory sense of the sort of information which is typically to be found in many management company's annual financial statements, it is useful for anyone connected with a management company—whether as a member or as a director—to study the document *Management Company Sample Report and Financial Statements* which is one of the outputs of the National Consumer Agency's Multi-Unit Development Stakeholder Forum.[558]

[31.07] At a general level, however, there are some basic points which we wish to make about management company's financial reporting.

[31.08] The basic elements of a company's financial statements are—

(a) a profit and loss account (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, or the surplus of income over expenditure or vice versa);

(b) a balance sheet (which describes the assets and liabilities of the company at the reporting date);[559]

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

[31.09] 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.

[31.10] The Companies Acts never *limit* the amount of information which can lawfully be disclosed in a company's financial statements. Instead, their object is to set down *minimum amounts* of accounting information which must be disclosed by companies: without prejudice, however, to the entitlement of a company to disclose

---

trading for the acquisition of gain by the members" within the meaning of Section 2(1)(a) of the Companies (Amendment) Act 1986. We have since concluded that this is probably not so having regard to the meaning of "gain" as found by the Supreme Court in *Deane v. Voluntary Health Insurance Board* [1992] 2 I.R. 319 – where the term was held not to be synonymous with commercial profits.

557 See paragraphs [32.01] to [32.14].

558 Available at www.consumerproperty.ie.

559 Although balance sheets are usually prepared on a 'historic cost' basis, so net worth as it appears from a balance sheet may not necessarily correspond with current asset values.

as much and more as it chooses.

[31.11] 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"[560]

[31.12] For these reasons, we suggest that the directors of management companies should at least give some consideration to the notion of preparing their balance sheets and profit and loss accounts not in some sort of a slavish adherence to the *minimal* levels of disclosure required under the Companies Acts, but rather 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 an appropriate sense of where the company stands financially.[561]

[31.13] The detailed accounting requirements contained in the Companies Acts were not formulated with the particular needs of management companies in mind. For that reason, the ODCE suggests that it is a useful exercise for the directors of management companies to consider what items of additional financial information it might be useful for members to be given in their management company's financial statements, perhaps by way of notes supplementing the financial statements. Without seeking to prescribe what should be included (still less to limit the scope for directors to think for themselves what is or is not appropriate in the particular circumstances of their company), we nonetheless suggest that such supplementary disclosure might perhaps include items such as the following—

> <u>Service Charges</u>
>
> (a) the number of units in the multi-unit development from which the management 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 units which are in arrears as to the payment of their service charges;

---

560 Section 149(2) of the Companies Act 1963 as amended by Regulation 4 of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005, S.I. 116 of 2005.

561 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 begin to become less intelligible.

(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 such of the multi-unit development as is required to be insured by the management company;

(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 management company 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 management 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.

[31.14] A further option, if the members of a company were so minded, is that the articles of association of the management company could even be amended to adopt an internal rule of the management company specifying what information over-and-above that required by the Companies Acts ought routinely to be included in the notes to the company's accounts.

32.0 AUDIT EXEMPTION

[32.01] Since 1999 it has been possible in specified circumstances for certain private companies to take advantage of a statutory exemption from the usual requirement to have the company's accounts audited.[562]

[32.02] As noted above,[563] many management companies are incorporated as companies limited by guarantee not having a share capital. As such they are not private companies[564] and so are ineligible to take advantage of this exemption, even if their turnover is comparatively small.

[32.03] However, where a management company was incorporated as a private company limited by shares it may be possible for the company to take advantage of audit exemption provided it can comply with the statutory provisions outlined below.

[32.04] Firstly the company must be one to which the Companies (Amendment) Act 1986 applies.[565]

[32.05] Secondly in respect of the financial year for which audit exemption is sought—

(a) The amount of the turnover of the company must not exceed €7.3 million.[566]

(b) The balance sheet total[567] of the company must not exceed €3.65 million.[568]

(c) The average number of persons employed by the company[569] must not exceed 50.[570]

(d) The company must not be involved in specified types of business – something which is almost invariably the case as regards the average

---

562 Part III of the Companies (Amendment) (No.2) Act 1999.

563 Paragraph [8.02].

564 Under Section 33 of the Companies Act 1963 one of the essential characteristics of a private company is that it must have a share capital.

565 Section 32(3)(a)(i) of the Companies (Amendment) (No.2) Act 1999. For the scope of the Companies (Amendment) Act 1986 see *inter alia* Section 2 thereof. See also footnote 556.

566 Section 32(3)(a)(ii) of the Companies (Amendment) (No.2) Act 1999.

567 As defined in Section 8 of the Companies (Amendment) Act 1986.

568 Section 32(3)(a)(iii) of the Companies (Amendment) (No.2) Act 1999.

569 As defined in Section 8 of the Companies (Amendment) Act 1986.

570 Section 32(3)(a)(iv) of the Companies (Amendment) (No.2) Act 1999.

management company.[571]

(e) The company must not be a parent or subsidiary undertaking within the meaning of the European Communities (Companies: Group Accounts) Regulations 1992, S.I. 201 or 1992.[572] This condition will usually be satisfied where the management company is a free-standing company, in which the majority of shares are not significantly held by another company, or where the management company itself holds no significant shareholding in any other company.

[32.06] Thirdly, the directors of the company must be of opinion that the management company will satisfy the foregoing conditions in respect of the financial year for which audit exemption is sought.[573] Furthermore, except where the issue arises in the first financial year of the company after its incorporation, the company must have also satisfied those conditions in the preceding financial year of the company.[574]

[32.07] The company's directors must then make a formal decision that the management company should avail itself of the statutory exemption from audit in respect of that year. A record of that decision must be included in the minutes of the relevant directors' meeting.[575]

[32.08] Even where these conditions are all satisfied it is a further precondition[576] to the management company's entitlement to avail of audit exemption that—

(a) The company's annual return to the CRO in respect of the financial year for which audit exemption is claimed is delivered to the CRO in full compliance with the requirements of the law.[577] Accordingly, if the management company is late in filing its annual return it must file audited accounts in conjunction with that return.

(b) The company's annual returns for the previous year must also have been delivered in full compliance with the law.[578] Accordingly, if the management company was late in filing its returns for 2008 it cannot claim audit exemption in respect of the following financial year.

---

571 Section 32(3)(v)(II) to 32(3)(v)(IV) of the Companies (Amendment) (No.2) Act 1999. The relevant business types include banking, insurance, and other forms of activity regulated by the Financial Regulator.

572 Section 32(3)(a)(v)(I) of the Companies (Amendment) (No.2) Act 1999.

573 Section 32(1)(a) of the Companies (Amendment) (No.2) Act 1999.

574 Section 32(1)(b) of the Companies (Amendment) (No.2) Act 1999.

575 Section 32(1)(a) of the Companies (Amendment) (No.2) Act 1999.

576 Section 32A of the of the Companies (Amendment) (No.2) Act 1999.

577 As laid down in Sections 125 and 127 of the Companies Act 1963, as substituted by Sections 59 and 60 of the Company Law Enforcement Act 2001.

578 This condition obviously does not apply where audit exemption is claimed in respect of a company's first financial year.

[32.09] Furthermore, even if all of the foregoing conditions are satisfied, a company cannot avail of audit exemption in respect of any financial year where a sufficient number of members of the company have served a written notice objecting to the company availing of audit exemption.[579]

[32.10] Where a management company was incorporated as a private company limited by shares and has adopted articles of association which include regulation 132 of Part I of Table A[580] then it is a requirement of the management company's articles of association that—

> "Auditors shall be appointed and their duties regulated in accordance with Sections 160 to 163 of the Act."

In the ODCE's view, for so long as a company has articles of association which include such a mandatory stipulation that *auditors shall be appointed* it would seem to preclude the company from being entitled to avail of audit exemption. However it would obviously be open to the company to seek to go through the procedure of amending its articles so as to remove this impediment to the company availing of audit exemption whenever it is otherwise entitled to do so.

[32.11] Where a company avails of audit exemption in a financial year the balance sheet of the company in respect of that year must contain a formal statement by the company's directors confirming that the company is availing of audit exemption, that it does so because it complies with all the relevant statutory preconditions, that no valid objections from shareholders has been served, and that the directors acknowledge the obligations of the company, under the Companies Acts 1963 to 2006, to keep proper books of account and prepare accounts which give a true and fair view of the state of affairs of the company at the end of its financial year and of its profit or loss for such a year and to otherwise comply with the provisions of those Acts relating to accounts so far as they are applicable to the company.[581]

How members can object to a company availing of audit exemption

[32.12] Even if the company's directors think it appropriate to take advantage of the statutory exemption from audit, it is possible for a specified minority of the company's members to insist on an audit being carried out. In this regard, any member or members of a company holding shares in the company that confer in aggregate not less than 10% of the total voting rights in the company may serve a written notice on the company objecting to the company availing of audit exemption.[582]

---

579 Section 33(1) of the Companies (Amendment) (No.2) Act 1999. See further paragraphs [32.12] to [32.14].

580 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company incorporated as a private company limited by shares may not necessarily include all of the regulations contained in Table A.

581 Section 33(4) of the Companies (Amendment) (No.2) Act 1999.

582 Section 33(1) of the Companies (Amendment) (No.2) Act 1999.

[32.13] To be effective in preventing the directors from taking advantage of audit exemption, such a notice must be served on the company either—

(a) during the financial year immediately preceding the financial year to which the notice relates, or

(b) during the financial year to which the notice relates (but not later than 1 month before the end of that year).[583]

[32.14] So, for example, if a company prepares its accounts on a calendar year basis, then minority shareholders (representing 10% or more of the voting power) who object to the company availing of audit exemption in respect of the financial year 2010 must serve their notice *either* during 2009 *or* between 1 January 2010 and 30 November 2010.

Even where it is eligible to do so, should a management company seek to avail of audit exemption?

[32.15] Ultimately, this is a question that needs to be answered (if necessary with the benefit of independent legal and/or accounting advice) by the directors and members of management companies themselves.

[32.16] In looking at this question the ODCE (while understanding fully the legitimate viewpoint of many persons[584] who see audit as a burdensome expense for their management company) considers it worthwhile for the positive aspects of audit to be emphasised also.

[32.17] Firstly, the involvement of an independent statutory auditor is, in the ODCE's view, a safeguard for multi-unit owners. The auditors' report of a company limited by shares specifically gives an opinion on—

(a) whether the financial statements of the company give a true and fair view in accordance with accounting practice in Ireland and are properly prepared in accordance with the Companies Acts;

(b) whether proper books of account have been kept by the company;

(c) whether the information given in the directors' report is consistent with the financial statements; and

(d) whether any information specified by law regarding directors' remuneration and directors' transactions is not disclosed;

In addition, the auditor's report states whether the auditor has obtained all the

---

583 Section 33(2) of the Companies (Amendment) (No.2) Act 1999.

584 Including some of the respondents to our Consultation Process.

information and explanations necessary for the purposes of the audit, and whether the financial statements are in agreement with the books of account.

[32.18] Management companies need to recall also that, whether or not they avail of audit exemption, they remain under a legal duty to prepare annual accounts which comply fully with all the requirements of the Companies Acts. In practice, complying with this obligation will often require the input of professional accountants. Accordingly, opting to avail of audit exemption will not necessarily lead to a saving of the entire amount which a company normally pays its auditors, unless the directors of the management company are content to take the somewhat risky step of dispensing entirely with the professional services of their accountants and preparing the annual accounts themselves.

[32.19] At the same time it must be made clear that statutory audit is only one of the possible means of providing external assurance that meets the needs of the users of financial information. Other forms of assurance and external reporting are possible, which may be more cost efficient and capable of better fulfilling the needs of third parties. Such other forms of assurance could be carried out by a reporting accountant on an agreed-upon-procedures basis. In the case of management companies it is likely that members of the company will be particularly interested in the service charge calculation and in whether the company operates effectively to protect the assets of the occupiers. Accordingly, a special purpose report by an independent person other than a statutory auditor may be a suitable alternative to a statutory audit where such an audit is not a mandatory requirement.

33.0 THE DIRECTORS' REPORT

[33.01] The management company's directors must make a written report to the members to accompany the financial statements of the company for each financial year.[585]

[33.02] Amongst the primary[586] topics which the directors' report should deal with are—

(a) "the state of the company's affairs";[587]

(b) "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";[588]

(c) "particulars of any important events affecting the company .. which have occurred since the end of [the financial year dealt with in the financial statements accompanying the directors' report]";[589]

(d) "an indication of likely future developments in the business of the company …",[590] and

(e) "a statement of the measures taken by the directors to secure compliance with the requirements of Section 202 of the Companies Act 1990 with regard to the keeping of proper books of account and the exact location of those books."[591]

[33.03] The directors report is required to be laid before the company's AGM.[592] By analogy with the position regarding a company's financial statements,[593] this means that ordinarily an opportunity should be provided at the AGM for the contents of the report to be considered by those present at the meeting and for all appropriate

---

585 Section 158 of the Companies Act 1963, as amended by Section 90 of the Company Law Enforcement Act 2001.

586 The law also require that a number of other issues be dealt with in a company's directors' report but for the purposes of this handbook—which does not purport to be an exhaustive account of all the law to which a management company is subject—those cited in subparagraphs (a) to (e) are the most important.

587 Section 158(1) of the Companies Act 1963, as amended by Section 90 of the Company Law Enforcement Act 2001.

588 Section 158(3) of the Companies Act 1963.

589 Section 13(1)(b) of the Companies (Amendment) Act 1986.

590 Section 13(1)(c) of the Companies (Amendment) Act 1986.

591 Section 158(6A) of the Companies Act 1963 as inserted by Section 90 of the Company Law Enforcement Act 2001.

592 Section 158(1) of the Companies Act 1963.

593 See paragraph [24.43].

discussions to take place.

[33.04] The statutory provisions cited at paragraph [33.02] express very wide-ranging concepts. Furthermore, over and above the requirements of the law, it seems to the ODCE that it is good corporate governance for a directors' report to be more than merely a statement of the obvious, which does little to inform members of what has been going on as regards the company's affairs.

[33.05] In this regard it seems to the ODCE that it is something of a missed opportunity when we see directors' reports concerning management companies which say perhaps as little as something along the following lines—

> "The company has continued to be involved with the management of an apartment complex located at 16 Parnell Square, Dublin 1 on behalf of its members."

[33.06] While obviously it is a matter for each board of directors to consider for themselves how much or little they should include in their reports to members,[594] the ODCE believes that at least some of the prevailing "information deficit" concerning the work of management companies could be alleviated if more comprehensive information were included in directors' reports. In our view management company directors generally have good reasons to be quite forthright in preparing their directors' report because the more information they give to the members, the less the members can seek to opt out of taking more responsibility themselves for whatever are the current needs of the company.

[33.07] In short, it seems to the ODCE that the directors of a management company might often 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, we think 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. 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 informed about the issue sooner.

[33.08] In the same way it seems to the ODCE that where the directors of a management company 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 may be fitting that such matters also be referred to in the directors' report.

[33.09] We acknowledge however that where the management company is

---

[594] And in some cases it may be advisable for them to seek appropriate professional advice in relation to the question.

incorporated as a company limited by guarantee not having a share capital the directors' report is one of the documents which must be filed in the CRO.[595] Accordingly, we recognise that cases may arise in which the directors of a management company might reasonably conclude that the suggestions for wide-ranging disclosure adverted to in the preceding paragraphs would be counter-productive because of a concern that, although it might be appropriate for issues to be disclosed to the members privately, they do not want such disclosure coming unnecessarily into the public domain by means of documents filed in the CRO. In the ODCE's view, this is a position which directors could quite legitimately take and nothing in paragraphs [33.06] to [33.08] is intended to suggest that there is any legal obligation on directors to "include everything" in their statutory reports. How much to include is ultimately a matter for the directors themselves – although even where they conclude that stating matters in the statutory report is inadvisable they should bear in mind that it is quite in order for them to perhaps supplement their statutory directors' report with a non-statutory statement to members which would not have to be filed in the CRO.

[33.10] If members of a management company with enough voting power thought it appropriate to do so, it would be open to them to amend the company's articles of association to adopt additional internal rules specifying that their directors' report should contain, in addition to the particulars required by the Companies Act 1963 to 2006, any other specified elements of disclosure that the members wish to have made available to them as a matter of right in their directors' reports.[596]

---

595 Section 7(1)(a) of the Companies (Amendment) Act 1986. Where the management company is incorporated as a company limited by shares and qualifies as a "small company" within the meaning of Section 8 of the 1986 Act, it is entitled to an exemption under Section 10 of the 1986 Act from the requirement to file a copy of its directors' report in the CRO. However as to whether management companies should consider it desirable to avail filing exemption see paragraph [8.31].

596 For example, the Law Reform Commission has recommended that directors' reports for management companies should include a list of the company's assets, its insurance details and whether the associated multi-unit development is fully compliant with fire and safety legislation. See paragraph of 3.68 and 3.69 of the Commission's report the details of which are at footnote 11. In advance of any legislation which the Oireachtas enacts to give effect to this recommendation it would be open to any management company which wished to voluntarily adopt this recommendation to do so by means of changes to its articles of association.

34.0 THE MANAGEMENT COMPANY'S REGISTERED OFFICE

[34.01] Like every other Irish company, a management company is required to have at all times a registered office within the State "to which all communications and notices may be addressed."[597]

[34.02] The intended location of a company's first registered office must be included in the documents completed by those involved in incorporating the company.[598] If/when the location of the company's registered office changes subsequently, details of the new registered office must be notified to the CRO within 14 days.[599]

[34.03] The company's registered office must be an actual physical location within the State: a post office box number is not enough.[600] However, it is not essential that the company should have any proprietary interest in its registered office, such as a freehold or leasehold ownership of the premises. Permission from the owner of a property to use their premises is sufficient and, on this basis, it is quite common that many companies opt to locate their registered offices at the premises of firms of accountants, company secretarial services providers, solicitors, etc. Likewise some management companies opt to have their registered offices at the premises of their managing agents.

[34.04] At first sight it might be thought that the directors of a company have an unfettered discretion as to where to locate the company's registered office, provided it is somewhere within the State and notice of its location has been duly given to the CRO. However, in the ODCE's view that discretion is limited by a number of other considerations which stem from the nature and extent of what the Companies Acts stipulate should be done from or at the company's registered office, or should be capable of being done from/at the registered office. 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.[601] Accordingly, it seems to the ODCE that directors of a company should exercise their discretion to ensure that the location chosen is one from which everything that is to be done from/at the company's registered office can, in fact, be done there.

Functions which must be carried out at a company's registered office

[34.05] There are a limited number of functions which the Companies Acts envisage must be performed at the company's registered office.

---

597 Section 113(1) of the Companies Act 1963.

598 Section 3(1)(c) of the Companies (Amendment) Act 1982.

599 Section 113(3) of the Companies Act 1963. The relevant CRO form is Form B2, available at www.cro.ie.

600 Regulation 14(4) of the Companies Act 1990 (Form and Content of Documents Delivered to Registrar) Regulations 2002, S.I. 39 of 2002.

601 Section 383(3) of the Companies Act 1963 as inserted by Section 100 of the Company Law Enforcement Act 2001.

[34.06] From the perspective of management companies key amongst these is the requirement that the minutes of a company's AGMs and EGMs must be kept at the company's registered office. Secondly, companies must ensure that, to at least a specified minimum extent, those minutes are available for inspection by the members of the company at the registered office during business hours. The company is, by its articles of association or by a resolution of the members, entitled to impose "reasonable restrictions" on members' exercise of these inspection rights, but the Companies Acts stipulate that such restrictions cannot be such as to limit the extent to which the minutes are available for inspection during normal business hours to any less than 2 hours in each (business) day.[602]

[34.07] Also the Companies Acts require that a company's register of its directors and secretaries shall be kept at the company's registered office.[603] Again this register must be available at the company's registered office for inspection (to the same extent as applies in relation to the minutes of AGMs and EGMs) not only by members of the company, but also by any other members of the public.[604]

[34.08] In the ODCE's view, the duty of company directors to ensure that the requirements of the Companies Acts are complied with by the company means that the registered office should be chosen as a location at which it is possible for members to exercise their statutory rights in this regard. Accordingly, this points to the desirability of choosing a location for a management company's registered office which is staffed during usual business hours – possibly the offices of the company's managing agents, solicitors, accountants, etc.[605]

[34.09] Another function which must be capable of being done at a company's registered office is to facilitate the exercise by any director, secretary, auditor or member of the company of their statutory entitlement[606] to inspect the records of all declarations and notices given by any directors of the company in pursuance of their duty[607] to disclose circumstances whereby they are in any way, whether directly or indirectly, interested in any contract or proposed contract with the company.

The extent to which a company's register of members may have to be kept at the company's registered office

[34.10] As noted at paragraphs [11.12] to [11.17] a company's register of members

---

602 Section 146(1) of the Companies Act 1963. See generally paragraphs [24.68] to [24.72].

603 Section 195(1) of the Companies Act 1963. See generally paragraphs [15.01] to [15.11].

604 Section 195(10) of the Companies Act 1963 – as substituted by Section 51 of the Companies Act 1990. Note that members of the company are entitled to inspect this register free of charge, non-members must pay the sum of €1.27 "or such less sum as the company may prescribe."

605 We are assuming here that the management company has no staff of its own who will usually be present during business hours at any fixed location.

606 Under Section 194(5)(a) of the Companies Act 1963.

607 Under Section 194(1) of the Companies Act 1963.

should be kept at the company's registered office[608] unless—

(a) the work of making up the register is done at "another office of the company"[609] and the register is kept at that other office; or,

(b) the company has arranged with some other person for the making up of the register to be undertaken on behalf of the company by that other person, and the register is kept at the offices of that other person.[610]

[34.11] Here again this register should be capable of being inspected, for at least 2 hours most business days, by both members of the company and non-members also.[611] Accordingly, where the company does not propose arranging for this register to be kept at either of the locations referred to in sub-paragraphs (a) and (b) of paragraph [34.10], it is important that they choose a registered office for the company at which it is possible for both members and non-members alike to exercise their statutory rights in this regard. A location which is not attended for at least 2 hours on business days would not seem suitable in this regard.

The importance of choosing an appropriate location for the registered office having regard to the extent to which the company will be presumed to have received any documents sent or left there

[34.12] The importance of choosing an appropriate location for a company's registered office arises also from Section 379 of the Companies Act 1963 under which any document may be validly served on a company by leaving it at, or sending it by post, to the company's registered office.

[34.13] This principle applies even where the company has moved away from or abandoned the premises that is recorded in the CRO records as the company's registered office.[612]

[34.14] Accordingly, if the registered office is a property which is not usually staffed or serviced by someone with appropriate authority to receive communications addressed to the company,[613] it can be quite prejudicial from the company's perspective. For example, legal proceedings may be left at a company's registered office and, whether or not anyone connected with the company has actually received them, the relevant court will be entitled to give judgment against the company if no defence has been entered to the relevant claim on the company's behalf – something which cannot happen if no-one in the company is aware of the receipt of the relevant documents. Similarly, where the CRO is contemplating striking the

---

608 Section 116(5) of the Companies Act 1963.
609 Section 116(5)(a) of the Companies Act 1963.
610 Section 116(5)(b) of the Companies Act 1963.
611 Section 119(1) of the Companies Act 1963.
612 Section 379(2) of the Companies Act 1963.
613 If only for the limited purpose of forwarding them onwards to the appropriate officers of the company, or alerting them to the receipt of documents etc.

company off the register for any reason,[614] this process begins with a letter sent by the CRO to the company's registered office. Again, it is important that a document such as this, which has potentially serious consequences for the company, should be actually received by those within the company (principally its directors and secretary) who need to have knowledge of it so as to take the necessary steps to avert the impending strike-off.

[34.15] In the ODCE's view, the duty of directors to act in a company's best interests includes the duty to ensure that the company will not be unnecessarily vulnerable to prejudicial outcomes such as these. Accordingly, it is highly desirable that a management company's directors choose as its registered office a location which is sufficiently manned so as to enable necessary communications to be received promptly by the company's directors.

---

[614] See paragraphs [42.13] to [42.18].

35.0 THE REQUIREMENTS FOR THE MANAGEMENT COMPANY'S BUSINESS LETTERS, WEBSITES, ETC, TO CONTAIN RELEVANT DETAILS CONCERNING THE COMPANY AND THE IDENTITY OF ITS DIRECTORS

[35.01] In the interests of transparency, the Companies Acts contain a number of provisions under which companies, management companies included, must give certain basic information on various communications sent by the company, or on any website which the company has.

[35.02] In the case of the typical management company[615] its letters (whether in conventional form, or when sent by email or fax) must specify[616]—

(a) the company's name and legal form;

(b) the address of the company's registered office;

(c) the fact that the company is registered in Ireland;

(d) the company's CRO number,

(e) the name of every director of the company;[617]

(f) details of the nationality of any director of the company who is not an Irish national;

[35.03] Normally a company will comply with these obligations by designing its letterhead perhaps along the following lines—

> ***16 Parnell Square Owners Management Company Limited***
> ***16 Parnell Square***
> ***Dublin 1***

---

615 Additional requirements exist if the company is being wound up, or if the management company is incorporated as a private company limited by shares and reference is made in the letter to the fact that the company has a share capital. See Regulation 9(1) of the European Communities (Companies) Regulations 1973, S.I. 163 of 1973, as amended by the European Communities (Companies) (Amendment) Regulations 2007, S.I. 49 of 2007.

616 These obligations are derived from Section 114(1)(c) of the Companies Act 1963, Section 196(1) of the Companies Act 1963 and from Regulation 9(1) of the European Communities (Companies) Regulations 1973, S.I. 163 of 1973, as amended by the European Communities (Companies) (Amendment) Regulations 2007, S.I. 49 of 2007.

617 His/her present forename, or the initials thereof, and present surname; together with any former forename and surname (except, in the case of a married woman, the name by which she was known previous to her marriage).

Registered in Ireland as a company limited by guarantee not having a share capital.
Company Number: 987654321
Directors: J.Walsh, J Murphy, P Ryan, J Byrne, D Clarke (USA), F.Leclerc (French)

[35.04] Elements (a), (b), (c), (d) in paragraph [35.02] must also be included on any order forms issued by the company for goods and services[618] and, where the company has a website, those elements must be displayed "in a prominent and easily accessible place on that website."[619] However, the identity of the company's directors does not need to be disclosed on any such website.

[35.05] A company must also ensure that its name is clearly specified on all notices and other official publications of the company, and in all cheques, invoices, receipts which it issues.[620]

---

618 Regulation 9(1) of the European Communities (Companies) Regulations 1973, S.I. 163 of 1973, as amended by the European Communities (Companies) (Amendment) Regulations 2007, S.I. 49 of 2007.

619 Regulation 9(1) of the European Communities (Companies) Regulations 1973, S.I. 163 of 1973, as amended by the European Communities (Companies) (Amendment) Regulations 2007, S.I. 49 of 2007.

620 Section 114(1)(c) of the Companies Act 1963.

36.0 FILINGS WITH THE COMPANIES REGISTRATION OFFICE

[36.01] Management companies, like every other company, are required by law to make an annual return to the CRO.[621]

[36.02] The annual return must be made in every calendar year – subject however to the rule that the management company's first annual return must be made up to the day 6 months after the date of the company's incorporation – which, depending on when in the year the company was incorporated may have the effect that no annual return needs to be made in the year of incorporation.[622]

[36.03] It is important to note that even though a management company is not required to hold an AGM in the year in which it was incorporated, it may be required to file an annual return in that year. Likewise even though the management company may not be required to hold an AGM in the year following the year in which it was incorporated, it is required to file an annual return in that year.[623]

[36.04] The return is a comparatively simple document setting out basic information in relation to the company.[624]

[36.05] Where the management company was incorporated as a company limited by guarantee not having a share capital, there is no requirement for the company's annual return to contain a listing of all the members of the company – although such a list is required where the management company is incorporated as a private company limited by shares.[625] In both cases the annual return must include details regarding the company's officers.

[36.06] Together with the company's annual return a management company which was incorporated as a company limited by guarantee not having a share capital must ordinarily[626] file the following documents[627]—

(a) a copy of the company's balance sheet made up to the end of the preceding financial year of the company to that during which the annual

---

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

622 Section 127(6) of the Companies Act 1963.

623 See paragraph [24.01] concerning how the company is not required to hold an AGM in its first calendar year, and may not be so required in the following year.

624 Form B1 is the prescribed form. A copy of Form B1 can be downloaded from www.cro.ie/ena/forms.aspx.

625 See *note twelve* in Form B1.

626 Except as regards the first annual return of the company (which is made up to the date 6 months after the incorporation of the company). See Section 127(7) of the Companies Act 1963, as replaced by Section 60 of the Company Law Enforcement Act 2001.

627 Section 7(1)(a) of the Companies (Amendment) Act 1986 *or* Section 128(1)(b) of the Companies Act 1963.

return is filed;[628]

(b) a copy of the company's profit and loss account for the same preceding financial year;

(c) a copy of the auditors' report on those financial statements;

(d) a copy of the directors' report which accompanied those financial statements.

[36.07] Where the management company was incorporated as a private company limited by shares then provided the company is a small company[629] it is ordinarily[630] enough for the annual return to be accompanied by only the following documents[631]—

(a) a copy of the company's *abridged* balance sheet made up to the end of the preceding financial year of the company to that during which the annual return is filed;[632]

(b) a copy of the auditors' report on its unabridged financial statements together with a report from the company's auditors[633] confirming that they are satisfied that the directors of the company are entitled to rely on the small companies filing exemption in Section 10 of the Companies (Amendment) Act 1986.

In other words, such a management company does not have to file copies of its profit and loss account or directors' report with the CRO: although if it wishes to do so it is quite entitled to not take advantage of the small companies' filing exemption.[634]

---

628 e.g., where the company's financial year runs from 1 January to 31 December, the annual return filed in 2009 should usually be accompanied by the balance sheet made up to 31 December 2008.

629 Most such management companies fall within the statutory definition of 'small company' in Section 8 of the Companies (Amendment) Act 1986 as amended by Regulation 4 of the European Communities (Accounts) Regulations 1993, S.I. 396 of 1993. Where the question arises during the year in which the company was incorporated the company will be small if it satisfies at least two of the following conditions: *(i)* that its balance sheet total for that year does not exceed €1,904,607; *(ii)* that the amount of its turnover is not more than €3,809,214; *(iii)* that the average number of its employees does not exceed 50. In subsequent years the company is small if it satisfies at least two of those conditions both in the year itself, and in the immediately preceding year.

630 Except as regards the company's first annual return, as to which see footnote 626.

631 Section 7(1)(a) of the Companies (Amendment) Act 1986.

632 e.g., where the company's financial year runs from 1 January to 31 December, the annual return filed in 2009 should usually be accompanied by the balance sheet made up to 31 December 2008.

633 Under Section 18(4) of the Companies (Amendment) Act 1986.

634 However as to whether management companies should consider it desirable to avail filing exemption see paragraph [8.31].

[36.08] Furthermore, if the management company was incorporated as a private company limited by shares and has opted to take advantage of audit exemption[635] it is entitled also to dispense with the filing of auditors' reports.

[36.09] In addition to the company's annual return, a management company must also promptly file details of certain other matters with the CRO. These include the following—

(a) Notices of any changes in the composition of the company's directors or secretary: Form B10;

(b) Notice that a person holding the office of director of secretary of a company has died: Form B70;

(c) Where the management company was incorporated as a company limited by guarantee not having a share capital, notice of any increase in the total number of members of the company: Form B9;

(d) Notice of any change in the location of the company's registered office: Form B2;

(e) 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;

(f) Notice of the nomination of a new annual return date: Form B73;

(g) Notice of the fact of any new director of the company being the subject of a foreign disqualification: Form B74;

(h) Notice of any mortgage or charge created by the company: Form C1;

(i) Notice of any special resolution of the company: Form G1;

(j) Notice of certain Ordinary Resolutions of the Company: Form G2;

(k) Notice of any removal of the company's auditor: Form H3.

[36.10] Further information in relation to these filings and other CRO requirements is also available on the CRO website: www.cro.ie. Alternatively you can telephone the CRO on 01 804 5200 or on LoCall 1890 220 226. The CRO's public office is located at Parnell House, 14 Parnell Square, Dublin 1. Where companies opt not to avail of the CRO's electronic filing facility many of the most common filings for

---

635 See paragraphs [32.01] to [32.19].

typical management companies will be processed from the CRO's office in Carlow. Postal submissions of those sorts[636] should be sent directly to CRO, O'Brien Road, Carlow. The CRO does not operate a public office from its premises in Carlow.

[636] Including annual returns, all resolutions, changes regarding: *(i)* the extent of the company's share capital, *(ii)* directors, secretaries and auditors, *(iii)* the location of the company's registered office, *(iv)* the location where the company's registers of members, directors, etc are kept. For further information see www.cro.ie/ena/postal_address.aspx.

37.0 THE OPERATION OF THE MANAGEMENT COMPANY'S BANK ACCOUNT(S)

[37.01] There are no provisions of the Companies Acts which expressly stipulate that a company must have a bank account, nor any rules governing how any bank account held by a company should be operated.

[37.02] However in order to optimise—

(a) the proper governance of a management company,

(b) the discharge by the management company's directors of their common-law and fiduciary duties,[637]

(c) the keeping of its accounting records;[638] and

(d) the preparation of its annual accounts;[639]

the ODCE suggests that management companies should consider the following observations.

[37.03] The law does not preclude the funds of a management company being kept in a pooled bank account (or accounts) operated by the company's managing agent and in practice this appears to happen quite frequently. However, opinions vary as to whether this is the most appropriate way of dealing with the management company's money and the respondents to the ODCE's Consultation Paper who dealt with this topic were strongly of the opinion that it was inadvisable.

[37.04] In all the circumstances, it seems to the ODCE that from a prudential perspective there are clear disadvantages to having the management company's money usually lodged to a pooled account operated by the company's managing agent, even in cases where the managing agent has very detailed and transparent reporting arrangements with the management company.

[37.05] In the ODCE's view, it is preferable that all of a management company'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 and 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 management company

---

637 See paragraphs [18.01] to [18.19].

638 As required by Section 202 of the Companies Act 1990.

639 As required by *inter alia* Sections 148ff of the Companies Act 1963, and Sections 3 to 6 of the Companies (Amendment) Act 1986, and the Schedule to that Act.

itself.[640]

[37.06] The directors of the management company should consider carefully, from a prudential perspective, what safeguards they wish to put in place as regards withdrawals from the company's bank account(s). These are obviously matters for the directors' own determination and, as always, it may be prudent to take advice on the matter. However, as the ODCE sees it, among the essential choices are as follows—

(a) whether the managing agent is to be an authorised signatory for withdrawals from the management company's bank account(s);

(b) 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;

(c) which of the management company's directors ought to be authorised signatories for withdrawals from the company's bank account(s)? 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?

(d) who is to have custody of the management company's chequebooks and deposit books?

(e) who is to receive the bank statements in relation to the management company's account(s)? Should they come directly to the management company 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 directors together with an up-to-date bank reconciliation statement?

Information available from the National Consumer Agency

[37.07] The topic of a management company's bank accounts is covered also in Section 15 of *Buying and Living in a Multi-Unit Development Property in Ireland* published by the National Consumer Agency.[641]

---

640 In general any sinking fund monies should be lodged separately to a long-term deposit account carrying an attractive interest rate.

641 See footnote 25.

38.0 THE RELATIONSHIP WITH THE MANAGEMENT COMPANY'S SOLICITORS

[38.01] 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 a management company in having one.

The importance of independent legal advice

[38.02] In the first case, there is a complicated legal framework which underpins the role of management companies and the role which they are 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 management company 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.

[38.03] This point was stressed in the submission made to the ODCE by the Law Society of Ireland in response to our Consultation Paper. They noted that—

> "the complexities in this area of law which are evidenced in the paper underline the importance for [management companies] to secure independent expert legal advice in relation to the myriad of legal issues that affect these companies and their directors. This would include not only company and property law but also legal issues arising in the context of the supply of goods and services, liability issues, and issues relating to claims ….. [The] board of [a management company] should be urged to ensure that their chosen solicitor has the necessary competencies to deal with the myriad of legal issues likely to affect the [management company]."

The document management role of the management company's solicitors

[38.04] In addition to the role which a management company's solicitors play in being available to advise the company and its directors, there is also an important practical advantage associated with the management company having an ongoing relationship with a firm of solicitors.

[38.05] One of the key roles of a management company is to hold legal title to all or some of the land on which the multi-unit properties have been built. In the case of an apartment complex this will usually consist of the freehold title to the whole of the complex, including the common areas; whereas in the case of an estate of houses it is likely to be confined to the common areas only.

[38.06] In most instances, this means that from the beginning of the owners-only phase at the latest the management company ought to be in possession of original title deeds to some of the land; including so called *counterparts* of some documents, the originals of which form part of the title deeds of each of the properties belonging to the individual unit owners.

[38.07] 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.

Legal costs

[38.08] 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 the ODCE's view it would be a false economy for the members of a management company to seek to always avoid incurring such expenditure.

[38.09] Firstly, unless the management company has particularly unusual needs, the directors are likely to have to consult the company's solicitor only occasionally and the charges involved will probably be comparatively small – when viewed in the context of what is often the millions of euro of residential property whose value is at least partly dependent on the successful operation of the management company.

[38.10] Secondly, we are conscious that it is usually the case that the members of a management company 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 it is reasonable for those directors to expect from their fellow-members a willingness to fund the provision of such legal advice as the directors need to assist them in the discharge of the burdens which they have voluntarily assumed for the benefit of their neighbours as a whole.[642]

---

642 See also paragraphs [20.05] to [20.07].

39.0 SERVICE CHARGES

[39.01] Service charges are frequently one of the most contentious topics which arise in relation to management companies.

[39.02] However, from a company law perspective the position is fairly simple. There are no provisions of company law which determine the level at which a management company should fix its service charges, or give any guidance as to how they should be calculated. This is because, as noted earlier,[643] company law provides merely the framework within which all sorts of business may be carried on – rather than to spell out the specific ways in which companies engaged in any particular type of activity should go about the running of their business.

[39.03] The obligation on unit-owners to pay service charges, and the entitlement of management companies to collect them, arise fundamentally from the covenants and obligations which both management companies and multi-unit property owners enter into in the conveyancing documents by which owners purchase their properties in a multi-unit development.[644]

[39.04] Accordingly, where disputes or concerns about service charges arise, it is to those agreements, rather than to company law obligations, that—in the ODCE's view—the affected parties should turn primarily, to examine what are the respective rights and duties of both the unit-owner and management company; and to what extent, if any, they can be enforced. If necessary, independent legal advice should be sought in relation to these questions.

[39.05] For advice on what ought to be components of a service charge calculation, the ODCE respectfully suggests that interested parties should study carefully the following publications of the National Consumer Agency—

- Section 3 of the National Consumer Agency publication *Buying and Living in a Multi-Unit Development Property in Ireland*.[645]

- *Management Company Service Charges: Income and Expenditure* and the accompanying spreadsheet.[646]

[39.06] From a company law perspective, the ODCE sees the fixing and collection of service charges as part of the business of the company which, in most management companies, is a task entrusted exclusively to the management company's directors: not to the members, in general meeting.[647] Accordingly, unless

---

643 See paragraph [6.02].
644 See paragraphs [3.03] to [3.08].
645 See footnote 25.
646 Available at www.consumerproperty.ie.
647 See paragraphs [16.01] to [16.23].

the articles of association permit otherwise,[648] it would not usually seem appropriate that the members of the management company should purport to make decisions in relation to service-charge issues at AGMs or EGMs of the company. This does not mean, however, that members are not free to seek to discuss the level of service charges in their consideration of the company's annual accounts, or the report of the directors on the state of the company's affairs.[649] Neither does it preclude the directors from paying due regard to any such views of the members provided that, assuming managerial powers are vested in the directors, their ultimate decision is based on their own view as to what is in the company's best interests.

[39.07] It is possible for management companies to adopt articles of association which provide *inter alia* that membership of the management company is contingent on the member being up-to-date in the payment of his/her service charges. However, what is probably more common is for management companies to adopt articles of association which include provisions along the lines of those in regulation 66 of Part I of Table A or regulation 23 of Table C.[650] If these provisions apply then—

> "No member shall be entitled to vote at any general meeting unless all moneys immediately payable by him to the company have been paid".[651]

The role of auditors regarding the ascertainment and certifying of service charges

[39.08] One aspect of the ascertainment and verification of service charges which at first sight may appear relevant from a company law perspective is the role which sometimes appears to be assigned to the management company's statutory auditors in relation to service charges.[652]

[39.09] The ODCE has seen many instances in which the conveyancing documents relating to units in a multi-unit development provide as to service charges something along the following lines—

> (a) the unit-owner will pay to the management company[653] [x]% of the costs and expenses incurred by the management company[654] in providing the common services;

---

648 Something which the ODCE has never seen in practice.

649 See paragraphs [24.39] to [24.45].

650 See paragraph [9.05] concerning the extent to which the regulations contained in Table A or C may not necessarily be contained in the articles of association of any particular management company.

651 See paragraph [12.23] in relation to the appropriateness of adopting such a regulation.

652 Or to the auditors of a developer's company in an instance where the conveyancing documents have been drafted so as to provide that, during the developer-and-owners' phase, service charges will be collected and expended by the developer's company, rather than by the management company. See paragraph [6.09].

653 Or, during the developer-and-owners' phase, to the developer.

654 Or, during the developer-and-owners' phase, by the developer.

(b) the amount of the service charges for the previous year shall be ascertained and certified annually by the auditors of the management company[655] 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[656] to the unit-owner on written request;

(d) subject to the provisions of paragraph (e) on the 1st day of April in each financial year, the unit-owner shall pay to the management company[657] such sum in advance and on account of the service charge as the management company[658] 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[659] shall furnish to the unit-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[660] the service charges or any balance found payable in respect thereof, or there shall be allowed by the management company[661] and repaid to the owner any amount which may have been overpaid by the owner (as the case may be).

[39.10] Where a clause along these or similar lines has been included in conveyancing documents it would seem that the presumed expectation of those who prepared those documents was that it was feasible to expect that the management company's statutory auditors[662] should be involved in the process of 'ascertaining and certifying' service charges – and should do so as experts with regard to such matters.

---

655 Or, during the developer-and-owners' phase, by the auditors of the developer.
656 Or, during the developer-and-owners' phase, by the developer.
657 Or, during the developer-and-owners' phase, to the developer.
658 Or, during the developer-and-owners' phase, the developer.
659 Or, during the developer-and-owners' phase, the developer.
660 Or, during the developer-and-owners' phase, the developer.
661 Or, during the developer-and-owners' phase, by the developer.
662 Or, during the developer-and-owners' phase, the auditors of the developer.

[39.11] There is nothing in the Companies Acts under which any company's statutory auditors are expected to perform any such role or function.

[39.12] Any role of this character undertaken by the statutory auditor of a company can only arise from engagement terms separately agreed between the statutory auditor and the company. Furthermore, the mere fact that agreements between the developers, management companies and unit-owners envisage that a function such as that described above will be performed by statutory auditors does not of itself have the effect of making it incumbent on those statutory auditors to discharge that function.

[39.13] Accordingly, where underlying conveyancing documents in relation to a multi-unit development with which a management company is to be associated envisage that the statutory auditors of a company[663] will play a role as regards the ascertainment and certification of service charges, it is important for the company who engages those auditors to seek to ensure that the terms of engagement include such an additional *non-statutory* assignment – which in general the relevant auditor *may* agree to perform, though not in the role of "statutory auditor" but possibly as "reporting accountant".

[39.14] From the perspective of the accountancy profession the ODCE has been informed by the Consultative Committee of Accountancy Bodies – Ireland (CCAB-I)[664] that if/when a statutory auditor accepts such an additional non-statutory assignment as reporting accountant, it most probably would be on the basis of what accountants term "an agreed upon procedures basis."[665]

[39.15] As the ODCE understands it the regular inclusion in conveyancing documents of clauses which purport to envisage that statutory auditors will perform a role in relation to the ascertainment and certification of service charges occurs despite the fact that there does not appear to have ever been any industry-wide consultation with the professional accountancy bodies from which a consensus emerged as to the appropriateness of assigning such a role to auditors. Indeed, during its Consultation Process leading to publication of this handbook, the ODCE had very valuable engagement with the CCAB-I from which we learned that the accountancy bodies resist the appropriateness of the inclusion in conveyancing arrangements[666] of clauses which purport to assume that statutory auditors will routinely be willing to take on the role of acting as experts in the ascertainment and determination of service charges arising in connection with the management of a

---

663 Whether the auditors of a developer or the auditors of a management company.

664 CCAB-I comprises the Association of Chartered Certified Accountants, the Chartered Institute of Management Accountants, the Institute of Certified Public Accountants in Ireland and the Institute of Chartered Accountants in Ireland.

665 The ODCE understands that this involves "performing certain specified procedures on factual information and reporting the findings without giving any form of opinion on the implications of the work performed": paragraph 25 of the Miscellaneous Technical Statement M39 – *Reporting to third parties*, published by the Institute of Chartered Accountants in Ireland in June 2002.

666 To which, it is worth recalling, no accountant, auditor or accountancy body is ever a party.

multi-unit development.[667]

[39.16] CCAB-I has also drawn the ODCE's attention to a further potentially problematic aspect of a service charge clause such as that outlined in paragraph [39.09].—

> "CCAB-I draws attention to the fact that auditors in the Republic of Ireland are obliged to comply with the APB Ethical Standards for Auditors and their individual professional body's Code of Ethics. In complying with these codes auditors must be cognisant of the requirement to remain independent of their audit client and avoid a situation where the auditor might undertake non-audit work which compromises audit independence. For example it would be inappropriate for an auditor to calculate a service charge figure and subsequently audit that figure."

[39.17] In all the circumstances, it would seem that stipulations in conveyancing agreements which purport to suggest that a company's statutory auditors will *ex officio* play a role in the ascertainment and certification of service charges give rise to difficulties and may fail to fulfil the reassuring role which it was envisaged that they would provide. This is clearly a problem which, depending on the circumstances, may necessitate the putting in place by management companies of some more suitable means of verifying the appropriateness of the service charges which they propose levying. However as already stated the Companies Acts do not in any way regulate service charges levied by management companies and, accordingly, it would not be appropriate for the ODCE to suggest what should be the solution. However, to the extent that perceptions may exist that statutory auditors under the Companies Acts have a role to play in the ascertainment and certification of management company service charges, we think it appropriate to draw attention to this issue.

---

667 CCAB-I informed us that they advise their members against the use of wording such as "ascertain" or "certify" in accountant's reports, since accountants would not normally be in a position to support the complete accuracy which such wording implies.

40.0 MANAGEMENT COMPANY MEMBERS' RIGHTS TO APPLY TO THE HIGH COURT FOR *(I)* ORDERS COMPELLING COMPLIANCE WITH PROVISIONS OF THE COMPANIES ACTS, *(II)* RELIEF IN CASES OF OPPRESSION AND/OR *(III)* ORDERS ARISING FROM IRREGULARITIES AT COMPANY MEETINGS

Orders compelling compliance with provisions of the Companies Acts ("Section 371 orders")

[40.01] Whenever a company, or any officer of a company, has defaulted in complying with any provision of the Companies Acts, it is possible for a member of the company[668] to seek an order from the High Court directing the company and any officer thereof to "make good" the default within such time as may be specified by the Court.[669]

[40.02] Prior to the making of such an application to the High Court the applicant must first have served a notice on the company or officer concerned, requiring it or him/her, to make good the default within 14 days after the service of the notice, or such longer period as is specified in the notice.

[40.03] It should be noted that Section 371 orders are available only where the alleged default is in complying with any provision of the Companies Acts. Where the alleged default concerns alleged non-compliance with an obligation which has its roots in a company's articles of association, it is not appropriate for a Section 371 order to be sought.

[40.04] So, for example, if the members' complaint is that the company's directors have failed to prepare accounts for the company, and have failed to circulate them to members in advance of the company's AGM these are defaults in complying with statutory obligations under the Companies Acts.[670] As such they are defaults capable of being the subject of a section 371 order. However if the complaint is, for example, that the directors have co-opted someone to be an additional director of the company over and above the number of directors permitted under the company's articles, this is an alleged breach of (where there are applicable[671])

---

668 Such applications may also be made by any creditor of the company, by the ODCE or by the CRO.

669 Section 371(1) of the Companies Act 1963, as amended by Section 96 of the Company Law Enforcement Act 2001 and Section 64 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

670 Section 148(1) of the Companies Act 1963 (as amended Regulation 4 of the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005, S.I. 116 of 2005) and Section 159(1) of the Companies Act 1963 are the relevant provisions.

671 See paragraph [9.05] concerning the extent to which the articles of association of any particular management company may not necessarily include all of the regulations contained in Table A or C.

Regulation 98 of Part 1 of Table A, or Regulation 47 of Table C. As such it is not capable of giving rise to an application under Section 371.[672]

[40.05] Before embarking on actions which may culminate in an application for a Section 371 order it is advisable that members should seek legal advice.

Relief in cases of oppression

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

> (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.

[40.07] The ODCE is unaware of any Section 205 proceedings having ever been taken in relation to a management company.

[40.08] 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 embarking on such a course.

[40.09] However, in principle, we see no reason why such proceedings could not be brought in relation to a management company 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.

---

672 Although some of the provisions of a company's articles of association may simply be repetitive of obligations which are also to be found in the Companies Acts themselves, e.g. regulations 48 or 125 of Part I of Table A, regulations 5 and 62 of Table C. In that case an application under Section 371 as regards the overriding statutory obligation may be appropriate.

[40.10] Obviously this is a course which members should embark on only with the benefit of comprehensive legal advice.

[40.11] The very possibility that such proceedings *could* be taken is, however, something which management company directors should bear in mind – as yet another reason for ensuring that they exercise the significant powers entrusted to them in an honest and responsible manner.

The consequences of irregularity at directors' or members' meetings

[40.12] At paragraphs [23.19] and [24.29] we commented on how irregularity concerning the convening or conduct of meetings may invalidate the legal effect of the decisions purportedly taken at such meetings. These were merely specific examples of a general principle that the internal management of a company's affairs should be conducted properly, and that decisions taken by irregular means may be invalid.

[40.13] It is not necessarily the case, however, that *any* sort of irregularity necessarily means that ensuing decisions must be ignored by everyone concerned, especially people unaware of the underlying irregularity.

[40.14] For example, as noted above[673] companies' articles of association often provide that accidental omission to give notice of a general to one or more members shall not invalidate the proceedings at the meeting.

[40.15] Furthermore in general where a matter appears to be regular, then an outside party dealing in good faith with the company is not affected if in fact, by reason of some error in the internal management of the company, there is an irregularity.[674] So, for example, if a decision to engage a contractor (such as a managing agent) was taken at a directors' meeting of which one or more directors were not given notice, the resulting contract – provided the intended managing agent was unaware of the irregularity – would probably be binding on the company nonetheless.

[40.16] The other rule of company law which may limit the extent to which an aggrieved member may complain of an irregularity is the so-called rule in *Foss v. Harbottle*.[675] As noted by one of the leading Irish company law textbook writers the rule has two limbs—

> **"** - the first is that where the company has been wronged, the company, and not its shareholders is the proper person to institute proceedings;

---

673 See paragraph [24.30].
674 *Royal British Bank v. Turquand* [1843-60] All ER Rep 435.
675 (1843) 2 Hare 461.

- the second is that an individual shareholder, or shareholders, may not bring proceedings to overturn a decision of the company where that decision is one which a majority of the members may confirm."[676]

[40.17] Accordingly, if the irregularity is one which is a breach of the management company's rights, rather than the rights of individual members as such, it may be the case that no individual member is competent to seek to bring proceedings in the court in relation to it. So, for example, if a company's articles of association provide that the company's board of directors is to consist of six persons, and that they can act only with a quorum of three, a situation in which decisions are unilaterally taken by two of the directors is most likely a breach of the company's right to have its management conducted in accordance with the articles of association, rather than a breach of any members' individual rights. Ordinarily a member in that situation cannot take proceedings *e.g.* to seek an injunction against the two directors. The more appropriate solution would usually be for him/her to bring the matter to the correct forum which is an AGM or EGM of the company's members on foot of an appropriate resolution.

[40.18] However where what has been ignored or breached is a personal right of a member under the company's articles of association, it is possible for a member to take proceedings against the company. As previously stated[677] the memorandum and articles of association of a company constitute an agreement between the company and its members. Some of the provisions of that agreement accord personal rights to members such as, for example, a members' right to be notified of meetings and to have his/her vote counted at the company's meetings. A company's failure to honour those obligations owed directly to each member may be a basis upon which the member concerned could take appropriate legal proceedings against the company.

[40.19] This difficult area of law is further complicated by the fact that if the invalidity stems from non-compliance with a specific obligations under the Companies Acts (rather than merely from something in the company's articles of association) it may be possible for an aggrieved member to seek a remedy under Section 371 of the Companies Act 1963.[678] Likewise if the circumstances in which the irregularity occurred are so serious as to amount to—

> "the affairs of the company .. being exercised in a manner oppressive to [the aggrieved member] or any of the members (including [the aggrieved member]), or in disregard of his or their interests as members"

---

676 Courtney *The Law of Private Companies* (2nd edition, Tottel Publishing, 2002) at paragraph [19.082].

677 See paragraphs [9.13] and [9.14].

678 See paragraphs [40.01] to [40.05].

it *may* be possible for the member to seek relief from the High Court.[679]

[40.20] It is impossible for the ODCE to offer a simple yet comprehensive analysis of the consequences of irregularity in the conduct of a management company's affairs. In the circumstances we would suggest that when such issues arise, both management company directors and aggrieved members ought to seek their own legal advice.

---

[679] See paragraphs [40.06] to [40.11].

41.0 STATUTORY INVESTIGATION OF MANAGEMENT COMPANIES' AFFAIRS

By inspectors appointed by the High Court

[41.01] Like every other Irish company it is possible for the affairs of a management company to be the subject of an investigation carried out by one or more inspectors appointed by the High Court.[680] The role of such inspectors is "to investigate the affairs of a company [in order to enquire into matters specified by the court] and to report thereon in such manner as the court directs."[681]

[41.02] An application for the appointment of an inspector may be made—

- in any case on the application of the company itself, or by any director or creditor of the company;[682]
- where the management company is a company limited by guarantee not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members;[683]
- where the management company is a private company limited by shares, on the application of not less than 100 members, or of a member or members holding not less than one-tenth of the paid-up share capital of the company;[684]

[41.03] Such an application may also be made by the ODCE, but only where there are circumstances suggesting—

- that the company's affairs are being or have been conducted fraudulently, or in an unlawful manner, or in a manner which is unfairly prejudicial to some of its members; or,
- that persons connected with the formation or management of the company have in that regard been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or,
- that the company's members have not been given all the information relating to its affairs which they might reasonably expect.[685]

---

680 Although, to date, no application has ever been made for the appointment of such inspectors to investigate the affairs of a management company.

681 Section 7(1) and 8(1) of the Companies Act 1990. (Note that the words within the square brackets do not appear in Section 8(1).)

682 Section 7(1)(c), (d) and (e) of the Companies Act 1990.

683 Section 7(1)(b) of the Companies Act 1990.

684 Section 7(1)(a) of the Companies Act 1990.

685 Section 8(1) of the Companies Act 1990.

[41.04] Accordingly it would seem that the circumstances in which the ODCE may seek the appointment of an inspector are less extensive than those in which the persons specified in paragraph [41.02] may do so. ODCE applications must be made under Section 8 of the Companies Act 1990, while non-ODCE applications are made under Section 7. The High Court has observed that—

> "Section 7 .. permits the court to appoint one or more competent inspectors to investigate the affairs of a company in order to enquire into matters specified by the court and to report thereon as the court directs. It is to be noted that unlike Section 8, this section does not describe the circumstances in which the court is empowered to make such an appointment. The court is at large to exercise its discretion in determining whether there are circumstances which warrant investigation. The application has to be supported by such evidence as the court may require including such evidence as may be prescribed. No regulations have been made prescribing such evidence.
>
> It is clear that the jurisdiction conferred on the court by Section 7 is wider than that which is given under Section 8 …".[686]

[41.05] Where the court appoints inspectors the costs of the investigation are defrayed in the first instance by the State, but the court may direct that they be recouped from any company dealt with in the inspectors' report, or by the applicant(s) for the investigation.[687] There are also provisions under which it may be possible for some or all of the costs to be recouped from any person convicted on indictment in a prosecution instituted as a result of an investigation, or who is ordered to pay damages or restore any property in proceedings brought as a result of an inspector's investigation.[688] In addition where the application to appoint inspectors is brought by any of the persons mentioned in paragraph [41.02] the court may, at the outset, require the applicant(s) to give security towards the costs of the investigation but the amount of such security is not permitted to exceed €317,434. The Court may also direct that where damages are awarded to any person, or property is restored to any person, in proceedings brought as a result of an investigation, that up to one-tenth of that amount may have to allocated towards reimbursing the costs of the relevant investigation.[689]

[41.06] Once the inspectors have concluded their investigation they must make a report to the High Court. At that point the High Court may order that the report be forwarded to the company under investigation, and/or to members of the company, and/or to persons whose conduct is referred to in the report, and/or to certain regulatory bodies. The report will routinely be sent to the ODCE. The court may also order that the report be published.[690]

---

686 *Re DCC plc* [2008] IEHC 260.
687 Section 13(1) of the Companies Act 1990.
688 Section 13(2)(a) and (b) of the Companies Act 1990.
689 Section 13(2)(c) of the Companies Act 1990.
690 Section 11 of the Companies Act 1990.

[41.07] Having considered an inspectors' report, the High Court may make any order that it thinks fit in relation to matters arising from the report including—

- an order winding-up the company; or
- an order "for the purpose of remedying any disability suffered by any person whose interests were adversely affected by the conduct of the affairs of the company."[691]

[41.08] It should be noted that such an investigation is largely a fact-finding exercise. Other than to report on the facts they have found, the inspectors do not themselves take on a role in asserting persons' rights. As stated in one of the leading English cases—

> "… the inspectors' function is in essence to conduct an investigation designed to discover whether there are facts which may result in others taking action."[692]

The High Court has also had regard to Canadian case-law in which it was held that—

> "The primary purpose of an investigation is to 'bring to light facts which might otherwise be inaccessible to shareholder and security holders …".[693]

[41.09] While there has not yet been any case in which the High Court has had to consider whether, or to what extent, to appoint an inspector on foot of a Section 7 application by company members, or any of the other parties listed in paragraph [41.02], it may be worthwhile to note the Court's approach as regards Section 8 applications brought by the ODCE. In addition to being satisfied as to the existence of the circumstances outlined in paragraph [41.03] the Court has held that it is also necessary for the Court to be satisfied that the appointment of an inspector would be likely to achieve the purpose of enabling facts not already known to be found. Even if those two conditions are fulfilled, the Court still has a discretion as to whether or not to appoint the inspector. Among the factors to which the Court will have regard in exercising that discretion are the public interest, and whether the appointment of an inspector would be disproportionate. As regards this latter aspect, the Court has noted that "the appointment of inspectors is a serious matter and such a sledgehammer should not be used to crack a nut."[694]

[41.10] As the appointment of an inspector to any company is such a serious matter, it is clearly desirable that legal advice be sought by anyone contemplating

---

691 Section 12(1) of the Companies Act 1990.

692 *Re Pergamon Press Limited* [1970] 3 All ER 535.

693 *Saunders v. Eco Temp International Inc* [2007] ABB 136, referred to in *Re DCC plc* [2008] IEHC 260.

694 *Re DCC plc* [2008] IEHC 260.

the taking of such a step.

By the ODCE

[41.11] The ODCE also has certain powers to carry out statutory investigations of companies' affairs.[695] Such an investigation may be carried out as a step preliminary to an application to the High Court for the appointment of inspectors as described above, or where there are circumstances suggesting as in paragraph [41.03].

[41.12] While the output of such an investigation may be used by the ODCE for the purpose of discharging its statutory functions, and information acquired within it may be shared with certain other regulatory bodies, the Companies Acts do not allow for such information to published or disclosed to members of the public, or even to those persons (if any) who made complaints to the ODCE in consequence of which the relevant investigation was commenced.[696]

---

695 Section 19 of the Companies Act 1990, as amended by Section 29 of the Company Law Enforcement Act 2001.

696 Section 21 of the Companies Act 1990.

42.0 TERMINATING THE EXISTENCE OF THE MANAGEMENT COMPANY: WINDING-UP AND STRIKE-OFF

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

Winding-Up

[42.02] We do not propose to deal here in any great detail with the issue of winding-up.[697] Suffice it to say that there are two main types of winding-up: solvent and insolvent winding-up.

Solvent Winding-Up

[42.03] A solvent winding-up is a process which is initiated by the members of a company itself. It is possible only where the company has sufficient funds to ensure that all its creditors can be paid. Such a winding-up is usually the result of a decision by the members 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.

[42.04] While it is also possible for a winding-up application to be brought on grounds such as deadlock in the management of a company, or that the company was being used as an instrument of fraud, in practice the need for the business of a management company to continue is usually such that problems of this sort are better resolved otherwise than by the winding-up of the company.

Housing Estates

[42.05] Where a management company was established in relation to a multi-unit development which is a conventional housing estate (to hold legal title to the common areas of the estate, to maintain those areas, and to provide other shared services) it is possible to imagine a scenario in which if those areas were subsequently "taken in charge" by a local authority, there might no longer be any business for the management company to carry on, and consequently no need for the company to remain in existence.

[42.06] In such a case, it might perhaps be the case that the members would

---

697 See generally Chapter 25 of Courtney *The Law of Private Companies* (2nd edition, Tottel Publishing, 2002).

conclude that the company ought to be wound up under the Companies Acts.

[42.07] However, the ODCE is not aware of any instance in which that has actually occurred and, in the circumstances, we think it better to refrain from speculating as to what sort of considerations would apply if/when such a situation was actually to arise. It would clearly be advisable for professional advice to be taken in the circumstances.

Apartment Complexes

[42.08] So far as multi-unit developments which consist of apartment complexes are concerned we do not see how, under the current law, circumstances would arise in which the basic need for the management company could cease, while ever the apartment complex was to remain in existence. From the perspective of property law, the management company is a critical feature of the legal structure underpinning an apartment complex without which there would both practical and legal difficulties.

[42.09] 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.

Insolvent Winding-Up

[42.10] An insolvent winding-up usually occurs in one or other of the following circumstances—

(a) where the members of the company in general meeting resolve that it cannot by reason of its liabilities continue in business, and that it should be wound-up voluntarily;[698] *or*

(b) 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[699] – even though this course of action may be opposed by the company.

[42.11] While we can easily see how circumstances might arise in which the company as it is currently financed would be unable to pay its debts, it seems questionable to the ODCE that the members of a management company would be advised that it was appropriate for that situation to be resolved by means of allowing the company to be wound up. As we understand it, the winding-up of a management company would have a significant impact on the value of all the units in the associated multi-unit development because the management company is an important feature of the legal structure which underpins the title to each of those houses and/or apartments. While the ODCE is not expert in the area of property law,

---

698 Section 251(1)(c) of the Companies Act 1963.
699 Section 213(e) of the Companies Act 1963.

we have doubts as to whether units could continue to be regarded as being held on a "good marketable title" in the event that their associated management company had been wound up.[700] In most cases, this might significantly constrain the extent to which unit-owners would be able to sell their properties, at least in the usual manner.

[42.12] For this reason, it seems to the ODCE that the more likely response for the members of a management company, when faced with a situation in which as it was currently financed the company was unable to pay its debts and a creditor was threatening to petition for its winding-up, would be to take appropriate steps to re-finance the company: if necessary by means of all the owners making a once-off additional contribution to enable the existing debts to be discharged – rather than allowing the company to suffer winding-up. However once again this is a situation which, if it arises, is one in relation to which all those concerned should take their own legal advice.

Strike-Off

[42.13] Being struck off the register of companies is another hazard which threatens the continuation of the legal existence of a management company.

[42.14] Strike-off occurs by administrative act of the Registrar of Companies when certain statutory circumstances prevail.

[42.15] 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.[701]

[42.16] However strike-off is also possible—

(a) where the CRO has reasonable cause to believe that a company is not carrying on business;[702]

(b) 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;[703]

(c) where there are no persons recorded in the CRO as directors of the company;[704]

(d) where the Revenue Commissioners notify the CRO that the company

---

700 Again, we know of no situation in which this has actually occurred.

701 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.

702 Section 311 of the Companies Act 1963.

703 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.

704 Section 48 of the Companies (No.2) (Amendment) Act 1999.

has failed to deliver specified particulars of its business to the Revenue Commissioners within 30 days of having commenced business.[705]

[42.17] There are five important points which we wish to make about strike-off—

(a) Firstly, a management company will have no legal existence after it is struck off and, as indicated earlier, this may make the individual properties in the associated multi-unit development unsaleable;

(b) Secondly, 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;

(c) Thirdly, strike-off is always preceded by correspondence from the CRO[706] 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 returns, by delivering the appropriate Revenue statement) to avert the threat;

(d) Fourthly, 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;[707]

(e) Finally, 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 expensive application to the High Court if prompt action is taken to seek to undo the consequences of strike-off.[708]

[42.18] Accordingly, strike-off is something which can be avoided. Even when it happens, its consequences are usually capable of being reversed. Nonetheless it is much more sensible for a management company to comply with its legal obligations and ensure that the company does not become eligible for strike-off.

The possible liability of directors following strike-off

[42.19] We think it proper to allude also to the extent to which the directors of a company may face personal consequences in the event that a management

---

705 Section 12A of the Companies (Amendment) Act 1982. The specified particulars are those set out in Section 882(3) of the Taxes Consolidation Act 1997.

706 Sent to the company's registered office.

707 Section 12B of the Companies (Amendment) Act 1982 as inserted by Section 46 of the Companies (Amendment) (No.2) Act 1999.

708 Section 311A of the Companies Act 1963 as inserted by Section 246 of the Companies Act 1990.

company is struck off.

Disqualification

[42.20] Section 160(2)(h) of the Companies Act 1990[709] 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. (However a full defence is available in the circumstances to any director who can show that the company owed no outstanding debts at the time of strike-off.)

[42.21] The ODCE has an ongoing policy of bringing such applications in appropriate cases.

Actions for breach of duty

[42.22] 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.[710] This includes the requirements that annual returns be filed with the Companies Office.

[42.23] In the circumstances, we think it at least conceivable that the directors of a company who allowed it to become struck-off could be required to reimburse a company for costs, expenses and damages which arose as a result of the strike-off.

[42.24] Obviously, the directors might well have a good defence to any such claim and, in either event, the extent if any to which the respondent directors might be held liable would depend on the court's assessment of the merits of the case. Accordingly, it is impossible for the ODCE to predict what might be the outcome of such a claim. Self-evidently, however, we assume that it is a claim which no directors would wish to have brought against them.

---

709 As amended by Sections 14 and 42 of the Company Law Enforcement Act 2001.

710 Section 383(3) of the Companies Act 1963 as replaced by Section 100 of the Company Law Enforcement Act 2001.

43.0 NON-COMPANY LAW LEGAL OBLIGATIONS OF MANAGEMENT COMPANIES

[43.01] As indicated at the outset,[711] this handbook is written primarily from the perspective of the ODCE whose statutory role is mainly concerned with the enforcement of company law and encouraging compliance with it.[712]

[43.02] 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 management companies can potentially have responsibilities under other legislative codes.

[43.03] The list of other legislative codes which appears below is in no way intended to be exhaustive. It is included simply to alert management companies to the possibility that their potential responsibilities under these codes may make it prudent for consideration to be given to them, and the extent to which there are others. Obviously, this is something best done in conjunction with the management company's professional advisers (such as solicitors, accountants/auditors, managing agents, etc).

[43.04] Amongst the other legislative codes under which it is possible that management companies might have responsibilities we would suggest the following—

(a) the Taxes Consolidation Act 1997 – especially if the management company 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;[713]

(b) the Waste Management Acts – especially in so far as the disposal of refuse is concerned;

(c) the Litter Pollution Act 1997;

(d) the Occupiers' Liability Act 1995 – especially concerning the safety of access to the premises;

(e) the Fire Services Act 1981;[714]

---

711 Paragraphs [1.01] and [1.02].

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

713 Or if the management company has any obligations under any "tax designation" schemes in relation to the properties which form part of the multi-unit development. While the ODCE is not expert in this area one respondent to our Consultation Process – a managing agent – indicated that this may be so as regards certain student accommodation developments.

714 A summary of relevant obligations is contained at Section 17 of the National Consumer Agency's publication *Buying and Living in a Multi-Unit Development Property in Ireland*

(f) the Local Government (Multi-Storey Buildings) Act 1988;

(g) the Planning and Development Act 2000;

(h) disability law, especially concerning access;

(i) employment law – in so far as the management company has any direct employees (e.g., caretakers);

(j) the Safety, Health and Welfare at Work Act 2005;

(k) the Data Protection Acts – in regard to the records kept by or on behalf of the management company and any CCTV systems which are operated or maintained on the management company's behalf;

(l) the Residential Tenancies Act 2004.

[43.05] Once again we repeat that while many management companies may conclude that they have responsibilities under some only of the legislative codes listed above, it is possible that they may also have responsibilities under others not stated above. Accordingly, we very much encourage management companies to seek advice as to the full scope of their responsibilities, over and above those that are conventionally well understood.

---

the details of which are at footnote 25. This contains reference also to further information which can be obtained from sources such as the Department of the Environment, Heritage and Local Government and Dublin City Council.

44.0 THE ROLE AND APPROACH OF THE ODCE: WHAT IT CAN/CANNOT DO IN RELATION TO MANAGEMENT COMPANIES

[44.01] We began this handbook with a reference to the ODCE's role in relation to the encouragement of compliance with company law.[715] Throughout the text we have sought to highlight many of the key company law obligations and privileges of management companies, their directors and members. However, we have also sought, where appropriate, to emphasise the extent to which many issues concerning management companies (including many which are most often of day-to-day concern to property owners) have their roots in legal obligations or privileges which flow not from company law, but from other legal sources especially—

(a) the property law relationships created under the conveyancing documents which form the primary title documents of multi-unit development owners.

(b) the contracts entered into by management companies with, for example, their managing agent.

[44.02] 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.[716] 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.[717] In appropriate cases, the ODCE can also seek to have persons disqualified from acting as company directors[718] and has other significant powers in relation to insolvent companies.

[44.03] 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 a management company. However, this does not mean that it is appropriate for all or even many of the concerns in relation which commonly arise in relation to management companies to be referred to the ODCE. We are not a general regulator of management companies as such.

[44.04] Instead, the cases in which it is most usually appropriate for the ODCE to become involved are those where there are circumstances suggesting—

---

715 See also paragraphs [1.01] and [1.02].
716 Section 12(1) of the Company Law Enforcement Act 2001.
717 Part II of the Companies Act 1990.
718 Part VII of the Companies Act 1990.

(a) a breach of the Companies Acts;

(b) a breach of a common-law or fiduciary duty on the part of an officer of the company which has its roots in company law – as distinct from any other legislative code.

[44.05] 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—

(a) issues in relation to the level of service charges;

(b) issues concerning the quality of services which are being provided by a managing agent;

(c) issues relating to delays in the transfer of common-areas from a developer to a management company.

[44.06] There are, however, specific functions under the Companies Acts which the ODCE can perform and which may be particularly helpful in so far as management companies 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.[719]

[44.07] 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.[720]

[44.08] 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 management company, setting out their concerns in full and asking for a reasoned response from the management company. A reasonable time ought to be allowed for the management company to reply.

[44.09] We should also say that, in some cases at least, our approach to dealing with management companies is influenced by our having regard to management company's rather unusual and special character: at least during the owners-only phase as described earlier.[721] The directors of a management company are usually multi-unit owners who take on what is often a fairly thankless task of becoming unremunerated directors; often in a situation where very few of their fellow multi-unit development owners are willing to do so. We recognise that most such individuals

---

719 See paragraph [24.07]. Note however paragraph [25.14] concerning the lack of any power on the ODCE's part to direct the calling of an EGM.

720 The ODCE's complaint form can be downloaded from www.odce.ie/en/forms_complaints.aspx.

721 See paragraph [5.04].

are motivated by a genuine willingness to volunteer their services for the benefit of their development 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 nonetheless recognise that—in many cases— it will be in the interests of all concerned to try to remedy any deficiencies on an administrative basis.

[44.10] In addition, it sometimes appears ironic to the ODCE that at least some multi-unit development owners seem to prefer to complain about their management company and its directors, than to become actively involved in it.[722] In our view, the best solution to some of the concerns which some members sometimes express about their management companies would be if those members, and others who feel like them, would put themselves forward for appointment to the company's board of directors. What most management company 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 as directors to assess the overall needs of the multi-unit development, and resolving whatever problems it faces.

---

[722] These comments obviously do not apply in instances where a management company is still in its developer-and-owners' phase if the voting power of the developer or his/her nominees is such as to limit the scope for multi-unit development owners to become directors of the management company.

Appendix I

Outline of key provisions typically found in property law agreements between a unit owner in a hypothetical apartment complex and the associated management company

1. A clear statement of the location and extent of the common areas which it is intended will be owned by the management company (often indicated by reference to a map).

2. Covenants by the unit owner given to the management company such as the following—

    (a) to keep his/her apartment in good decorative order repair and condition;

    (b) to pay Service Charges to the management company – to be calculated on a basis specified in the document (such as x% of the total costs incurred by the management company, as verified by some independent competent person);

    (c) to pay interest at an agreed rate on any outstanding service charges not paid at the time when they fell due;

    (d) to comply with all reasonable regulations of the management company to govern the use of the common areas;

    (e) not to sell their apartment without first ensuring that the purchaser becomes a member of the management company;

    (f) not to do any anything which may be a nuisance or annoyance to the management company or the owners or occupiers of any of the other apartments;

    (g) to permit the management company or its agents to have access to the apartment to the extent that this is reasonably necessary for the management company to fulfil its obligations under the conveyance;

    (h) not to hang any signs from the balcony of the apartment or to put laundry drying there;

    (i) not to allow the apartment to be used other than as a single private residence;

    (j) not to play music, or use electronic equipment, or otherwise make any noise so as to cause annoyance to the owners and occupiers of

adjoining apartments, or so as to be audible outside the apartment between the hours of 11 pm and 8 am;

(k) not to keep birds or animals in the apartment or on its balcony which may cause annoyance to the owners and occupiers of other apartments;

(l) not to erect television aerials or satellite dishes on the external walls of the apartment, or on its balcony;

(m) not to decorate the exterior or alter the external appearance of the apartment without prior consent from the management company;

(n) not to dispose of domestic waste otherwise than in the designated refuse area;

(o) not to make any structural alteration or addition to the apartment without the prior written consent of the management company;

(p) not to keep hazardous materials in the apartment;

(q) not to do anything which might imperil the insurance policies in respect of the complex put in place by the management company;

(r) etc.

3. Covenants by the management company such as the following—

(a) to maintain the Common Areas and the services associated with them (pipes, drains, sewers, cables and other conduits etc) in good and substantial repair and condition;

(b) to provide, if the management company thinks fit, the services of such caretakers, gardeners, managing agents, etc as the management company thinks necessary or desirable to manage and conduct or maintain the Common Areas in good condition; with power for the management company, as it thinks fit, to employ professionals such as accountants, architects, building contractors, security personnel, solicitors, surveyors, etc to provide such professional services as may be needed by the management company from time to time;

(c) to keep the common areas adequately lighted;

(d) to provide a CCTV system in the common areas;

(e) to provide and carry out such other matters, things, services and facilities for running the apartment complex as a high class development as the management company in its absolute discretion thinks fit;

(f) to build up a reserve or sinking fund to meet contingencies, major

repairs and capital replacement;

(g) without prejudice to the rights of each of the apartment owners to do likewise in their personal capacities, to take all reasonable steps to enforce the observance and performance by individual apartment owners of their covenants such as those at paragraph 2(a) to (r) above;

(h) to arrange appropriate insurance in respect of the apartment complex as a whole covering risks such as damage by fire, explosion, floods, subsidence, etc together with cover in respect of public liability and property owners' liability;

(i) etc.

subject to the unit owner's service charges being paid to date.

Appendix II

An example showing how the "Rotation of Directors" provisions found in Tables A and C might work in practice

In the example which follows we are assuming that the company is authorised to have up to 6 directors, and that the members do not at any stage exercise their power under Regulation 97 of Part I of Table A or Regulation 46 of Table C to increase or reduce the number of directors by ordinary resolution. Those regulations where they apply[723] provide that in conjunction with the passing of such a resolution "[the members] may also determine in what rotation the increased or reduced number is to go out of office."

		(a) Period from incorporation to 2008 AGM	**(b) Period from after 2008 AGM to 2009 AGM**
[1]	Directors at the beginning of this period	Ann, Brian, Clare, David	Ann, Brian, Clare, David, Elizabeth, Frank
[2]	Directors who ceased to hold office during this period (by resignation, removal from office, becoming disqualified under Section 160(1) of the Companies Act 1990, death or otherwise).	None	Clare was removed from office.
[3]	Additional directors co-opted during this period (under regulation 98 of Part I of Table A or regulation 47 of Table C) and who therefore hold office only until next AGM, but are eligible for re-election at that AGM.	Elizabeth and Frank co-opted as additional directors, to bring number up to maximum permitted under company's articles	None

723 See paragraph [9.05] concerning the extent to which the regulations contained in Table A or C may not necessarily be contained in the articles of association of any particular management company.

		(a) Period from incorporation to 2008 AGM	(b) Period from after 2008 AGM to 2009 AGM
[4]	Directors within the scope of the retirement by rotation rules *i.e.* [1] – [2]]	Ann, Brian, Clare, David	Ann, Brian, David, Elizabeth, Frank
[5]	Number of directors required to retire in accordance with regulation 92 of Part I of Table A or regulation 41 of Table C: one-third of number of directors at [4], or whole number nearest one-third, except at the first AGM.	All: in accordance with regulation 92 or 41 *all* the directors retire from office at the first AGM.	2
[6]	Directors longest in office since they were last elected or re-elected, up to the number in row [5].	n/a	All five are equally long in office.
[7]	Directors who have no choice but to retire by rotation	n/a	n/a
[8]	In case of directors potentially required to retire by rotation, but equally long in office, outcome of agreement between those directors as to who will retire by rotation; or, in default of such agreement, outcome of decision taken by lot	n/a	Brian agrees to retire by rotation, David is the unlucky person when the other directors draw lots
[9]	Directors retiring from office at AGM and offering themselves for re-election	Ann, Brian, Clare, David, Elizabeth, Frank	Brian and David
[10]	Additional persons seeking to be elected as directors	None	Grainne
[11]	Outcome of AGM	Ann, Brian, Clare, David, Elizabeth, Frank all deemed re-elected under regulation 95 of Part I of Table A, or regulation 44 of Table C.	Motion for the election of Grainne defeated. Brian & David deemed re-elected under regulation 95 of Part I of Table A, or regulation 44 of

		(a) Period from incorporation to 2008 AGM	(b) Period from after 2008 AGM to 2009 AGM
			Table C.

		[c] Period from after 2009 AGM to 2010 AGM	[d] Period from after 2010 AGM to 2011 AGM
[1]	Directors at the beginning of this period	Ann, Brian, David, Elizabeth, Frank	Ann, Brian, David, Elizabeth, Grainne
[2]	Directors who ceased to hold office during this period (by resignation, removal from office, becoming disqualified under Section 160(1) of the Companies Act 1990, death or otherwise).	None	None
[3]	Additional directors co-opted during this period (under regulation 98 of Part I of Table A or regulation 47 of Table C) and who therefore hold office only until next AGM, but are eligible for re-election at that AGM.	None	None
[4]	Directors within the scope of the retirement by rotation rules (= [1] – [2]])	Ann, Brian, David, Elizabeth, Frank	Ann, Brian, David, Elizabeth, Grainne
[5]	Number of directors required to retire in accordance with regulation 92 of Part I of Table A or regulation 41 of Table C: one-third of number of directors at [4], or whole number nearest one-third.	2	2
[6]	Directors longest in office since they were last elected or re-elected, up to the number in row [5]	Ann, Elizabeth and Frank equally	Ann longest; Brian and David are jointly the next-longest

		[c] Period from after 2009 AGM to 2010 AGM	[d] Period from after 2010 AGM to 2011 AGM
[7]	Directors who have no choice but to retire by rotation	n/a	Ann
[8]	In case of directors potentially required to retire by rotation, but equally long in office, outcome of agreement between those directors as to who will retire by rotation; or, in default of such agreement, outcome of decision taken by lot	Elizabeth and Frank, following a decision by lot.	David agrees to go up for re-election
[9]	Directors retiring from office at AGM and offering themselves for re-election.	Elizabeth and Frank	Ann and David
[10]	Additional persons seeking to be elected as directors	Grainne (again)	None
[11]	Outcome of AGM	Motions successfully carried (1) opposing the re-election of Frank *and* (2) proposing the election of Grainne. Elizabeth deemed re-elected under regulation 95 of Part I of Table A, or regulation 44 of Table C.	Ann & David deemed re-elected under regulation 95 of Part I of Table A, or regulation 44 of Table C.

		[e] Period from after 2011 AGM to 2012 AGM	[f] Period from after 2012 AGM to 2013 AGM
[1]	Directors at the beginning of this period	Ann, Brian, David, Elizabeth, Grainne	Ann, David, Grainne, Harry, Iseult

		[e] Period from after 2011 AGM to 2012 AGM	[f] Period from after 2012 AGM to 2013 AGM
[2]	Directors who ceased to hold office during this period (by resignation, removal from office, becoming disqualified under Section 160(1) of the Companies Act 1990, death or otherwise).	Brian resigns.	None.
[3]	Additional directors co-opted during this period (under regulation 98 of Part I of Table A or regulation 47 of Table C) and who therefore hold office only until next AGM, but are eligible for re-election at that AGM.	Harry co-opted to replace Brian.	John
[4]	Directors within the scope of the retirement by rotation rules (= [1] – [2]])	Ann, David, Elizabeth, Grainne	Ann, David, Grainne, Harry, Iseult
[5]	Number of directors required to retire in accordance with regulation 92 of Part I of Table A or regulation 41 of Table C: one-third of number of directors at [4], or whole number nearest one-third.	1	2
[6]	Directors longest in office since they were last elected or re-elected, up to the number in row [5].	Elizabeth and Grainne equally	Grainne longest; Ann and David are jointly the next longest
[7]	Directors who have no choice but to retire by rotation	n/a	Grainne
[8]	In case of directors potentially required to retire by rotation, but equally long in office, outcome of agreement between those directors as to who will retire by rotation; or, in default of such agreement, outcome of decision taken by lot	Elizabeth, by agreement with Grainne.	David, having “tossed the coin” with Ann.

		[e] Period from after 2011 AGM to 2012 AGM	[f] Period from after 2012 AGM to 2013 AGM
[9]	Directors retiring from office at AGM and offering themselves for re-election.	Elizabeth and Harry	Grainne, David and John
[10]	Additional persons seeking to be elected as directors	Iseult	None
[11]	Outcome of AGM	Motions (1) opposing the re-election of Elizabeth and (2) proposing the re-election of Harry and (3) proposing the election of Iseult successfully carried.	Motion proposing the re-election of John successfully carried. Grainne and David deemed re-elected under regulation 95 of Part I of Table A, or regulation 44 of Table C.

APPENDIX III

Table A Part II

Unofficial **Consolidation by the ODCE**

Incorporating

(i) the extent to which the regulations contained in Part I of Table A apply pursuant to regulation 1 of Part II of Table A;

(ii) the alternatives to regulations 8, 24, 51, 54, 84 and 86 of Part I of Table A provided for in regulations 10, 3, 4, 5, 7 and 8 of Part II of Table A;[724]

(iii) regulation 2, 6 and 9 of Part II of Table A (included here as regulations 1A, 74A and 78A respectively).

Interpretation.

1. In these regulations:

"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;

“the register” means the register of members to be kept as required by section 116 of the Act;

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

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

"the seal" means the common seal 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 regulations shall bear the same meaning as in the Act or any statutory

---

[724] See the note at the end of Part II of Table A.

modification thereof in force at the date at which these regulations become binding on the company.

[Private Company][725]

1A.[726] The company is a private company and accordingly—

(a) the right to transfer shares is restricted in the manner hereinafter prescribed;

(b) the number of members of the company (exclusive of persons who are in the employment of the company and of persons who, having been formerly in the employment of the company, were while in such employment, and have continued after the determination of such employment to be, members of the company) is limited to fifty,[727] so, however, that where two or more persons hold one or more shares in the company jointly, they shall, for the purpose of this regulation, be treated as a single member;

(c) any invitation to the public to subscribe for any shares or debentures of the company is prohibited;

(d) the company shall not have power to issue share warrants to bearer.

Share Capital and Variation of Rights.

2. Without prejudice to any special rights previously conferred on the holders of any existing shares or class of shares, any share in the company may be issued with such preferred, deferred or other special rights or such restrictions, whether in regard to dividend, voting, return of capital or otherwise, as the company may from time to time by ordinary resolution determine.

3. If at any time the share capital is divided into different classes of shares, the rights attached to any class may, whether or not the company is being wound up, be varied or abrogated with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of a special resolution passed at a separate general meeting of the holders of the shares of the class.

4. The rights conferred upon the holders of the shares of any class issued with preferred or other rights shall not, unless otherwise expressly provided by the terms of issue of the shares of that class, be deemed to be varied by the creation

---

725 Part II of Table A does not authorise the inclusion of this heading.

726 This is regulation 2 of Table A Part II. The note at the end of Part II does not indicate that it is intended as an alternative to any of the Part I regulations. Accordingly, it has been inserted at this point into this consolidation otherwise than pursuant to any statutory authority.

727 Although regulation 2 of Table A Part II has not been amended in consequence Section 33 of the Companies Act 1963 was amended with effect from 1 July 2005 to increase this figure from 50 to 99. Private companies limited by shares choosing to adopt this regulation would, in consequence, be entitled to use that higher figure.

or issue of further shares ranking pari passu therewith.

5. Subject to the provisions of these regulations relating to new shares, the shares shall be at the disposal of the directors, and they may (subject to the provisions of the Companies Acts, 1963 to 1983) allot, grant options over or otherwise dispose of them to such persons, on such terms and conditions and at such times as they may consider to be in the best interests of the company and its shareholders, but so that no share shall be issued at a discount and so that, in the case of shares offered to the public for subscription by a public limited company, the amount payable on application on each share shall not be less than one-quarter of the nominal amount of the share and the whole of any premium thereon.

6. The company may exercise the powers of paying commissions conferred by section 59 of the Act, provided that the rate per cent. and the amount of the commission paid or agreed to be paid shall be disclosed in the manner required by that section, and the rate of the commission shall not exceed the rate of 10 per cent. of the price at which the shares in respect whereof the same is paid are issued or an amount equal to 10 per cent. of such price (as the case may be). Such commission may be satisfied by the payment of cash or the allotment of fully or partly paid shares or partly in one way and partly in the other. The company may also, on any issue of shares, pay such brokerage as may be lawful.

7. Except as required by law, no person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share or (except only as by these regulations or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder: this shall not preclude the company from requiring the members or a transferee of shares to furnish the company with information as to the beneficial ownership of any share when such information is reasonably required by the company.

8A.[728] Every person whose name is entered as a member in the register shall be entitled without payment to receive within 2 months after allotment or lodgment of a transfer (or within such other period as the conditions of issue shall provide) one certificate for all his shares or several certificates each for one or more of his shares upon payment of [16 cent] for every certificate after the first or such less sum as the directors shall from time to time determine, so, however, that in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all such holders. Every certificate shall be under the seal and shall specify the shares to which it relates and the amount paid up thereon.

9. If a share certificate be defaced, lost or destroyed, it may be renewed on payment of [27 cent] or such less sum and on such terms (if any) as to evidence and indemnity and the payment of out-of-pocket expenses of the company of

---

728 This is regulation 10 of Table A Part II which, as per the Note at the end of Part II, is intended as an alternative to regulation 8 of Table A Part I.

investigating evidence as the directors think fit.

10. The company shall not give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company, but this regulation shall not prohibit any transaction permitted by section 60 of the Act.

Lien

11. The company shall have a first and paramount lien on every share (not being a fully paid share) called or payable at a fixed time in respect of that share but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this regulation. The company's lien on a share shall extend to all dividends payable thereon.

12. The company may sell, in such manner as the directors think fit, any shares on which the company has a lien, but no sale shall be made unless a sum in respect of which the lien exists is immediately payable, nor until the expiration of 14 days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is immediately payable, has been given to the registered holder for the time being of the share, or the person entitled thereto by reason of his death or bankruptcy.

13. To give effect to any such sale, the directors may authorise some person to transfer the shares sold to the purchaser thereof. The purchaser shall be registered as the holder of the shares comprised in any such transfer, and he shall not be bound to see to the application of the purchase money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

14. The proceeds of the sale shall be received by the company and applied in payment of such part of the amount in respect of which the lien exists as is immediately payable, and the residue, if any, shall (subject to a like lien for sums not immediately payable as existed upon the shares before the sale) be paid to the person entitled to the shares at the date of the sale.

Calls on Shares

15. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares (whether on account of the nominal value of the shares or by way of premium) and not by the conditions of allotment thereof made payable at fixed times, provided that no call shall exceed one-fourth of the nominal value of the share or be payable at less than one month from the date fixed for the payment of the last preceding call, and each member shall (subject to receiving at least 14 days' notice specifying the time or times and place of payment) pay to the company at the time or times and place so specified the amount called on his shares. A call may be revoked or postponed as the directors may determine.

16. A call shall be deemed to have been made at the time when the resolution of the directors authorising the call was passed and may be required to be paid by instalments.

17. The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

18. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest on the sum from the day appointed for payment thereof to the time of actual payment at such rate, not exceeding 5 per cent. per annum, as the directors may determine, but the directors shall be at liberty to waive payment of such interest wholly or in part.

19. Any sum which by the terms of issue of a share becomes payable on allotment or at any fixed date, whether on account of the nominal value of the share or by way of premium, shall, for the purposes of these regulations, be deemed to be a call duly made and payable on the date on which, by the terms of issue, the same becomes payable, and in case of non-payment all the relevant provisions of these regulations as to payment of interest and expenses, forfeiture or otherwise, shall apply as if such sum had become payable by virtue of a call duly made and notified.

20. The directors may, on the issue of shares, differentiate between the holders as to the amount of calls to be paid and the times of payment.

21. The directors may, if they think fit, receive from any member willing to advance the same, all or any part of the moneys uncalled and unpaid upon any shares held by him, and upon all or any of the moneys so advanced may (until the same would, but for such advance, become payable) pay interest at such rate not exceeding (unless the company in general meeting otherwise directs) 5 per cent. per annum, as may be agreed upon between the directors and the member paying such sum in advance.

Transfer of Shares.

22. The instrument of transfer of any share shall be executed by or on behalf of the transferor and transferee, and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register in respect thereof.

23. Subject to such of the restrictions of these regulations as may be applicable, any member may transfer all or any of his shares by instrument in writing in any usual or common form or any other form which the directors may approve.

24A.[729] The directors may, in their absolute discretion, and without assigning any reason therefor, decline to register any transfer of any share, whether or not it is a fully paid share.

25. The directors may also decline to recognise any instrument of transfer unless—

(a) a fee of [27 cent] such lesser sum as the directors may from time to time require, is paid to the company in respect thereof; and

---

729 This is regulation 3 of Table A Part II which, as per the Note at the end of Part II, is intended as an alternative to regulation 24 of Table A Part I.

(b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer; and

(c) the instrument of transfer is in respect of one class of share only.

26. If the directors refuse to register a transfer they shall, within 2 months after the date on which the transfer was lodged with the company, send to the transferee notice of the refusal.

27. The registration of transfers may be suspended at such times and for such periods, not exceeding in the whole 30 days in each year, as the directors may from time to time determine.

28. The company shall be entitled to charge a fee not exceeding [27 cent] on the registration of every probate, letters of administration, certificate of death or marriage, power of attorney, notice as to stock or other instrument.

Transmission of Shares

29. In the case of the death of a member, the survivor or survivors where the deceased was a joint holder, and the personal representatives of the deceased where he was a sole holder, shall be the only persons recognised by the company as having any title to his interest in the shares; but nothing herein contained shall release the estate of a deceased joint holder from any liability in respect of any share which had been jointly held by him with other persons.

30. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as may from time to time properly be required by the directors and subject as hereinafter provided, elect either to be registered himself as holder of the share or to have some person nominated by him registered as the transferee thereof, but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by that member before his death or bankruptcy, as the case may be.

31. If the person so becoming entitled elects to be registered himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects. If he elects to have another person registered, he shall testify his election by executing to that person a transfer of the share. All the limitations, restrictions and provisions of these regulations relating to the right to transfer and the registration of transfers of shares shall be applicable to any such notice or transfer as aforesaid as if the death or bankruptcy of the member had not occurred and the notice or transfer were a transfer signed by that member.

32. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company, so, however, that the directors may at any time give notice requiring any such person to elect either to be registered himself or to

transfer the share, and if the notice is not complied with within 90 days, the directors may thereupon withhold payment of all dividends, bonuses or other moneys payable in respect of the share until the requirements of the notice have been complied with.

Forfeiture of Shares.

33. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of the call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid together with any interest which may have accrued.

34. The notice shall name a further day (not earlier than the expiration of 14 days from the date of service of the notice) on or before which the payment required by the notice is to be made, and shall state that in the event of non-payment at or before the time appointed the shares in respect of which the call was made will be liable to be forfeited.

35. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

36. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

37. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were payable by him to the company in respect of the shares, but his liability shall cease if and when the company shall have received payment in full of all such moneys in respect of the shares.

38. A statutory declaration that the declarant is a director or the secretary of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share. The company may receive the consideration, if any, given for the share on any sale or disposition thereof and may execute a transfer of the share in favour of the person to whom the share is sold or disposed of and he shall thereupon be registered as the holder of the share, and shall not be bound to see to the application of the purchase money, if any, nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

39. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the nominal value of the share or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

Conversion of Shares into Stock.

40. The company may by ordinary resolution convert any paid up shares into stock, and reconvert any stock into paid up shares of any denomination.

41. The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same regulations, as and subject to which the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; and the directors may from time to time fix the minimum amount of stock transferable but so that such minimum shall not exceed the nominal amount of each share from which the stock arose.

42. The holders of stock shall, according to the amount of stock held by them, have the same rights, privileges and advantages in relation to dividends, voting at meetings of the company and other matters as if they held the shares from which the stock arose, but no such right, privilege or advantage (except participation in the dividends and profits of the company and in the assets on winding up) shall be conferred by an amount of stock which would not, if existing in shares, have conferred that right privilege or advantage.

43. Such of the regulations of the company as are applicable to paid up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and " stockholder".

Alteration of Capital.

44. The company may from time to time by ordinary resolution increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

45. The company may by ordinary resolution—

(a) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;

(b) subdivide its existing shares, or any of them, into shares of smaller amount than is fixed by the memorandum of association subject, nevertheless, to section 68(1)(d) of the Act;

(c) cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person.

46. The company may by special resolution reduce its share capital, any capital redemption reserve fund or any share premium account in any manner and with and subject to any incident authorised, and consent required, by law.

General Meetings

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

48. (1) Subject to paragraph (2) of this regulation, the company shall in each year hold a general meeting as its annual general meeting in addition to any other meeting 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 year following. Subject to regulation 47, the annual general meeting shall be held at such time and place as the directors shall appoint.

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

50. 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 2 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.

51A.[730] 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 7 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 day, the place and the hour of the meeting and, in the case of special business, the general nature of that business and shall be given in manner authorised by these regulations to such persons as are under the regulations of the company entitled to receive such notices from the company.

52. 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 the meeting.

Proceedings at General Meetings.

53. 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.

54A.[731] No business shall be transacted at any general meeting unless a quorum of

---

730 This is regulation 4 of Table A Part II which, as per the Note at the end of Part II, is intended as an alternative to regulation 51 of Table A Part I.

731 This is regulation 5 of Table A Part II which, as per the Note at the end of Part II, is intended as an alternative to regulation 54 of Table A Part I.

members is present at the time when the meeting proceeds to business; save as herein otherwise provided, two members present in person or by proxy shall be a quorum.

55. 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.

56. 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.

57. 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.

58. 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.

59. 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; or
(d) by a member or members holding shares in the company conferring the right to vote at the meeting being shares on which an aggregate sum has been paid up equal to not less than one-tenth of the total sum paid up on all the shares conferring that right.

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 the 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.

60. Except as provided in regulation 62, 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.

61. Where there is an equality of votes, whether on a show of hand 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.

62. 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 on which a poll is demanded may be proceeded with pending the taking of the poll.

Votes of Members.

63. Subject to any rights or restrictions for the time being attached to any class or classes of shares, on a show of hands every member present in person and every proxy shall have one vote, so, however, that no individual shall have more than one vote, and on a poll every member shall have one vote for each share of which he is the holder.

64. Where there are joint holders, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose, seniority shall be determined by the order in which the names stand in the register.

65. 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.

66. No member shall be entitled to vote at any general meeting unless all calls or other sums immediately payable by him in respect of shares in the company have been paid.

67. 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.

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

69. The instrument appointing a proxy shall be in writing under the hand of the appointer or of his attorney duly authorised in writing, or, if the appointer 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.

70. 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.

71. 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 for me/us on my/our behalf at the (annual or extraordinary, 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.

* Strike out whichever is not desired."

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

73. 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 or the transfer of the share in respect of which the proxy is given, if no intimation in writing of such death, insanity, revocation or transfer 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.

74. 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 or of any class of members 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.

[Resolutions in Writing][732]

74A.[733] 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.

Directors

75. 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.

76. 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 meeting of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.

77. The shareholding qualification for directors may be fixed by the company in general meeting and unless and until so fixed, no qualification shall be required.

78. A director of the company may be or become a director or other officer of, or otherwise interested in, any company promoted by the company or in which the company may be interested as shareholder or otherwise, and no such director shall be accountable to the company for any remuneration or other benefits received by him as a director or officer of, or from his interest in, such other company unless the company otherwise directs.

78A.[734] Any director may from time to time appoint any person who is approved by the

---

732 Part II of Table A does not authorise the inclusion of this heading.

733 This is regulation 6 of Table A Part II. The note at the end of Part II does not indicate that it is intended as an alternative to any of the Part I regulations. Accordingly, it has been inserted at this point into this consolidation otherwise than pursuant to any statutory authority.

734 This is regulation 9 of Table A Part II. The note at the end of Part II does not indicate that it is intended as an alternative to any of the Part I regulations. Accordingly, it has been inserted at this point into this consolidation otherwise than pursuant to any statutory authority.

majority of the directors to be an alternate or substitute director. The appointee, while he holds office as an alternate director, shall be entitled to notice of meetings of the directors and to attend and vote thereat as a director and shall not be entitled to be remunerated otherwise than out of the remuneration of the director appointing him. Any appointment under this regulation shall be effected by notice in writing given by the appointer to the secretary. Any appointment so made may be revoked at any time by the appointer or by a majority of the other directors or by the company in general meeting. Revocation by an appointer shall be effected by notice in writing given by the appointer to the secretary.

Borrowing Powers

79. The directors may exercise all the powers of the company to borrow money, and to mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and subject to section 20 of the Companies (Amendment) Act, 1983 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, so, however, that the amount for the time being remaining undischarged of moneys borrowed or secured by the directors as aforesaid (apart from temporary loans obtained from the company's bankers in the ordinary course of business) shall not at any time, without the previous sanction of the company in general meeting, exceed the nominal amount of the share capital of the company for the time being issued, but nevertheless no lender or other person dealing with the company shall be concerned to see or inquire whether this limit is observed. No debt incurred or security given in excess of such limit shall be invalid or ineffectual except in the case of express notice to the lender or the recipient of the security at the time when the debt was incurred or security given that the limit hereby imposed had been or was thereby exceeded.

Powers and Duties of Directors

80. 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 regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act and to such directions, being not inconsistent with the aforesaid regulations or 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.

81. 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 regulations) and for such period and subject to such conditions as they may think fit, and any such power of attorney may contain such provisions for the protection 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.

82. The company may exercise the powers conferred by section 41 of the Act with regard to having an official seal for use abroad, and such powers shall be vested in the directors.

83. A director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall declare the nature of his interest at a meeting of the directors in accordance with section 194 of the Act.

84A.[735] A director may vote in respect of any contract, appointment or arrangement in which he is interested, and he shall be counted in the quorum present at the meeting.

85. A director may hold any other office or place of profit under the company (other than the office of auditor) in conjunction with his office of director for such period and on such terms as to remuneration and otherwise as the directors may determine, and no director or intending director shall be disqualified by his office from contracting with the company either with regard to his tenure of any such other office or place of profit or as vendor, purchaser or otherwise, nor shall any such contract or any contract or arrangement entered into by or on behalf of the company in which any director is in any way interested, be liable to be avoided, nor shall any director so contracting or being so interested be liable to account to the company for any profit realised by any such contract or arrangement by reason of such director holding that office or of the fiduciary relation thereby established.

86A.[736] The directors may exercise the voting powers conferred by the shares of any other company held or owned by the company in such manner in all respects as they think fit and in particular they may exercise the voting powers in favour of any resolution appointing the directors or any of them as directors or officers of such other company or providing for the payment of remuneration or pensions to the directors or officers of such other company. Any director of the company may vote in favour of the exercise of such voting rights, notwithstanding that he may be or may be about to become a director or officer of such other company, and as such or in any other manner is or may be interested in the exercise of such voting rights in manner aforesaid.

87. Any director may act by himself or his firm in a professional capacity for the company, and he or his firm shall be entitled to remuneration for professional services as if he were not a director; but nothing herein contained shall authorise a director or his firm to act as auditor to the company.

88. 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.

89. The directors shall cause minutes to be made in books provided for the

---

735 This is regulation 7 of Table A Part II which, as per the Note at the end of Part II, is intended as an alternative to regulation 84 of Table A Part I.

736 This is regulation 8 of Table A Part II which, as per the Note at the end of Part II, is intended as an alternative to regulation 86 of Table A Part I.

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.

90. The directors on behalf of the company may pay a gratuity or pension or allowance on retirement to any director who has held any other salaried office or place of profit with the company or to his widow or dependants, and may make contributions to any fund and pay premium for the purchase or provision of any such gratuity, pension or allowance.

Disqualification of Directors.

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

(a) ceases to be a director by virtue of section 180 of the Act; 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 for more than 6 months absent without permission of the directors from meetings of the directors held during that period.

Rotation of Directors.

92. 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.

93. 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.

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

95. 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.

96. 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 day appointed for the meeting there shall have 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 person for election and also notice in writing signed by that person of his willingness to be elected.

97. 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.

98. 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 regulations. Any director so appointed shall hold office only until the next following 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.

99. 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 regulations 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.

100. The company may, by ordinary resolution, appoint another person in place of a director removed from office under regulation 99 and without prejudice to the powers of the directors under regulation 98 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

101. 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.

102. 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.

103. 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 regulations 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.

104. 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.

105. 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.

106. 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.

107. 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 where there is an equality of votes, the chairman shall have a second or casting vote.

108. 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 be 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.

109. 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.

Managing Director.

110. The directors may from time to time appoint one or more of themselves to the office of managing director for such period and on such terms as to remuneration and otherwise as they see fit, and, subject to the terms of any agreement entered into in any particular case, may revoke such appointment. A director so appointed shall not, whilst holding that office, be subject to retirement by rotation or be taken into account in determining the rotation of retirement of directors but (without prejudice to any claim he may have for damages for breach of any contract of service between him and the company), his appointment shall be automatically determined if he ceases from any cause to be a director.

111. A managing director shall receive such remuneration whether by way of salary,

commission or participation in the profits, or partly in one way and partly in another, as the directors may determine.

112. The directors may entrust to and confer upon a managing director any of the powers exercisable by them upon such terms and conditions and with such restrictions as they may think fit, and either collaterally with or to the exclusion of their own powers, and may from time to time revoke, withdraw, alter or vary all or any of such powers.

Secretary.

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

114. A provision of the Act or these regulations 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

115. 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.

Dividends and Reserves

116. The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors.

117. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

118. No dividend or interim dividend shall be paid otherwise than in accordance with the provisions of Part IV of the Companies (Amendment) Act, 1983 which apply to the company.

119. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for any purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments as the directors may lawfully determine. The directors may also, without placing the same to reserve, carry forward any profits which they may think it prudent not to divide.

120. Subject to the rights of persons, if any, entitled to shares with special rights as to dividend, all dividends shall be declared and paid according to the amounts paid or credited as paid on the shares in respect whereof the dividend is paid, but no amount paid or credited as paid on a share in advance of calls shall be treated

for the purposes of this regulation as paid on the share. All dividends shall be apportioned and paid proportionately to the amounts paid or credited as paid on the shares during any portion or portions of the period in respect of which the dividend is paid; but if any share is issued on term providing that it shall rank for dividend as from a particular date, such share shall rank for dividend accordingly.

121. The directors may deduct from any dividend payable to any member all sums of money (if any) immediately payable by him to the company on account of calls or otherwise in relation to the shares of the company.

122. Any general meeting declaring a dividend or bonus may direct payment of such dividend or bonus wholly or partly by the distribution of specific assets and in particular of paid up shares, debentures or debenture stock of any other company or in any one or more of such ways, and the directors shall give effect to such resolution, and where any difficulty arises in regard to such distribution, the directors may settle the same as they think expedient, and in particular may issue fractional certificates and fix the value for distribution of such specific assets or any part thereof and may determine that cash payments shall be made to any members upon the footing of the value so fixed, in order to adjust the rights of all the parties, and may vest any such specific assets in trustees as may seem expedient to the directors.

123. Any dividend, interest or other moneys payable in cash in respect of any shares may be paid by cheque or warrant sent through the post directed to the registered address of the holder, or, where there are joint holders, to the registered address of that one of the joint holders who is first named on the register or to such person and to such address as the holder or joint holders may in writing direct. Every such cheque or warrant shall be made payable to the order of the person to whom it is sent. Any one of two or more joint holders may give effectual receipts for any dividends, bonuses or other moneys payable in respect of the shares held by them as joint holders.

124. No dividend shall bear interest against the company.

Accounts

125. 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; and

(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.

126. 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.

127. 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.

128. 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.

129. 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.

Capitalisation of Profits

130. The company in general meeting may upon the recommendation of the directors resolve that any sum for the time being standing to the credit of any of the company's reserves (including any capital redemption reserve fund or share premium account) or to the credit of profit and loss account be capitalised and applied on behalf of the members who would have been entitled to receive the same if the same had been distributed by way of dividend and in the same proportions either in or towards paying up amounts for the time being unpaid on any shares held by them respectively or in paying up in full unissued shares or debentures of the company of a nominal amount equal to the sum capitalised (such shares or debentures to be allotted and distributed credited as fully paid up to and amongst such holders in the proportions aforesaid) or partly in one way and partly in another, so however, that the only purpose for which sums standing to the credit of the capital redemption reserve fund or the share premium account shall be applied shall be those permitted by sections 62 and 64 of the Act.

130A.[737] The company in general meeting may on the recommendation of the directors resolve that it is desirable to capitalise any part of the amount for the time being standing to the credit of any of the company's reserve accounts or to the credit of the profit and loss account which is not available for distribution by applying such sum in paying up in full unissued shares to be allotted as fully paid bonus shares to those members of the company who would have been entitled to that sum if it were, distributed by way of dividend (and in the same proportions), and the directors shall give effect to such resolution.

131. Whenever a resolution is passed in pursuance of regulation 130 or 130A, the directors shall make all appropriations and applications of the undivided profits

---

[737] Inserted by Paragraph 24 of Schedule 1 of the Companies (Amendment) Act 1983.

resolved to be capitalised thereby and all allotments and issues of fully paid shares or debentures, if any, and generally shall do all acts and things required to give effect thereto with full power to the directors to make such provision as they shall think fit for the case of shares or debentures becoming distributable in fractions (and, in particular, without prejudice to the generality of the foregoing, to sell the shares or debentures represented by such fractions and distribute the net proceeds of such sale amongst the members otherwise entitled to such fractions in due proportions) and also to authorise any person to enter on behalf of all the members concerned into an agreement with the company providing for the allotment to them respectively credited as fully paid up of any further shares or debentures to which they may become entitled on such capitalisation or, as the case may require, for the payment up by the application thereto of their respective proportions of the profits resolved to be capitalised of the amounts remaining unpaid on their existing shares and any agreement made under such authority shall be effective and binding on all such members.

Audit

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

Notices

133. 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 the 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.

134. A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder first named in the register in respect of the share.

135. A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name or by the title of representatives of the deceased or Official Assignee in bankruptcy or by any like description at the address supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred.

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

(a) every member; and

(b) every person upon whom the ownership of a share devolves by reason of his 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.

Winding Up

137. If the company is wound up, the liquidator may, with the sanction of a special resolution of the company and any other sanction required by the Act, divide among the members in specie or kind the whole or any part of the assets of the company (whether they shall consist of property of the same kind or not) and may, for such purpose, set such value as he deems fair upon any property to be divided as aforesaid and may determine how such division shall be carried out as between the members or different classes of members. The liquidator may, with the like sanction, vest the whole or any part of such assets in trustees upon such trusts for the benefit of the contributories as the liquidator, with the like sanction, shall think fit, but so that no member shall be compelled to accept any shares or other securities whereon there is any liability.

Indemnity

138. Every director, managing director, agent, auditor, secretary and other officer for the time being of the company shall be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in relation to his acts while acting in such office, in which judgement is given in his favour or in which he is acquitted or in connection with any application under section 391 of the Act in which relief is granted to him by the court.

APPENDIX IV

"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 for 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.

* Strike out whichever is not desired."

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.

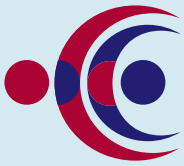
69. Notice of every general meeting shall be given in any manner hereinbefore authorised to—

(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.



Office of the Director
of Corporate Enforcement

Oifig an Stiúrthóra um
Fhorfheidhmiú Corparáideach

For further information contact:

Office of the Director of Corporate Enforcement
16 Parnell Square
Dublin 1

(01) 858 5800
LoCall 1890 315 015

(01) 858 5801

info@odce.ie

www.odce.ie