MUD ACT 2011

Commencement date 1st April 2011

Common Areas to be transferred by the 30th of September 2011

1. Sections

Section 1 - Definitions

All reasonably standard and to be expected however Developer is defined as a person who carries out or "arranges" for the development or construction of a multi unit development, it is conceivable that NAMA could be deemed to be a Developer given that they could ultimately account for the arrangement of the development or the completion of the development albeit through the NAMA tied developer i.e. NAMA would be the ultimate controlling party. The question in relation to Receivers is something that I will touch upon later on as it a complicated and basically untested area.

2. The broad definition of what a development is and what developments are captured by the legislation. In effect all residential Multi Unit Developments are captured so long as there are five or more units within it. Anything between obviously two and five is not necessarily captured although they can be captured and only those elements within Schedule 1 apply to those developments i.e. the entire of the Act does not apply to those developments. These are for the most part outside of the normal scope of MUD.

   Are housing developments included? There is a practise direction from the Law Society Conveyancing Committee from June 2013 which

indicates that they are not included notwithstanding that there are some planning permissions in existence which provide that a management company ought to be established. There is a variation in relation to that whereby the Department of the Environment directed that those otherwise common areas ought to be taken in charge by the Local Authority with those planning permissions conditions ought to be varied and the practise direction appears to indicate that housing estates effectively are not included within Multi Unit Developments.

3. Is the now standard operating procedure in relation to Multi Unit Developments and says in basic terms that the common areas ought to be transferred prior to the first unit being sold. Given that we are in effect in a transitionary phase of development within Ireland following the boom bust period. It is only expected that Section 3 will start becoming applicable from hereon in. That said in real terms it is not something that is in fact adhered to by anyone it would appear. It is important to note that the OMC has to be represented by a different solicitor from that of the developer and that the developer is obligated to discharge the costs associated with that. The normal issues that arise in relation to the transfer of the common areas are typically regarding mapping and what is physically on the ground as opposed to what was in effect planned for. You will often find a divergence between the planning permission and the in effect as built units. There will normally be the planning drawings which would be submitted as part of the planning permission which ultimately will turn into the as built drawings and the variations in relation to those as built drawings should be noted. It is often also the case that the as built drawings may have no relationship to what is physically on the ground and you may find the technical i.e. the mechanical and electrical the

plumbing etc in slightly different places from the as built drawings as the supervising Architect or Engineer may physically not be on site on the day that the services go in and therefore they appear in a slightly different location. It is important that as much technical documentation is obtained at that transfer stage and schedule 3 sets out what the requirements are.

4. Is somewhat irrelevant as it dealt with developments where one unit was sold but less than 80% of the units were sold and the common areas had to be transferred before the 30th of September 2011.

5. Unit 5 is broadly similar to Unit 4 insofar as where there is more than 80% of the units sold but also taking into account non commercial units.

6. Section 6 obligates the owner management company to join in the transfer and this is giving statutory effect to what was the practise in any event.

7. This places a statutory obligation on the developer to complete the development in accordance with the planning permission and the building regulations. This whilst welcome places no actual time limit in relation to that and there appears to be no real incentive to ensure that it is something that is adhered to. The difficulty that most OMCs face is that the developer's solicitors will say that they have an ongoing obligation and therefore there is no basis on which to refuse to take a transfer and join in the transfer of the common areas. Whilst this is technically true it is tactically probably easier to simply insist that you will not join in the transfer of the common areas until certain matters

are addressed. Conceivably it would be open to an OMC to bring an application under MUD pursuant to Section 7 seeking orders directing the developer to complete certain works however as with all aspects of MUD it would be critically important that there would be some engagement or some attempt at engagement in advance of that. More often than not the real issue is that the developer has no money or is on the precipice of insolvency and therefore a more practical decision has to be made in relation to how this issue might be addressed. It is sometimes the case that the developer has retained a unit or two and this can be used as leverage in any discussions.

8. If you own a unit within a Multi Unit Development you automatically become a member of the OMC without having to take any additional steps. Previously it was the case that you were entitled to become a member but you may not actually become a member dependent on how the Lease was drafted and that has now given statutory effect. One of the more interesting aspects of Section 8 is Section 8.3. OMCs are routinely plagued by service charge defaulters and typically the investor landlord will feature prominently in that. One of the difficulties in dealing with investor landlords is that sometimes they can be quite difficult to trace and they in effect try and make themselves anonymous. Section 8.3 can be used to good effect insofar as it is now an absolute obligation that a OMC know the name and identity and such other reasonable details of the owner or the occupier. Logically an OMC should therefore seek the name and contact details including email addresses and telephone numbers of everyone who is in occupation or who is an owner. There are a number of good reasons for this the most notable being if there was an emergency i.e. plumbing or some other issue that required input from the owner quite quickly.

This can be used to good effect in dealing with any errant investors insofar as the opportunity ought to be given to them to deliver all of these details and if they do not then it would be open to the OMC to make an application to the Circuit Court directing the owner to comply with the reasonable requests and in the absence of the owner doing so it is conceivable that the owner could be found in contempt which would ultimately amount to a period of imprisonment.

9. This deals with what happens once the common areas are transferred and of particular interest is that the developer is obligated to indemnify the OMC in respect of any claims made. In real terms it matters not a jot whether you are in fact indemnified by the developer if the developer has no money.

10. Section 10. The OMC and the developer can make amendments to the common areas that are transferred insofar as certain areas that otherwise would be common areas could be transferred to individual unit owners. In effect this would be say the roof space on a penthouse unit or a garden area that is so obviously pertinent to a unit that it ought to be joined with that unit.

11. Section 11. Once the development is complete the mortgagees i.e. the banks must release their charge over those common areas. The development being complete could be a number of different things i.e. the last unit is sold or that the entire development is certified as now being complete by the architect or supervising professional.

12. Section 12. If at a general meeting 60% of the residential units in a Multi Unit Development request that the common areas be transferred

the owner i.e. the developer shall transfer the common areas unless there is a good and sufficient reason not to. What might be deemed a good and sufficient reason might be in relation to a title query or Land Registry query which would not be unusual giving the various mapping difficulties. If there is a disagreement in relation to what a good and sufficient cause might be it is always open to bring an application under Section 24 which I will deal with below.

13. Section 13. This should be read with Section 8.3 and gives the OMC a statutory basis to go in to somebody's unit in an emergency situation. The typical emergency situation would be flooding or a burst pipe where one or two units above a particular unit has suffered the damage and the water is leaking down through various units. This is something that many of you are probably familiar with. There was always a common law right to this and there was normally a right retained in various leases to allow the developer or indeed the OMC access in an emergency situation. It has now given a statutory right.

14. Section 14. This effectively gives one unit one vote and that each vote has equal weight and in effect applies to all units prior to the enactment of MUD.

15. Section 15 mimics Section 14 and applies to all developments after MUD and it is in effect one unit one vote but many of you will be familiar with the weighted voting that routinely existed in various developments and the only manner or way that the weighted voting can be preserved is by way of a Court application and in order to show why the weighted voting ought to be preserved there would have to be a very very strong reason.

16. Section 16. A person can no longer be a director of a management company for life, the usual developer director life directorship or a term greater than three years. However a director can obviously resign or retire after a three year period and be re-elected.

17. Section 17 is how to conduct an annual general meeting and this is where the MUD Act and the Companies Act blend together:-

    MUD requires that ten days prior to the AGM a report must be sent to the members which will include

    a) Income and expenditure
    b) Assets and liabilities
    c) The sinking fund
    d) Service charge amount for the year end i.e. the year that has passed.
    e) The projected service charge amount for the forthcoming year.
    f) Planned expenditure. This really means planned capital expenditure i.e. that expenditure above and beyond normal expenditure.
    g) A fire safety statement
    h) A statement of the director's interests i.e. connected interests, whether the OMC had any financial dealings with any of the directors and/or their related interests i.e. if they had a gardening company that provided gardening services to the OMC.

18. Section 18 This is most important as it is probably the area where there is most scope for disagreement and difficulties. The service charge has to be approved at the meeting however if there is any

amendments to be made to how the service charge is to be set 60% of those present and voting at the meeting. Cleary proxies could arise in relation to that however in order to not allow the service charge as proposed by the directors more than 75% of those present and voting would have to vote against it.

If no agreement can be reached in relation to the service charge and the proposed service charge is not approved at the general meeting and is in fact disproved at the general meeting the directors can in effect implement a four month service charge period but would then logically have to place it before the meeting again and in effect you could have a rolling stalemate situation where every four months the directors are calling meetings and trying to move matters on. One would have to think that logically the situation that would have to prevail would be the directors taking steps under Section 24 to have the service charge approved by the Circuit Court after a period of stalemate. The OMC would have to pick up the cost of that. I cannot see another way of resolving the issue.

19. Section 19. OMCs must have a sinking fund and perhaps more importantly developers are now required to contribute to the sinking fund once the first unit is sold in respect of all other unfinished units. There is clearly scope for a significant debate in relation to what would be deemed to be an unfinished unit but one would have to think that a unit which is beyond first fix and certainly at second fix i.e. that would have all of its utilities installed would be deemed sufficiently complete to attract a contribution to the sinking fund.

20. Section 20 effectively applies to sinking funds for housing estates.

21. Section 21 allows for the inclusion of the sinking fund in relation to the service charge and that this can amount to in effect one charge and there doesn't need to be a separate charge.

22. Section 22 is useful insofar as it now provides that the service charge is a simple contract debt and that you can bring the claim in the court of competent jurisdiction. This has in many respects made life much easier insofar as there is no need to actually prove some of the more technical aspects of ownership and that once a member accepts that they are a unit owner i.e. once we can prove the registration, then you can sue on foot of the contract debt. This has been assisted by a change in the financial limits of the Courts and the District Court financial limit has been increased to €15,000.00 which takes into account probably 90% of all debt issues. The Circuit Court jurisdiction has bene moved up to €75,000.00 which I would think takes in probably 99.9% of all claims. We have previously issued in the High Court for claims in excess of €40,000.00 for management fees however that is a rare enough event. It is possible in a mixed use development that the commercial units could accrue a service charge in excess of the €75,000.00 but that would be a rare enough event.

23. Section 23 provides for the OMC to draft house rules and these are now fairly standard. The only warning in relation to house rules is that the house rules must be consistent with the lease and it would not be unusual that there would be provisions within the Lease prohibiting the use of wooden floors etc. Therefore the house rules could conceivably reflect that. The house rules need to be approved at a general meeting and approval would only require a simple majority and a breach of the

house rules is deemed and can be deemed to be a matter that is applicable to every occupier of the premises but it is an obligation that every occupier should be given a copy of the house rules. It is a condition of the Act that anyone who lets a premises must give their tenants a copy of the house rules and they in turn are bound by those house rules. The OMC can recover the cost of fixing any breach of the house rules and the cost associated with that breach or whatever it may be can be effected by way of a simple contract debt.

24. Section 24 is the catch all or fix it all provision within the Act. Effectively Section 24 provides for any person in any way connected with an OMC or a unit or a development in general terms can make an application to the Circuit Court to deal with in effect any issue. The only substantive proviso in relation to the operation of Section 24 is that there is a positive obligation on parties to engage in mediation and try and resolve the issue in advance of having to go to Court.

    It is in effect a condition precedent of Section 24 that you make some attempt to resolve the issue before going to Court. It would be open to any party to indicate that given that there was an non engagement that the entire costs of the entire proceedings would have to be borne by the other side. The only thing to substantially watch out for in Section 24 is that there must be an OMC in order to bring the claim. If there is in fact no OMC i.e. where the OMC has been dissolved for whatever reason you must make an application under Section 25 to the Court in order to bring the claim i.e. you have to get permission.

25. Section 25 is dealt with here.

26. Section 26 provides that the Circuit Court is the Court with competent jurisdiction and there is a Circuit Court operating in I think every County of Ireland or certainly within proximity of every County.

27. Section 27 provides for mediation and this in effect and you will occasionally hear it is is this "has there been Section 27 Ordered mediation" and in that case the mediator is obligated to provide a report under Section 28 for the Court and for the parties and that report has to deal with the level of cooperation each party has provided. Whilst Section 27 Mediation has certainly arisen I think that there is definitely a shortage or a significant lack of Section 28 reports that may have ever been prepared. My experience is that there is little to none and we have attempted and tried mediation at various levels.

28. Section 29 preserves prior jurisdiction.

29. Section 30 provides for the OMC being restored by way of a Circuit Court application if it has been dissolved and if the common areas have already been transferred this has to be done within six years.

30. Section 31 is the transfer of the benefits and warranties and guarantees within the development to the OMC so typically the certificates of the Architects/Engineers compliance, the mechanical and the electrical certification and the guarantees and warranties provided within those are transferred to the benefit of the OMC and there is nothing controversial in relation to that. That is something that has routinely happened prior to the operation of MUD.

31. Section 32 provides OMCs cannot enter into any contract in excess of three years and there cannot be any penalty in relation to a contract in excess of three years.

32. Section 33 allows the Minister to make regulations.

33. Section 34 gives the short title.

Other points to note.

The matters that could easily be addressed for OMCs would be the establishment of regulations by the Minister setting out what in clear terms are the obligations of receivers, banks etc in relation to OMCs generally and the completion of developments where those banks have taken security even in a negative situation. This can be differentiated from NAMA appointed receivers as they appear to have an additional statutory obligation under the NAMA Act and there is a fairly convincing argument that those receivers have additional obligations above and beyond given their statutory functions for NAMA in effect a state agency. There is probably also a good case to be made for a small panel of state appointed or state sponsored mediators to be established and a very straight forward application form much like the mediation service at the Labour Relations Commission where parties could simply make an application for mediation directly to that panel and that panel would invite the other side and if they refused to engage a simple letter or certificate could be furnished and then the OMC could bring proceedings immediately with their Certificate which would in many respects insulate the OMC from costs. This doesn't in any way detract from the fact that an OMC would still have to engage with a solicitor etc and there would still

undoubtedly be costs involved but there would then be some prospect of perhaps recovering those costs if the developer was not insolvent.

There is also obviously the prospect that the matter might resolve through mediation.