Multi-Unit Developments Act 2011
Brief Summary and Practical Issues

Management Company Legislation – Implications for Owners, Managing Agents, Lenders and Receivers.

The Multi-Unit Developments Act 2011 which was commenced on the 1st April 2011 introduces a statutory regime for the regulation of owners management companies (OMC's), transfer of common areas, service charges, and related matters in respect of apartment developments and management company development structures.

Application of the Act:

The Act applies to Multi-Unit Developments (MUDs), defined as land on which there are buildings erected comprising not less than 5 residential units in which it is intended amenities, facilities and services are to be shared. In addition to applying to the concept of traditional apartment developments, Section 2 of the Act expands the application of the Act (in part) to residential housing developments (where there is a management company structure) and also in limited scope, to mixed use developments (i.e. those comprising commercial and residential units) to the extent that amenities, facilities and services are shared by the commercial and residential units.

The Act applies to all Multi-Unit Developments (i.e. new and existing MUDs) except where otherwise provided, i.e. Sections 3 [Conditions of Sale of MUDs] and 14 [Voting Rights].

New MUDs:

From the 1st of April specific statutory requirements must be adhered to before a person or company may sell the first residential unit in a new MUD. Included in these requirements are the following:

(i) The owners management company (OMC) must have been established
(ii) Ownership of the common areas must have been transferred to the OMC
(iii) Certification from an appropriately qualified person must be delivered confirming the MUD has been constructed in compliance with the Fire Safety Certificate,
(iv) Entry into a contract between the OMC and developer outlining each parties obligations, completion of the common areas etc.
(v) Appointment of an independent legal representative (at the developers cost) to advise the OMC in relation to such contract between the developer and OMC.

Similar to the transfer of common areas different approaches apply in respect of voting in OMCs pre and post 1st April 2011 (commencement of the Act). In respect of new MUDs, each residential unit must have one vote of equal value and no other person may have voting rights.

Existing MUDs:

(a) Common Areas:

As stated above in respect of new MUDs the common areas must be transferred to the OMC before the first unit is sold in a MUD. For existing MUDs where the common areas have not yet been transferred the developer must arrange for the transfer of the common areas to the OMC before the 1st October 2011 [Section 4]. In addition there is provision in respect of substantially completed developments (where sales of at least 80% of the residential units have closed) that the developer must arrange for the transfer of the common areas to the OMC before the 1st October 2011.

(b) Voting Rights:

In respect of existing MUDs, each unit in a MUD shall have one vote and no other person may hold a vote. Where a person does hold such voting rights (it is frequently the case that developers retain weighted/casting votes for many years following completion of developments) such voting rights may not be exercised without the authorisation of the Circuit Court. This is intended to remove the control of developers from OMCs.

Provision is also made in the Act for voting rights in relation to mixed use (i.e. residential and commercial) MUDs. [Section 2(4)]. In respect of such mixed use developments, the requirements of the Act shall be complied with where there is a "fair and equitable apportionment of the costs and

expenses" and where voting rights are "apportioned in a manner which is fair and equitable". This is a vague arrangement but nevertheless an improvement on the original Bill which did not address such developments (which were common place) at all.

Practical Matters for Owners and Managing Agents:

The Act provides that the transfer of the common areas does not absolve the developer from the obligation to ensure completion of the development, compliance with obligations under the Planning and Development Acts 2000 to 2009 or Building Control Acts 1990 and 2007.

On the transfer of the common areas, the developer retains rights of access and passage for the purposes of completion of the common areas. However the developer must indemnify the OMC from all claims in this respect and must maintain at its own expense an insurance policy for all risks connected with the developers use or occupation of the property.

On the sale of a residential unit in a MUD membership of the OMC shall transfer to a purchaser automatically and the Act disapplies the usual formalities/requirements as regards companies in respect of the requirement for a formal stock transfer form (of membership) or approval of the transfer by the directors of the OMC.

In addition to the rights granted to an OMC in the lease, it now has a statutory right to enter onto parts of a MUD which are not in its ownership to effect repairs or maintenance to ensure safe and effective occupation of the MUD and where expenditure is incurred in relation to such repairs to recover such from the owner where the owner was responsible for carrying out such repairs or maintenance. Considerable requirements are introduced by the Act in relation to AGM's, Service Charges, and Sinking Funds, relating to the process, formalities and agreement of matters related to budgets etc. The Act introduces a sinking fund contribution per unit of €200 per annum to all MUDS (except MUDs consisting of houses). However this provision has been watered down from a minimum contribution of €200 p.a. by the inclusion of the proviso *"or such <u>other</u> [previously "greater"] amount as agreed by the members"*. This will no doubt result in members voting with their wallets rather than in best interest and will store up problems for the future in the absence of a prudent sinking fund. Such sinking fund contributions must be levied commencing on the later of 3 years from the sale of the first unit in a MUD or 18 months from the coming into operation of the section.

Service charges may not be used to defray expenses the responsibility of the builder or developer unless authorised by 75% of the OMC.

In the case of OMCs which have been struck off the Register of Companies (for example failing to file returns), the abridged procedure under the Companies Acts

whereby application can be made to the Companies Office within 12 months of being struck off is extended to a period of six years in the case of OMC's. The issue of OMCs being struck off the Register has unfortunately been an issue for many companies (whether it be through the fault of the developer, managing agents or member appointed directors). It will be of significant ease to OMC's as outside of the traditional 12 month period application must be made through the High Court to restore a company to the Register which can involve substantial cost.

In the case of disputes, application can be made to the Circuit Court (the Act specifically excludes the High Court) to enforce obligations, rights or determination of other matters provided for under the Act.

Developers and Receiver's Obligations:

Given the current state of the property market and economic climate certain of the obligations introduced by the Act may have wide-ranging implications for receivers of properties and in particular the obligations imposed in Section 3 [New Developments] will apply to persons (other than an OMC) who is the owner of the common areas of a MUD, this could equally apply to a receiver as a developer.

(a) Transfer of Common Areas:

In respect of MUDs where no unit has been sold prior to the 1st April 2011 a receiver would be required to ensure that an OMC has been established, ownership of the common areas have been transferred to the OMC, certification has been obtained in relation to Fire Safety and Building Control Requirements, a Management Company contract is in place/executed between the developer/receiver and OMC, that the common areas transfer includes any necessary rights of access etc before selling a unit. This will require additional conveyancing/title checks to be carried out by the receiver/receiver's solicitor and potentially additional preparatory work in advance of any sales process.

Receivers appointed over existing MUDs and substantially completed MUDs will be required to ensure that the Common Areas are transferred to the OMC before the 1st October 2011.

(b) Vesting of Beneficial Interest:

As discussed above, the Act contains requirements in Sections 3 and 4 that the legal interest in the common areas and reversion interest in the individual units be transferred to the OMC within the timeframe specified. However Sections 3(7) and 4(2) specify the beneficial interest in the parts transferred shall be reserved to the party (usually the developer) transferring the common areas. This means that for new and un-completed developments, although the OMC will be the legal owner of the common areas the beneficial owner will remain the developer who

will remain responsible for completing same. This continuing obligation on the developer is reiterated in Section 7.

Upon the completion of the development the developer will make a statutory declaration in favour of the OMC that the beneficial interest has passed to the OMC. This declaration will be deemed to vest the beneficial interest in the OMC who already hold the legal interest and accordingly the beneficial interest and legal interest will merge.

There is also provision in Section 12 for early transfer of the beneficial interest where 60% of the owners of an OMC call upon the developer to vest the beneficial interest.

This may have implications for receivers and lenders security. Receivers may be greeted with applications from unit owners [under Section 12] that as owner of the beneficial interest in the common areas they make the statutory declaration that the beneficial interest in the common areas stands transferred to the OMC.

The effect of such a declaration is that the beneficial and legal interest in the common areas stands merged. Such a declaration requires the consent of the developers lending institution. This may have implications for the title/financing structure of the development as the effect of such a declaration is to merge the freehold reversion in the estate with the legal title to the common areas, thus where apartment units, for example, remained unsold in a development the merging of the freehold reversion would convey these apartments to the management company also with the common areas.

This would obviously be unintended and receivers will be required to consider title **and security** structures to avoid this occurring, such as trustee leases or establishing SPV structures to hold the unsold apartments (giving detailed consideration to potential stamp duty implications).
There is one saver in the Act from a lenders perspective which requires the consent of the holder of any mortgage (which cannot be unreasonably withheld) to the vesting of the beneficial interest. Certainly it could be argued that if a lender's security were to be prejudiced then it could reasonably withhold its consent. However this should not frustrate the aim of the Act and prevent the vesting of the beneficial interest indefinitely and lenders would be required (and advised) to consider strategies to deal with such issues well in advance, as they will undoubtedly arise.

(c) Resting in Contract Arrangements:

Receivers and lenders will be required to consider how such arrangements are affected by the Act and the implications for its security (often consisting of collateral guarantee mortgages from the original owner of the property as title was not transferred to the developer to avoid stamp duty) arising from the requirement to transfer common areas within the time period specified in the Act and to then transfer the beneficial interest to the OMC once the development has been completed. Failure to do so could result in members or OMC's applying to the Circuit Court to require compliance with the Acts' requirements and consequent cost implications.

(d) Service Charges:

The Act introduces an obligation on every owner of a unit in a MUD, including a developer or building contractor, to pay all service charges. Developers and Building contractors are deemed to be owners of units from the date of the sale of the first unit.

(e) Voting Rights:

As stated above voting rights in new MUDs require to be structured such that each unit has one vote. In existing MUDs the same applies but where weighted voting rights have been allocated to a developer, these cannot be exercised without the consent of the Circuit Court. The effect of this is intended to limit the undue influence developers could exert over OMCs but this will also limit a receiver's discretion in relation to an OMC whether it be the appointment of directors, setting of budgets etc.

(f) Insurance:

Developers must have appropriate insurance for all risks and indemnify the management company connected with the developer's occupation of the property/estate. Receivers would normally obtain all necessary insurance on their appointment, however consideration should be given to whether additional cover may be required.

Conclusion:

The Act is long overdue in respect of the introduction of controls, regulation of OMCs, and protection of rights of unit owners. However its effect will raise many issues for developers & Receivers, many of whom are now struggling and potentially not in a position to comply with the obligations imposed (which would not have been considered unduly onerous in previous economic times), receivers, lenders and managing agents.

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