

# Submission to Review Group on the **Administration of Civil Justice**

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February 2018

## Abbreviations/Acronyms Used

DHPLG	Department of Housing, Planning and Local Government
DJE	Department of Justice and Equality
MUD	Multi-Unit Developments, as described in section 1(1) of the MUD Act
MUD Act	Multi-Unit Developments Act 2011
OMC	Owners' Management Company as defined in section 1(1) of the MUD Act
PMA	Property Management Agent
PSRA	Property Services Regulatory Authority
SCSI	Society of Chartered Surveyors Ireland

## 1.0 Introduction

### 1.1 Executive Summary

This submission responds to the request for submissions issued on 29 November 2017 by the Review Group on the Administration of Civil Justice (“the Group”).

Our submission covers the following (three of the five) topical areas of the Group’s work<sup>1</sup>-

- (c) Encouraging alternative methods of dispute resolution;
- (d) Reviewing the use of electronic methods of communications including e-litigation and possibilities for making court documents (including submissions and pleadings) available or accessible on the internet;
- (e) Achieving more effective outcomes for court users, particularly vulnerable court users.

The submission addresses these areas as they apply to the interaction of the following parties with the civil justice system-

- Owners’ Management Companies (“OMCs”)
- Directors of OMCs
- Unit owners in multi-unit developments (“MUDs”)/OMC members<sup>2</sup>

Our principal concerns are-

- Enforcement of Lease & Lessor covenants in the common interest
- Achieving a more effective and efficient method of recovering unpaid service charges
- Removing costs in enforcing (currently through the Circuit Court) the wider provisions of the MUD Act.
- Improving the understanding of the MUD/apartment sector within the wider Civil Justice system and in particular the understanding of the OMC representing the community and common interest of all unit owners.
- Achieving consistency of approach (so-called “joined up thinking”) between Civil Law, Housing policy, and the realities of apartment management on the ground.

We note that some of the matters raised in this submission may be beyond the scope of the Group’s terms of reference. It may be the first time that certain suggestions on dispute resolution, etc. (drawn from other Common Law jurisdictions) have been articulated in an Irish context. The Network takes the opportunity of this consultation process to start a conversation on such matters.

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<sup>1</sup> As set out on the Group’s website <http://www.civiljusticereview.ie/en/cjrg/pages/submissions>

<sup>2</sup> Under sections 1(1) and 14 of the MUD Act, every unit owner is a member of the OMC with one vote.



## 1.2 About us

### Apartment Owners' Network

The Network is established as a Company Limited by Guarantee (CRO No. 592683).

#### ***Policy engagement***

The AON has working relationships with various national and local government agencies, including the Housing Agency, DHPLG, the Law Reform Commission, the Department of Justice and Equality, the PSRA, and all four Dublin Local Authorities.

The Network played a central role in securing the formulation and enactment of the MUD Act 2011.

We contributed to the preparation of the Property Services (Regulation) Act 2011, and related secondary legislation.

The Network liaises with the SCSi (Residential Committee), as the representatives of the Property Management Agent sector. We have working links with the Owners Corporation Network in Australia.

#### ***Monthly forum meetings***

Open forum meetings are held approximately once a month at DCC Civic Offices, Wood Quay, Dublin 8.

Meetings and activities are currently facilitated by funding from DCC, and by the involvement of the Network's volunteer members. Funding requests to support the Network's activities on a full-time professional basis currently lie with the Housing Agency and Dublin Local Authorities.

Further information about the Network's activities is available at:

<http://www.apartmentownersnetwork.org>

We are active on:

Twitter @ApartmentOwners

Facebook-

<https://www.facebook.com/apartmentowners>

### Society of Chartered Surveyors Ireland

The Society of Chartered Surveyors Ireland is the independent professional body for Chartered Surveyors working and practising in Ireland. Working in partnership with RICS, the pre-eminent Chartered professional body for the construction, land and property sectors around the world, the Society and RICS act in the public interest: setting and maintaining the highest standards of competence and integrity among the profession; and providing impartial, authoritative advice on key issues for business, society and governments worldwide.

Advancing standards in construction, land and property, the Chartered Surveyor professional qualification is the world's leading qualification when it comes to professional standards. In a world where more and more people, governments, banks and commercial organisations demand greater certainty of professional standards and ethics, attaining the Chartered Surveyor qualification is the recognized mark of property professionalism.

SCSi has a membership of over 5000 with many of these Property Management Surveyors being employed in management of multi-unit developments on behalf of Owners' Management Companies.

#### **Society of Chartered Surveyors Ireland**

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### 1.3 Brief overview of apartment management sector

To inform the reader, and to provide context for the proposals in this submission, we present a brief overview of how apartment and multi-unit developments are currently structured and managed.

#### **Sector Size**

It is anticipated that nearly 500,000 people live in units in multi-unit developments in Ireland and that there is in excess of 7,000 OMCs.

It is clear from the migration patterns both nationally and internationally that as our population increases so will our dependence on our cities for accommodation and employment (estimated at 80% of our population or 4.8 million by 2040 as opposed to 3.1 million currently).

As our dependence of urban centres increases so will the need for a sustainable and functioning apartment living sector.

#### **Owners' Management Companies**

An OMC comprises a board of volunteer directors, typically civic-minded residents or owners in the estate. The directors are elected by the wider body of apartment/unit owners in the estate, i.e. the membership of the OMC.

In the vast majority of cases the directors are not paid. They are, however, charged with the primary responsibility of managing the estate common areas and shared services, and of ensuring adherence to the principles of good estate management. Effective stewardship of the OMC is vital to ensuring the upkeep of the estate. It is essential to ensuring that the estate is a good community in which to live.

The MUD/OMC model of apartment management in Ireland means that property assets worth hundreds of millions of euro are under the stewardship of volunteer directors. Other than the usual CRO and ODCE filing requirements and enforcement measures, and the generality of Company Law, there is no specific regulation of OMCs.

The OMC agrees an annual budget for the year. It then issues an annual service charge to each unit owner. This service charge pays for the aforementioned services.

The service charge must by law<sup>3</sup> include a contribution to a long-term building investment ("sinking") fund for non-recurring/capital expenditure (e.g. lift replacement). The amount of the sinking fund contribution is set by the members; it is open to them to agree there shall be no contribution.<sup>4</sup> It is submitted that this is a flaw in the legislation and that it should require the OMC to professionally determine the appropriate level of sinking fund required before agreeing the level to be collected at a general meeting of owners.

A management agent is appointed by the OMC to attend to the day-to-day operational running of the estate. This includes common area maintenance and upkeep, block insurance, domestic waste disposal, landscaping, etc.

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<sup>3</sup> Section 19(3) of the Multi-Unit Developments Act 2011 obliges the owner of each unit in a multi-unit development to make a payment to the sinking fund of the amount of contribution fixed in respect of the unit concerned in accordance with the section.

<sup>4</sup> Section 19(5) provides that the amount of the contribution to be paid as respects a unit by each unit owner to the sinking fund shall be €200, "...or such other amount as may be agreed by a meeting of the members...".



## ***Mutuality/community ethos***

An OMC is *de jure* a company, a body corporate. *De facto*, it is a committee of volunteer directors made up of home owners, usually the residents. In this way, an OMC is often referred to as “the residents’ committee”.

An OMC is established in law typically as company limited by guarantee. It has no shareholders, only guarantors, usually for an amount up to a nominal sum, €10. The OMC is not-for-profit, and does not pay dividends. In substance it is a mutual organisation.

Any excess of income over expenditure is either allocated to the building investment/sinking fund, or else it is carried forward towards the cost of provision of estate services for the following year.

## ***Apartment Service Charges***

Service charge debt recovery and OMC illiquidity are widely accepted as the most significant and immediate financial challenges confronting OMCs and their volunteer directors.

Independent academic research demonstrates the considerable difficulties faced by OMCs in recovering service charges.<sup>5</sup>

Many OMCs are faced with current fee recovery rates of less than 70%. Aged debtors can run to five or more years. Accumulated debtors can represent in excess of 100% of the OMC annual budget. Insolvency is a real prospect for many OMCs.

Sinking fund provision is in many cases tied up in debtors. As a consequence many OMCs are forced to give priority to the costs of basic estate services only: insurance, refuse collection and common area lighting.

In practical terms OMCs often inflate service charges and sinking fund levies in order to account for the non-payment of contributions by their members and unit owners.

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<sup>5</sup> “Service Charge Collection In Multi-Unit Developments”, Adele McKeown, DIT MSc in Real Estate, 10 October 2016  
“Owners’ Management Companies - The Ticking Time-Bomb Of Service Charge Collection”, Adele McKeown  
<https://apartmentownersnetwork.org/2017/06/19/adele-mckeown-scsi-presentation-omc-service-charge-collection/>  
“Financial Planning in Multi-Unit Developments”, Finbarr Malone, DIT MSc in Real Estate, 23 October 2017  
<https://apartmentownersnetwork.org/2018/01/08/academic-study-of-multi-unit-developments-confirms-imminent-funding-crisis/>

## 2.0 Details of Submission

### 2.1 Achieving more effective outcomes for court users, particularly vulnerable court users

#### (a) Service charges recovery

##### *Existing law*

In effect the law already recognises that OMCs should recover service charges in full. We submit that there are other changes to the Civil Law that would-

- Remove OMCs and apartment owners from costly court processes
- Enable faster service charge recovery

##### *Excludable debt*

The mutual and unique nature of OMC service charge debt was recognised in law by section 2(1) of the Personal Insolvency Act 2012 (“the PI Act”).

Services charges are an “excludable” debt under the PI Act, meaning that they may be covered by a Personal Insolvency Agreement only with the consent of the creditor.<sup>6</sup> In the case of apartment service charges, the OMC is the creditor.

#### **(i) Proposal to re-categorise service charge debts, to exclude from Statute of Limitations**

Service charge debts arise under the covenants of the lease between the OMC, the apartment owner and the estate developer. They are treated in law as a contract debt.

Under section 11 of the Statute of Limitations 1957, court actions for the recovery of contract debts may be brought only within six years of when the sum became due. (In the case of a contract debt, the debt normally becomes due as is agreed in the terms between the parties, e.g. invoice date plus 30 days.)

The position in relation to court action changes where the debtor (apartment owner)-

- acknowledges the debt after it becomes due, or
- makes a part payment towards the debt.

In these circumstances the right of action is deemed to have accrued on the date the debt was acknowledged, or on the date of the part payment, i.e. on a later date, and giving more time to the creditor to pursue action for recovery.

In the same way that the unique nature of services charges is given recognition by treatment as an excludable debt under a PIA, exceptional treatment should be provided by specifically excluding MUD service charges from the Statute of Limitations.

OMCs are funded entirely through the service charge receipts from its members. These constitute trade debtors on their balance sheet and the writing down of such debt has an impact

<sup>6</sup> See for details <http://www.personal-insolvency-arrangement.ie/resources/Excluded-And-Excludable-Debts-In-A-PIA.asp>



on the robustness of the OMC. In addition, writing down of service charge debt is ultimately funded by other members of the company, giving rise to a double payment and inequity.

Over recent years, where many unit owners have experienced difficulty in maintaining mortgage payments, a large number of properties in MUDs have had receivers appointed and owners struggle with potential insolvency. This has led to many OMCs facing the prospect of issuing legal proceedings simply to obtain judgements but not realising any financial benefit, simply protecting the debt.

The exercise is a costly one, where the outcome is known at the outset. The process simply increases the cost of all owners' service charges.

## **(ii) Enforcement of Service Charge Debt in Court**

As detailed previously, the impact of non-payment of service charges is not only detrimental to the operation of a MUD but also inequitable to the other owners.

Lease titles executed by apartment owners contain many clauses designed to encourage the prompt payment of service charges. Clauses include the application of penalty interest (typically linked to overdraft rates plus a small margin), the ability to recover legal fees, and to withdraw services where applicable.

The experience when seeking recovery in the Courts often reduces or eliminates the interest charges and rarely awards full costs. This continues the trend of other unit owners paying the cost of recovery and it unnecessarily adds to their service charge costs.

We suggest that the attitude toward service charge debt recovery by an OMC should be changed. The interest of the collective ownership should be taken as a positive. Non-payment of service charges should be enforced vigorously by the Courts to encourage prompt payment by owners. It will encourage efficient pursuit of debts by OMCs, in the knowledge that their actions will be supported in contract, statute and the Courts.

## **(iii) Enforcement of Judgements**

Following an award by the Courts it is often difficult for the OMC actually to recover monies from the defaulter. In many circumstances the subject property is rented with the owner receiving rental income directly from the tenant.

In other jurisdictions in the interests of the common good more severe remedies against defaulters are available. Remedies include garnishing orders on rents, temporary charge of the property for the OMC to receive rent until debt and costs are cleared, or the removal of certain rights of the owner until payment is made. The latter can include curtailing the right to use the common areas and other facilities, thereby preventing enjoyment of the property.

## **(iv) Service of Proceedings**

Section 8(3) of the MUD Act requires unit owners to provide their correspondence address to the OMC. In the event that unit owners have not furnished such details, meaning that the OMC cannot locate the owner, we submit that the OMC should be entitled to serve any proceedings to the subject property, i.e. the apartment/unit in the estate managed by the OMC.



It is worth noting that in the event that the property is rented, under section 12(1)(f) of the Residential Tenancies Act 2004, the landlord is obliged to deliver to a tenant a “point of contact”<sup>7</sup>.

## **(b) MUD enforcement in the Courts**

In addition to the recovery of service charge debt by OMC there are a number of other issues where the rights of the individual appear to take precedence over the rights of the collective and the Lease title executed.

The areas where this can occur are typically in the enforcement of Lessee covenants under Lease title as follows;

- The covenant not to cause nuisance
- The covenant not to alter
- The covenant regarding user (to prevent short-let (so-called “Airbnb-style”) use)

We submit that the covenants are detailed in the interests of the community and that their existence was clear to any unit owner on purchasing the property.

The inclusion of mediation in the MUD Act 2011 appears to have diluted the rigidity of such covenants and suggests that they are now open to negotiation. We submit that an approach to the Courts weighted towards enforcement of lease covenants would improve the viability of the MUD sector.

## **2.2 Reviewing the use of electronic methods of communications including e-litigation and possibilities for making court documents (including submissions and pleadings) available or accessible on the internet**

### **Encouraging alternative methods of dispute resolution**

#### ***Online dispute resolution for MUDs***

We propose that dispute resolution for the multi-unit/apartment sector be moved away from the Courts to an online platform, albeit with a right of appeal lying to the Courts.

In Canada, the Condominium Authority of Ontario has recently adopted such an online regime, in the form of the Condo Authority Tribunal (“CAT”).

The stated aim of the CAT is to help resolve disputes conveniently, quickly and affordably.

We understand that the CAT currently deals with disputes about condo corporation (Canadian equivalent of the Irish OMC) records. More cases will be added gradually in the future following the issuing of government regulations.

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<sup>7</sup> The landlord must “provide to the tenant particulars of the means by which the tenant may, at all reasonable times, contact him or her or his or her authorised agent,”

There are three stages to the online process-

1. Negotiation

Users file their case online. For a fee of CAN\$25 they are provided with access to the CAT's online dispute resolution system. Users negotiate in a neutral forum and attempt to resolve the dispute themselves.

2. Mediation

If the dispute cannot be resolved at this stage, the users can move to Mediation. For a cost of CAN\$50 a dedicated CAT mediator joins the case to assist the users in attempting to resolve the matter.

3. Tribunal Decision

If still unresolved, the dispute moves to Tribunal Decision. A dedicated CAT member conducts a formal adjudication of the dispute. The cost here is CAN\$125.

Full details of the online process are available on-  
<https://www.condoauthorityontario.ca/en-US/tribunal/the-cat-process/>

The proposal is to initiate a similar process in Ireland for OMCs, suitably adapted for the Irish context.

***Practical Irish example***

A unit owner wishes to make alterations to an apartment to make it more accessible as they believe they will require the use of a wheelchair in the future.

The OMC refuses the alterations on the basis of the lease clause and the owner appeals the decision to an online dispute resolution process.

Both parties would submit their cases and the adjudicator would deliver a determination based on the arguments put forward suggesting a situation where alterations would be acceptable and with what oversight and certification.



### 3.0 Conclusion

Both the Society of Chartered Surveyors Ireland and the Apartment Owners' Network are convinced of the long term viability of apartment development as a housing solution in Irish urban centres.

We believe that we can learn from other countries that have similar frameworks and legal structures but that enjoy a greater ability to enforce the rules for the greater good of the wider community.

We believe that Civil Justice needs to be reformed to acknowledge the unique function of OMCs and their need to be able to enforce their rights and obligations in an efficient and effective manner.

We wish to thank the Group for the opportunity to contribute to the review process.

We would welcome the opportunity to contribute further by way of meeting or other communication.

We trust that the views expressed will be received in the constructive spirit intended, and will be given due consideration in the Group's deliberations.

