

# Liston & Company Solicitors

**Booklet on Management Companies**

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## **MANAGEMENT COMPANY QUESTIONS**

How much do you really know about how your Management Company works?

Do you understand why it is necessary to have a Management Company?

### **Test yourself on these questions:-**

- Do you know the main difference between buying an apartment and buying a house?
- Do you know that you could buy a house and still have to pay a service charge?
- If your apartment has a balcony do you know who owns it?
- If you have a car parking space do you know if you own it?
- If you have two cars are you entitled to park the second one?
- Who arranges the insurance?
- If there is a "Block Insurance Policy" do you know if it covers your belongings if they are stolen?
- If there is a break-in and your front door is broken who is responsible for it?
- If the Management Company goes bust will you have to contribute towards its debts?
- If the committee members of the Management Company are sued successfully will they have to pay up?
- Do you know how to become a committee member?

- Do you know if there is a difference between a committee member and a director?
- Do you know the difference between a Management Company and a Managing Agent?
- Do you know if you can claim tax relief on your service charge?
- Aside from day-to-day issues what are the items that you should look for in the accounts?
- Do you know what you have to do if you are going to sell your apartment?

## ***JUST A FEW WORDS TO START***



It is believed that there are approximately half a million people living in apartment schemes in Ireland. This is in addition to those people who live in houses that are part of residential housing developments on which there is area that they manage themselves and so is not run or owned by the local authority.

Many people do not understand how Management Companies work but it has to be said at the same time that the level of knowledge is improving all of the time. This is because of the growing number of people living in apartments who explain “apartment culture living” to their friends, because of publications by government departments and private individuals, such as this one, and through debate and discussion in both the print and other media.

If you own an apartment or you are going to own an apartment there are fundamentals which you must understand. You must understand what you own and what you don’t own. In almost every case there is a Management Company. You must understand that you as an owner of an

apartment will also be a member of the Management Company. So you have two things.

You must also understand that a badly managed Management Company or an under-funded sinking fund is detrimental to the value of your apartment. It may even be detrimental to the sale of your apartment. On the contrary a well-run scheme with a healthy sinking fund adds value and improves the marketability of your apartment. We would like to state that this is a view that we support and encourage in any scheme in which we are the legal advisors.

This guide is going to elaborate on these things in an easy to read way and on the relevant issues that lead to a quality lifestyle in a well-managed and secure residential development.

In writing this booklet we are drawing on our considerable experience. We have been involved at the initial stages of developments whereby we acted for the builder when the land was purchased and we had the privilege of putting together the leases for the apartments. Those documents prepared by us for these schemes will remain in existence and are the vehicles upon which those developments are driven. On the other side we have acted for purchasers of both new and second-hand developments. We take a critical view of the documentation that is prepared. By and large the documentation is well prepared but if schemes come to our knowledge in which for one reason or another we hold that the documents are not satisfactory and cannot be driven we advise our client accordingly.

We have also served on committees and acted as chairpersons of Management Companies. We are not finished. We have lectured to students for thirty years and also to the profession.

It is a subject that is dear to us, we feel we have a good working knowledge of it and the purpose of this booklet is to share some of these things with you and to make you better informed.

In this commentary you will come across some words that you should know the meaning of, such as:-

Lease – A lease is a contract. It is a contract between an owner and an occupier. It has a term and rent. It has covenants. Covenants on part of the owner and covenants on part of the occupier. Depending upon the circumstances it can be a short lease i.e. six months to a year or it can be a long lease such as five hundred years. It just depends upon the circumstances. So an owner of an apartment could own the apartment under a lease. The lease could be for a term of five hundred years. The rent could be nominal such as €10.00 (if demanded). That owner would rent out the apartment. In that case the term could be one year. The rent, depending upon the circumstances of course, could be €1,000.00 per month. There would be covenants on the part of both the owner and the tenant.

There are the words Management Company and Managing Agent. They sound alike but they are two totally different things. The Management Company will own the development. The Managing Agent will be employed by the Management Company to provide the services and to collect the service charges.

Now we have just used another word, service charge. When there is shared ownership there are shared services. Where there are services they have to be paid for. When the demand issues it issues in the form of a charge. The word charge is used in similar circumstances to when you say “what is the charge?”. So that’s how you get the word service charge.

## ***FIRST THINGS FIRST...***

### **What do I need to know when I am buying an apartment?**

If you are going to buy an apartment it will either be a new or a second-hand apartment.

There are advantages in buying a second-hand apartment in that the scheme on paper has been established and you have an opportunity of seeing if it works in practice. In other words all of the documentation would have been prepared and presumably properly but the question then is when the scheme was handed over to the owners of the apartments did they know what they should do and how they should go about it?

In Ireland we do have a healthy interest in property. Generally speaking houses are kept well, grass is cut and hedges are trimmed. This leads to a pleasant presentation.

In an apartment scheme the same issues arise. Is the apartment block or are the apartment blocks visually well maintained from the exterior? Are the driveways and lawns, often referred to as the external common areas, well tended to? If so that is a plus and so you should proceed to the next stage.

Next comes an examination of the hallway and the internal stairways and landings. These are called the internal common areas. Are they in good condition?

Lastly there is the apartment itself. You should always remember that it is far better to buy a badly maintained apartment in a well-run scheme rather than a gleaming apartment in a badly run scheme. The scheme will influence the quality of your living and the saleability of your apartment when you decide to sell.

Buying into a new scheme is an adventure into the unknown. You place considerable trust on the builder and on the documentation prepared by or on behalf of the builder and also on your new neighbours.

You are influenced by the nature of the development and the stage of construction of the development. You are influenced by the quality of the workmanship and have to form a view on the quality of the likely finish of your apartment. When you put down your deposit the apartment could merely be a cube of space in the air. Looking back it is often hard to believe this.

So as much as you must trust the builder, your solicitor must ensure that the documents do what they are supposed to do. While the standard of workmanship of most of those solicitors involved in development is very high it is not always the case. Here is one example to prove the point; is it fair that a one-bedroom apartment should pay the same amount of service charge as a three-bedroom apartment? Obviously, no.

There are leases with this in it and they are still being done.

As already stated buying a new apartment is a leap of faith. The builder has to finish to the design that you anticipated. The paperwork has to function. Then the apartment owners have to take over responsibility for the management of the development after it is finished. That means a group of people who never met each other before have to come together and form a committee and take over the provision of the services and the collection of the service charges for the apartment owners. That is a definite leap of faith. But it is being done every day and it works. One of the reasons why it works is because there are companies out there who specialise in doing this work. They are called Managing Agents.

So here are these two words Management Company and Managing Agents again.

**What is the purpose of a Management Company?**

**What rights do I have as the member of a Management Company?**

*Read on and you get the answer to these questions.*



## **A PLACE TO CALL MY OWN**

When you buy a house you can see exactly what you're getting. Most times there is a garden or a bit of a garden and there is the house itself. Also there is the water, electricity and foul sewer pipes. All of those must be there so in the end you will have the structure, the garden and the services.

It is different with an apartment. In fact unlike a house, the less you own with an apartment the better. Hard to believe? The reason being that the less you own the more the Management Company own. The more the Management Company own the less you have to pay for directly.

When you own an apartment in a traditionally drafted scheme you will only own to the plaster on the inside walls, the screed on top of the concrete on the floor and the underside of the ceiling. All structural elements will be the property of the Management Company. That means that all internal, non-load bearing walls are owned by the apartment owner.

### **If there is an attic who owns it?**

Generally speaking you only own to the underside of the ceiling and the attic is not yours, it is owned by the Management Company even though nobody else can get into it.

You own any utility that is solely used by you. Therefore the water tank in the attic goes with the apartment and so do the heaters. You may not own your door and you don't own the external parts of your window frames. Therefore if somebody breaks into your apartment and damages your front door then you could make a claim on the Block Policy that is operated by the Management Company.

If the thief steals some of your belongings you claim for those under your own policy about which there is more discussion later on.

As with any residence your apartment will discharge from both the sink and the toilet. Unlike a house you get an easement to use these.

An easement is a technical word and it is a right in law to do something. In this case it is a right to have water and to discharge from both the sink and the toilet. A house automatically has these. Therefore what does the Management Company own? The answer is it owns everything except the inside of the apartment which we have already described.

### **Who owns the windows?**

The glass in the windows is owned by the owner of the apartment. This has nothing to do with cleaning. It has everything to do with breakage. If the glass gets broken the Management Company do not want to be faced with the responsibility of repairing it and if appropriate making an insurance claim. So it is the tradition that the lease will provide that the ownership in the glass is part of the apartment. Therefore when you go to insure the glass will be covered under your policy. Incidental while mentioning this so also will the external door of the apartment.

### **Why is it better to own less?**

Well imagine if you were on the ground floor and there was a crack in that floor. If you owned the foundation then you would be responsible for repairing that crack even though all of the people above you have the benefit of the foundation. That would be a serious burden.

The same comments would apply if you were on the top floor and the roof was damaged. These things do happen. When they do they should be repaired and most times they are but everybody contributes to the cost of those repairs. So that is why the less you own the better. Also if the owner refused to do the repairs it could be a problem for other people as well. That should not be the case and it is not.

## **THE BALCONY**



There are balconies and balconies. There are those balconies from which it would only be possible to throw a rose often called "Juliets". It would not be possible to use them for anything else because there is no depth and all they really allow you to do is to open the windows and not to fall out.

There are other balconies that are substantial and secluded and they are almost like an extra room. These balconies bring an added dimension to an apartment. You will know this because the price will be different.

### **So who owns the balcony?**

The universal practice is that the Management Company owns the balcony and you get a licence to use it. Some people get upset about this. They feel that they should own their balcony. But as long as you can use it what difference does it make? None in reality. Also if anything should happen to it structurally then everybody has to contribute. So that is not a bad deal.

The reason why the Management Company owns it is because it wants to be able to ensure that the appearance of the block is consistent from the outside. So the Management Company will always look after the maintenance of the balcony, which in most cases means the painting.

There are also strict rules about how you can use a balcony. In almost every lease it provides that you cannot hang out or dry clothes on a balcony. This is because it runs down the general external appearance of the apartment block.

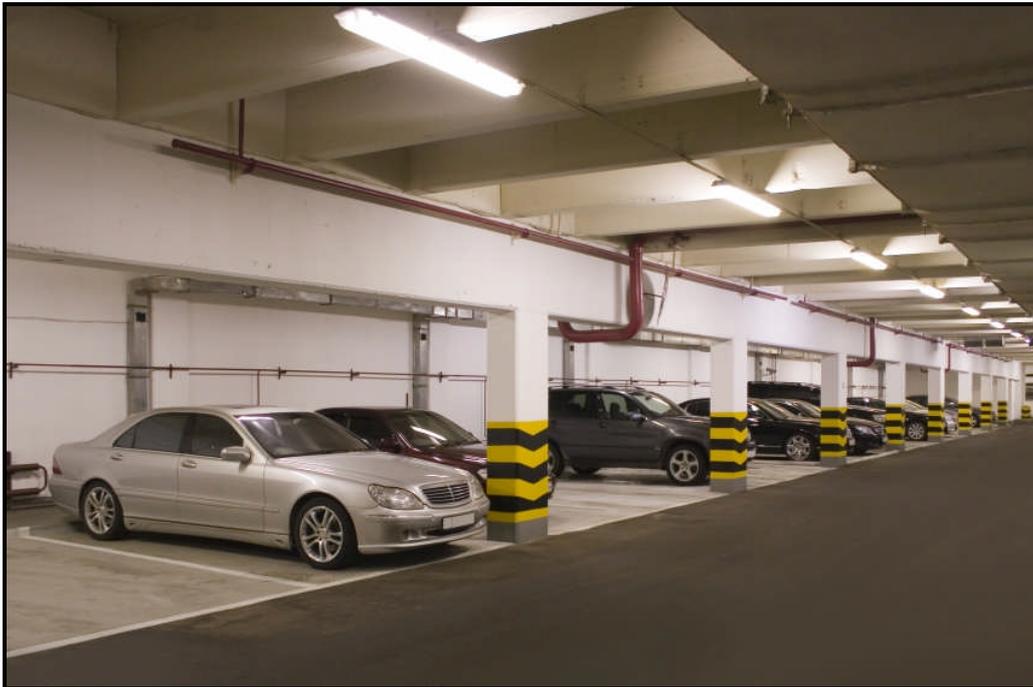
You cannot beat mats or rugs on a balcony obviously because the dust will spread and could go on to other balconies. Sometimes it provides that you cannot barbeque on a balcony or keep a bicycle on a balcony. That depends upon the lease.

There is no consistent thinking in relation to keeping flowerpots on a balcony. At present it is moving more and more to not having flowerpots on a balcony.

### **So what can you do on a balcony?**

Sit out on your chair and have a glass of wine!!

## **WHAT ABOUT THE CAR PARK?**



The first document that is going to determine the car parking arrangement is the Planning Permission. All modern Planning Permissions provide conditions that deal with parking arrangements.

Construction in this country is considerably advanced. Consequently there can be sophisticated underground car parks and there can be surface car parking and even roof car parking.

Ownership of a car parking space can be leased, licensed or designated. It really does not make much difference.

If it is leased it is just identified in your lease as you own car parking space.

A Licence is not as strong as a lease but in practice it makes no difference. It is merely a right to do something. The right in this case would be to park a car in a car parking space.

A designated space is a lesser form of Licence. A space is just designated for use by a particular apartment owner.

The Management Company will always own the surface of the car park because if and when it has to be renewed the Management Company can go and do it. Again everybody in the car park will have to share in that cost. Generally speaking you can only park a car or a motorcycle in a car parking space. The lease may prevent campervans, vans and boats being parked in car parking spaces. The lease will almost universally prohibit the parking of trucks or heavy goods vehicles in car parking spaces. They are unsightly and they do damage.

Those apartment owners who have a car parking space will have to pay for its maintenance, upkeep, lighting and insurance. This is very often known as the car parking service charge.

There are visitor car parking spaces. A well-run Management Company will ensure that only bona fide genuine visitors use the visitor car parking spaces. If they are being used by owners then that's a question that you can raise at the Annual General Meeting. They shouldn't be.

### **So what about that second car?**

Well if you don't have a second car parking space there is no place for you to park. Check it out before you buy.

The worst arrangement is a free for all. That is the spaces are not designated. Those people who come home early will always get the best space and those people who work late are forced to park furthest away from the point of access. Not a good thing. Should be checked out before you buy.

## ***COMMON AREAS - WHAT DOES THIS MEAN?***



The word “common areas” is creeping into our vocabulary. It is because of the number of people who are living in shared accommodation.

Common areas are principally divided into two. They are simply called the internal common areas and the external common areas but this depends on how they are treated in the lease. For example a roof garden in a city centre apartment block, even though it is surrounded on all sides could be called an external common area.

A well-drafted lease defines each of these things and that definition is used through the lease to give meaning.

The internal common areas are, by and large, all of the structural parts of the block including the roof and the foundations and the hallways, stairs, landing and lifts and lift shafts.

Everybody living in the apartment block will contribute towards their maintenance, upkeep and repair.

The amount that they contribute will be a proportion. The lease will determine this. More about this later on.

The external common areas will include the driveways, the pleasure garden, the external gate, the lighting and the underground services.

Some people are confused as to why the external common areas include the driveways. This is a very good question. Particularly when you bear in mind that in some cases the local authority look after the driveways and in other cases they don't. Well the answer to this goes back to the planning permission. It will depend upon the builder and/or the local authority. If the roads are not going to be wide enough for the bin men to come in and turn then the local authority won't take them in charge. That is won't take ownership of them. Consequently the Management Company will have to look after them and more consequently you'll have to pay for it.

Sometimes they might be wide enough to be taken in charge but the builder thinks that people would enjoy greater privacy if the development was gated and in those circumstances the fact that it is gated it will probably mean that the Management Company will have to look after it. It is a thorny issue particularly if there is substantial roadway leading to substantial charge. Also don't forget that the local authority are delighted if the Management Company look after it because it means they don't and therefore they are inclined to encourage developers to provide in their applications to the local authority that the road will be owned by the Management Company.

Traditionally the internal and the external common areas are separated in the leases. One of the reasons is that some people may not have to contribute to the internal common areas but may have to contribute to the external common areas. This will arise if there are houses on the development.

It is our strongest recommendation to invest money in the maintenance and appearance of both the internal and external common areas. It

makes the development a more pleasant place to live in and it adds value. This means you can enjoy your living and at the same time be certain that your apartment will be marketable when you go to sell.



## ***SINKING FUND***

Again this is a new word that has come into our vocabulary. Again going back to comparing an apartment with a house, people who own houses are in control of their own destiny. By and large houses are well maintained. Houses need renewal from time to time. As things fall to be done they are done. Mentally the owner is making provision for that. You have heard the word "I won't do it this year because it doesn't suit me". Generally speaking that means that the domestic sinking fund is not sufficient to pay for the repairs.

When apartment owners take over a Management Company at the early stages they put money aside for those ongoing future repairs. At the beginning this is really just painting and decorating. There should be no structural problems at the beginning and the builder should repair any that do exist.

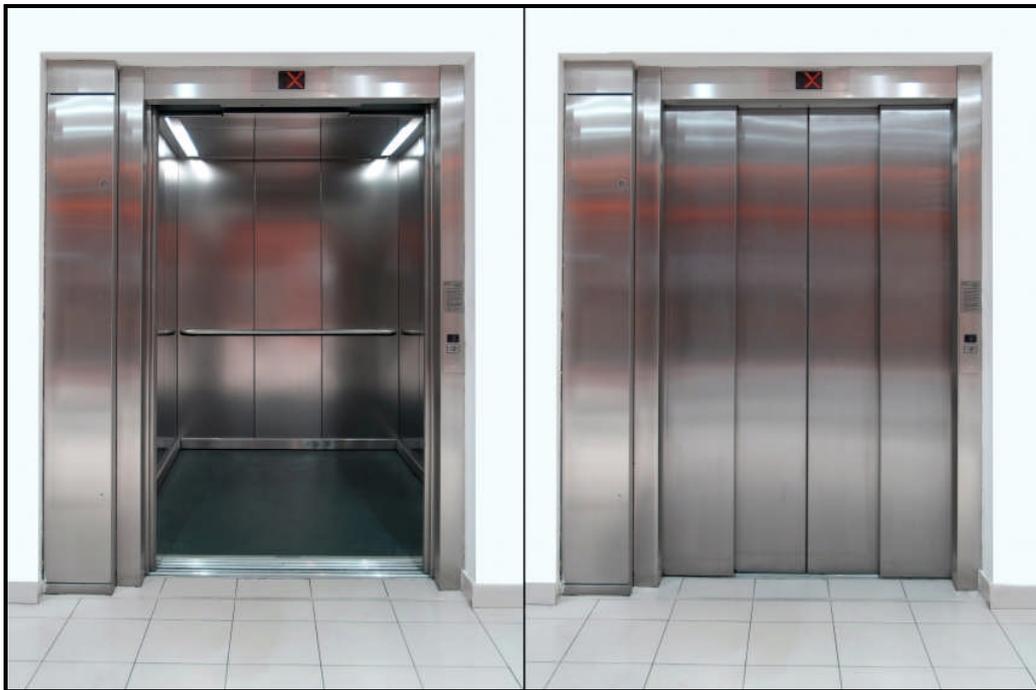
But as time goes by the builder's responsibility for maintenance and repair diminishes and the Management Company's responsibility consequently increases. With this change the sinking fund should be increased.

Different items need replacement at different times. For example a lift may last twenty years. A roof may last sixty to one hundred years.

One of the reasons why we have a sinking fund is to make sure that everybody pays as they use. In terms of the lift that means that when the lift has to be replaced after say year twenty that the person who bought in on year nineteen will not have to contribute towards the full cost of the repair but that the sinking fund will cover the substantial cost of the repair and the new owner will only have to contribute towards a portion of it. Really speaking the proportion should be one-twentieth in this case. When you get to that you have a properly managed sinking fund.

And talking lifts, the argument is sometimes made that those persons who live on the ground floor of an apartment should not have to contribute

towards the cost of the lift. While there may be some legitimacy in this argument it has not to our knowledge ever succeeded.



Much akin to having a development in good state of repair and maintenance it is also wise to have a strong sinking fund. In fact as a matter of principal as we have said, we advocate this. A strong sinking fund is a bonus. It sends out a very strong signal that a new purchaser will not have to pay for something that the purchaser has not used and consequently it is a big plus when you go to sell.

A depleted sinking fund means that somebody is going to have to pay for something that they did not use. It is false economy and can devalue an apartment.

We have come across cases where the sinking fund has not been sufficient to pay for the repairs. When apartment owners reach this conclusion it is extremely painful. It can happen that the apartment owners do not have the ability to fund a substantial levy or even if they do have the ability they do not have the interest to do so. It can happen that the majority of the apartment owners are in agreement with the proposal and can pay for it but are greatly restricted by the ability or the unwillingness of a few to fund a levy. In that case and where possible, apartment owners have

sought an alternative solution. The easy solution where space permits is to sell off a piece of land for additional apartments to be constructed. This opportunity is not always there. Other apartment owners have sold the roof thereby enabling a new builder to construct new apartments on the roof. Neither of these are popular but when faced with a faulty roof, windows that are leaking and lifts that are constantly broken down and no sinking fund, it can be the painful alternative.

It is our strongest recommendation that a survey of the wasting assets in both the internal and external common areas should be conducted periodically i.e. every three years and that survey should establish the estimated length of their life and the estimated cost of replacement and as a consequence the funds should be in place to pay for the replacement when needs be to ensure that all apartment owners pay as they use.

Sinking funds are put on deposit and they do earn interest.

A well run Management Company guided by good Managing Agents will prepare a budget for its forthcoming financial year. You should examine this carefully and you should look very closely at the contribution being made towards the sinking fund and it is perfectly legitimate and in fact it is encouraged to ask questions at the Annual General Meeting in order to establish that the sinking fund is fully funded and up to date.

It is our strongest advice to never agree to a budget that does not contain a contribution to the sinking fund. We are very strong on this viewpoint. So are all other respectable commentators.

## ***THE SERVICE CHARGE***

The lease will state that the Management Company has to manage the development. In the context of this chapter it means provide the services and collect the service charges.

The services to be provided include the general maintenance of the apartment block.

The general maintenance is the cleaning, the repairs, the lighting and the disposal of refuse. That is in the short term. In the long term it will be the replacement of all worn or broken parts. That is the lift if there is one and perhaps the roof. Like a house things do go from time to time.

The service charge covers other expenses. It includes the premium on the Block Policy. It includes the fees of the Managing Agents. At year-end the accounts have to be audited and filed in the Companies Office and this is also an expense.

The lease also provides that apartment owners have to contribute towards the cost of providing these services.

If you have an apartment block that has apartments that are all of the same size then clearly everybody should contribute equally.

As stated the proportion to be contributed is always set out in the lease. A good draftsman properly instructed will allocate the proportion on a fair basis when the apartments are of different sizes.

The proportion is set out in the lease and once the ink is dry on the lease it really cannot be changed. The reason is that every apartment owner has to agree and no apartment owner is ever going to agree to a change that is going to increase the amount of the proportion.

On going to buy an apartment be it new or old you should find out what the proportion is and make sure that you are satisfied with it. Life has moved on for the draftsmen in that currently the proportion is generally determined by the size of the apartment. That is the size in area. The proportion is the percentage size that the apartment bears to the total floor area of all of the apartments in the block. However the thinking is moving on to a stage further to say really it should be determined by bed spaces. When you think about it that is probably fairer. That should influence the number of people having use of the apartment.

Sometimes the proportion calculated in relation to the use of the external common areas is calculated on a different basis.

Car parking is almost universally calculated by dividing the number of car parking spaces to which an apartment owner is entitled amongst the total number of car parking spaces.

You should see what your lease says about this and you should ensure at the Annual General Meeting that the service charge is calculated in accordance with the lease. It generally is but its something to watch.

Here is a worthwhile tip. Pay your service charge by standing order. It saves time for the Managing Agent and time is money.

## **WHY A LEASE?**

### **Why a Lease? What is it?**

That is a very good question.

In Ireland there are really two ways of owning property. You can have a freehold title or you can have a leasehold title.

A freehold title is when you own the property outright. By outright it means you have title to what is known as the bowels of the earth and the top of the sky. That is the extent of your title.

The position with a leasehold title is different. Somebody else owns the ground and for that matter the sky above the property. The owner (lessee) has a right to use it for a certain period of time subject to a rent and subject to conditions.

### **But why are apartments generally held under a Lease?**

The explanation is simple. In 1977 legislation prevented the creation of any more leases in relation to residential apartments unless the property was part of a number of properties of four or more that shared the same front door. Simply put apartments in an apartment block can be sold by way of lease. As already stated houses must be sold by way of freehold title. The law does not allow the creation of a lease in relation to a new house built after 1977.

A lease is an agreement, it is a contract and it is between the owner of the property known as the "Lessor" and the owner of the property known as the "Lessee" so you have both a Lessor and a Lessee. There may be other parties but the Lessor and the Lessee are the essential parties, for this discussion anyway.

The lease will be for a term. With apartments that can be from 99 years to 999 years. It must be over 70 years.

The lessee will have to pay a rent. The rent is generally nominal but the rent is only payable if it has been demanded by the Lessor.

But there are other reasons why it is a lease.

As already stated a lease is an agreement between a Lessor and a Lessee but there are other parts of the lease that are essential.

The lease will provide easements.

So if you own an apartment you must have easements. They are quite extensive but they include support and the essential services. The essential services are the supply of water and the discharge of sink and bath water and from the toilet as well.

But there is another essential element. That is "covenants". Covenants are agreements to do or not to do something.

The covenants on the part of the Lessor are to provide all of the services that are necessary and essential to enable you to live in the apartment. You see the word services coming in. That is how you get the word service charge. Then there are the covenants on the part of the Lessee. They are both negative and positive. The positive covenants include an obligation by the Lessee to pay for the services. That is how you get the word service charge.

There are other covenants that are essential for people "to share the same roof". Obviously you cannot create a nuisance and obviously you cannot subdivide your apartment.

When you sell your apartment your purchaser replaces you as Lessee. The apartment continues to receive all of the easements. The Management Company continue to agree to provide the services and your new purchaser agrees to take over your obligation to pay for these services and to comply with the other covenants.

Curiously because of an ancient law this does not happen when the title is freehold. No need to go into the law here other than to say that is another reason why leases are used for apartments.

At the beginning of a development until such time as the development has been finished the Lessor is the builder. When the builder has been paid for all of the apartments then the Lessor becomes the Management Company. The builder retires, so to speak.

So that is why you have leases.



## ***INSURANCE***

Insurance is slightly complicated in relation to an apartment scheme.

Every prudent house owner maintains insurance cover. It covers a number of items but principally it covers the house in the event of fire. It would be impractical for each apartment owner to insure his or her own apartment against fire. Firstly what would they cover seeing that they only own the plaster on the walls and the screed on the floor and the underside of the ceiling? Secondly it would be very cumbersome having a number of policies. Thirdly what would happen if somebody didn't maintain his or her insurance?

The answer to this problem has been well thought out. The Management Company arrange for a policy to be put in place to cover all of the structural parts of the apartment block that have not been sold to any individual or are not for sale to any individual and their external common areas. This is known as a Block Policy.

The builder arranges for this policy to be put in place in the first instance and when the builder has sold the last apartment the Management Company takes over this policy.

The policy notes the interest of each individual purchaser and also of that purchaser's lending institution.

Aside from that, each individual apartment owner should arrange their own separate insurance cover in respect of their own personal contents.

If an apartment owner is renting an apartment then the apartment owner should put in place a landlord's policy to cover any risk that might arise by reason of the fact that the apartment is let out.

## **MANAGEMENT COMPANY**

The builder always incorporates the Management Company. Incorporates is a word that lawyers use but it really means forms a Management Company.

The object of the Management Company, which is set out in the Memorandum of Association, is to manage the development and to collect the service charges.

Sorry we have used words that we are familiar with on a daily basis but you may not understand. A company has two parts. It has a section called Memorandum of Association and another section called Articles of Association. The section under the heading Memorandum of Association describes what the company can or can't do. The object of a Management Company is to manage the development and collect the service charges.

The Articles of Association are the rules by which it is governed. These rules are by and large set out in the Companies Acts. They deal with things like meetings and votes.

There are two types of company. There is a limited liability company and there is a company limited by guarantee.

A limited liability company has shareholders and each shareholder receives a certificate.

The company limited by guarantee does not have shareholders. It has members.

If either form of company goes bust with liabilities then in the event of it being a limited liability company there is no financial exposure to the shareholders.

In the event of a company limited by guarantee going bust then the members are exposed to the amount of the guarantee. The guarantee is generally €5.00/€10.00 per apartment.

In both cases the directors could be disqualified from acting as a director of any other company. Further if the company went into liquidation on account of the reckless behaviour of the directors then the directors could be exposed to prosecution through the Courts.

Well-managed Management Companies arrange director's insurance cover for each of their directors. The premium is payable by the Management Company and is part of the service cost and is recoverable through the service charge.

Every Management Company must have two directors, a secretary who can be one of the directors and a registered office.

The Management Company has a committee. This is sometimes referred to as the Council of Management. It looks after the day-to-day affairs of the apartment scheme. It meets as often as it deems necessary. It has a chairperson and the Articles of Association will set out the minimum number of members that it will have.

So in practice it operates just like any other committee.

The Management Company must hold an Annual General Meeting. All of the apartments owners are invited to the Annual General Meeting. There are certain procedures to be followed at the Annual General Meeting. These relate to the adoption of the accounts, the appointment of accountants for the following year and the election of the committee for the following year and "any other business". Some advice about this later.

## ***COMMITTEE / COUNCIL OF MANAGEMENT***

The people who put themselves forward to act on the committee are doing so in the best interest of the development.

Sometimes these people do not have experience of committee work and probably do not have experience of arranging for the services to be provided and the service charges to be collected.

In our experience they do have the best concern of the development at heart and they do take their duties seriously.

Like everybody else they are entitled to their privacy.

There are ways of communicating with the committee and ways of not committing with the committee.

If you have an issue then if you cannot resolve it yourself and if it requires the committee to resolve it then write a letter to the secretary of the Management Company bring the matter to the committee's attention. The committee should discuss it at the next meeting and should reply to you preferably in writing giving you the response.

The way not to go about it is to discuss it with one or more of the committee members when they are going about their daily lives. They didn't go on the committee to have their daily lives disrupted. The committee are entitled to their privacy.

Try and resolve all issues in this fashion and always be constructive.

In the unlikely event of the issue not being dealt with then you can raise the matter at the Annual General Meeting. That is the day when the committee have to account for their stewardship. It is sometimes helpful to a hard working committee if you tell them in advance that you are going to bring up your grievance.

However once again you should be constructive. Remember the committee give voluntarily of their time in the best interests of everybody and a non-constructive approach at a general meeting can dispirit the goodwill of those people who are working on your behalf. However if you feel that the committee are not doing a good job then put your own name forward for election onto the committee. In those circumstances that is the best way to change it.

The committee, often called the Council of Management, look after the provision of the services. That is everything from the supply of water, to the removal of refuse, to the collection of the service charges and to the arrangement of the Block Insurance. The list goes on. It is not an easy task. Further the committee members give of their time and their experience on a voluntary basis. Apartment owners are lucky that there are people who are willing to come forward in the best interest of a development and take on the responsibility of looking after the development. Respect them for what they do.

Every Management Company registered in the Companies Office has to hold an Annual General Meeting and at that Annual General Meeting it accounts for its stewardship.

Remember that it is your committee voluntarily doing work that you get the benefit of. Consequently always be gracious and as already said be constructive as well. That does not mean that you cannot ask questions. But bear in mind, as already said that if there are genuine questions there is nothing to stop you writing to the secretary in advance of the Annual General Meeting setting out the matters that concern you and giving notice of your questions. Hijacking a committee at an Annual General Meeting destroys goodwill, negatives hard work and makes possible new committee members cautious about going forward and can be to the detriment of the development. It is a non-profit organisation. Our view would be different if it was a profit organisation.

## What are the questions that you might ask?

Here is a list of some of the items that you might raise:-

### The Accounts

- Arrears of service charges;
- You can ask how many units are in arrears and for how long and if they are in arrears for an unsatisfactory length of time have they been pursued by way of the legal process;
- If there is an item of expenditure in the accounts that has increased more than the inflationary figure it is reasonable to seek an explanation;
- Is the sinking fund sufficient to cover the wasting assets i.e., roof, lift, air-conditioning, electrical panel for replacement when their natural life is up etc.;
- Has the sinking fund been put on deposit and if so at what rate?

Be prepared to argue from the floor against any person who proposes that the service charge should not be increased. It must be increased with inflation and adequate and significant money must always be put in to the sinking fund regardless of the financial climate;

There are any number of things that can come up under "any other business". This will be influenced on whether the apartments are owner-occupied or rented. If rented, the attendance is generally low at general meetings and apartment owners only turn up if there is a crisis. On the other hand owner-occupiers do turn up and do take a very strong interest. Remember counteract anybody, who is, without justification, criticising the committee. As said already the committee is voluntary, generally has little experience and is giving freely of its time. That must be respected.

## Votes

Normally each apartment has one vote at the Annual General Meeting. Normally this is regardless of the size of the apartment. Therefore the one-bedroom apartment has the same number of votes as the penthouse.

Normally it is provided that where there are two or more apartment owners that the apartment owner whose name appears first in the register is the person who has the vote.

Sometimes where there are apartments and houses on a scheme the apartment owners have the votes in relation to the internal common areas and all have the votes in relation to the external common areas.

We have seen some of the new substantial schemes that have come into existence from the mid 1990's there can be complicated voting arrangements. Complicated schemes would include apartments, houses, shops and a supermarket. In these cases the vote is much more complicated. There is no general practice but a well-advised apartment owner should know this before purchasing an apartment whether it is new or second-hand.

## ***THE MANAGING AGENT***

Because of the complex nature of managing shared ownership scheme there has been a growth in firms providing the day-to-day service for managing these schemes.

Managing Agents are in the market for knowing who is good at doing a particular job, who is reliable and the price that should be paid for the service.

Managing Agents manage substantial numbers of shared ownership schemes and so they have the know-how to do what should be done.

They know the companies that look after the maintenance of the lifts, they know the cleaning companies and they know the companies that look after the removal of the refuse. They know the companies that can provide handyman services in the event of an emergency. Therefore they do bring worthwhile knowledge and they save the Management Company the task of actually appointing contractors.

The Managing Agent works with the Council of Management of the Management Company on a regular basis. It ensures that the services are provided to the standard that the Council of Management require and it arranges for the collection of the service charges.

It also handles all emergencies.

In reality people living in shared ownership schemes could not properly function without Managing Agents and Managing Agents have, broadly speaking, brought a high standard to the overall maintenance of managed properties.

The Council of Management in appointing a Management Agent takes on a considerable burden of responsibility. In other words if it doesn't go right the Council of Management will be asked to account at the Annual General Meeting. That is fair.

## **What questions should the Council of Management put to a Managing Agent when appointing them?**

Here are a few:-

- Ask them for a list of the properties that they manage;
- Ask them for the name of somebody else in another shared ownership scheme that you can go to for a reference;
- Ask them do they have a Contract and if so ask to look at it;
- Carefully read the Contract and see what are the arrangements for disengagement. You cannot have circumstances where a Managing Agent can cease its appointment on very short notice. If necessary take legal advice on the Contract. It will be paid for out of the service charge;
- Ask for evidence of its own insurance cover and insist that the Managing Agent ensures that all personnel carrying out work for the Management Company are fully insured;
- Ask about its arrangement for collecting the service charges and what its attitude is to arrears;
- Ask if it has a firm of solicitors that it is using for pursuing the collection of service charges in arrears and enquire about its efficiency;
- Ask about its scale of management charges;
- Ask to interview the person who will be appointed to your development and see if you can work with that person;

- As about its emergency back-up service;
- Ask if it uses a particular firm of accountants to conduct the audit of the Management Company's accounts and satisfy yourself that the accountant will produce the account within a reasonable period of time i.e., three months from the date of the financial year-end.

There may be other issues that do occur to you due to the particular circumstances but the foregoing is a good start.

## ***RELATIONSHIP BETWEEN MANAGEMENT COMPANY AND MANAGING AGENT***

Obviously there has to be a close, trusting relationship between the Management Company and the Managing Agent. Assuming that this is the case it is normal practice for the Management Company to have regular meetings with the Managing Agent. The number of meetings depends upon the circumstances. The better the scheme is run, the less need there is for the Management Company to meet the Managing Agent.

If schemes are very well run then it may only be necessary to meet half yearly. If on the other hand there are ongoing problems it requires the Management Company to meeting the Managing Agent more frequently, even as frequent as once a month. Time is important to us all and is as equally important to the Managing Agent. Therefore the appropriate practice is for the chairman of the Management Company to be the point of contact between the Management Company and the Managing Agent. If this structure is not in place then there will be duplication and an increase in demand on the Managing Agents time that serves no one.

## ***RELATIONSHIP BETWEEN THE APARTMENT OWNERS AND THE MANAGING AGENT***

Apartment owners have elected a Council of Management. The Council of Management is thereby the appropriate party to communicate with the Managing Agent. Unless there is an emergency there should be no communication between an apartment owner and the Managing Agent. If there are issues then the appropriate communication is for the apartment owner to address the issue by way of correspondence with the Management Company. The Management Company can then take up the issue, if deemed appropriate, with the Managing Agent. Apartment owners who go outside this routine are a nuisance.

However the Managing Agents almost universally attend the Annual General Meeting. At that meeting, if justified an apartment owner can raise an issue with a Managing Agent and if appropriate, can seek an explanation. If the apartment owner is dissatisfied with the answer from the Managing Agent and with the attitude of the Management Company then that apartment owner can seek election to the Council of Management. This is the route to be followed in these circumstances. This is a non-contentious and non-confrontational method of resolving a dispute in relation to the provision of a service.

## **TAX RELIEF ON SERVICE CHARGES**

Certain elements of the overall service charge payable are eligible for tax relief.

Different rules apply to investors and to those who live in their apartments.

Investors are allowed to write off a range of legitimate costs against the rental income they receive, subject to certain overall limits and to the costs being genuinely incurred for the maintenance and upkeep of the apartment. In general, service charges paid to a management company are allowed as expenses against rental income.

If you are an owner-occupier then certain elements of the service qualify for tax relief. Tax can be reclaimed on those parts of the charge that relate to refuse collection and water and sewerage services.

Relief is given at the standard rate of 20% for service charges paid in full and on time in the previous calendar year. From January 2007 the total tax relief that can be claimed for service charges is subject to an overall limit of €400.

If you are self employed the tax relief can be claimed in your annual tax return. If you are a PAYE employer, you can claim the relief in a number of ways to include using the Revenue's PAYE self-service facility available on its website [www.revenue.ie](http://www.revenue.ie) or by completing the relevant claim form (Form IT27) which is also available on the Revenue's website.

## ***GOING TO SELL***



If you are selling your apartment you should contact your solicitor in good time. One of the things that your solicitor will need to know is whether the builder has transferred his legal interest in the development to the Management Company and if the Management Company is now the registered owner of the apartment scheme. That is very important.

If the builder has transferred his interest to the Management Company then there is no issue. If not there may be a problem. Builders are generally given a reasonable amount of time in which to do this. That would probably be a year after the last apartment was sold. If the year has expired and the common areas have not been transferred then the Management Company has a case to answer. More to the point you will have a case to answer to your purchaser. The longer that this goes on the more difficult it is to explain. If it has gone on an unreasonable length of time without an explanation then it could impinge on the marketability of your apartment. That is why you should go to your solicitor early. It just may be possible to do something or to obtain an acceptable answer.

Your solicitor will have to obtain information in relation to the Management Company, which is routine.

Your solicitor will have to find out if a Managing Agent has been appointed.

If Managing Agents have been appointed your solicitor will have to find out the name of the firm and the terms of engagement.

Management Companies are entitled under the leases of the apartments to make rules for the orderly living of persons in a shared scheme. It might be that all refuse is to be bagged and put into the bins provided. It might be that bicycles are not to be brought through the building but are to use the gate provided. There are any number of rules. Your purchaser will have to be made aware of these.

The next questions relate to the matter that we have been discussing several times which is the sinking fund. Your solicitor will have to find out the level of the sinking fund and where it is held. This will be vital to your purchaser, as you can imagine. Your solicitor will have to obtain a copy of the latest set of accounts. The accounts should be ready within six months after the end of the financial year of the Management Company.

Your solicitor will wish to know what the amount of the service charge is. Your purchaser will have to be advised of this.

Most importantly your purchaser will have to be told if there is any possible claim against the sinking fund. In other words is it envisaged that substantial work will be carried out in the future. This would be work beyond the normal maintenance and repair. It would relate say to a structural element such as the lift.

If for example the roof had to be replaced. This does happen. If the funds were insufficient to cover this then the incoming purchaser would have to make a choice either to go ahead in the knowledge that work is

going to have to be done that has not been provided for financially or not to go ahead or to go ahead on a compromise being that when the work is done the vendor will pay a portion of that cost. After all, the vendor had the use of it and not the purchaser. The money could be set aside until the work was done.

From this you will see the point that we continuously make that an under-funded sinking fund will impact negatively on the marketability of a second hand apartment.

We often say in the legal profession that the day you buy is the day you sell. In other words when you purchase a property you should be able to sell the property the next day. If it is a house and the title is in order then you will be able to. If it is an apartment then the title may be in order but the Management Company may not and this could impact on its marketability. That can be influenced by the supply and demand circumstances in relation to second hand apartments prevailing at the time of the sale.

## ***BUILDING ENERGY RATING CERTIFICATE***

Energy Rating Certificates apply to all buildings but in the context of this commentary we are only dealing with their application in relation to second-hand dwellings. Consequently we are not commenting here on new dwellings or on non-domestic buildings.

Existing dwellings must have an Energy Rating Certificate and an Advisory Report prepared by a certified BER Assessor if offered for sale or letting on or after 1st January 2009.

The energy performance of the buildings directive is concerned with providing prospective purchasers and prospective tenants with standardised information setting out the energy rating of a building. The certificate provides in a standard form a rating of the energy consumption of the building. The certificate must be accompanied by an Advisory Report produced by a BER Assessor. This report may recommend improvements to the energy performance of the building. The obligation is to provide the information. There is no obligation on either the vendor/landlord or the prospective purchaser/tenant to make the recommended improvements. There is no requirement that a building should achieve a particular level of energy rating.

The directive imposes the obligation on the person who offered for sale or letting to produce the BER Certificate and the Advisory Report. Consequently the agent acting on behalf of the vendor/landlord has to produce the BER Certificate and Advisory Report where such an agent is engaged. If an agent is not engaged then the onus falls upon the solicitor acting for the vendor/landlord.

It is good practice for the owner or the estate agent to provide this information to potential purchasers/tenants when the property is advertised.

If an Energy Rating Certificate and Advisory Report are not available when a property has been sold or let, a solicitor acting for such person cannot issue a contract/letting agreement until such time as the certificate and Advisory Report have been obtained.

There is no provision enabling a prospective purchaser/tenant to waive the obligation to provide a copy of the BER Certificate and Advisory Report.

The regulations are very clear in their intention. The purpose is to ensure that prospective purchasers/tenants have all of the necessary relevant information concerning energy usage of a building at the earliest possible stage and at least before the contract issues. This intent cannot be fulfilled if the purchaser is bound to contract in advance of having this information and in those circumstances the only way that it can be remedied is if the purchaser/tenant is simultaneously given the opportunity to back out of the contract.

The obligation is simply for the vendor/landlord to provide the appropriate information in relation to energy rating prior to making a sale or letting. There is no requirement on the purchaser to seek this information.

There is no requirement on a dwelling owner to have a current or existing Energy Rating Certificate. It only applies if there is going to be a sale or a letting.

An Energy Rating Certificate remains valid for ten years but notwithstanding this it can be rendered invalid in the following circumstances:-

- a change in the heating system;
- a change in the type of fuel used;
- an alteration to the dwelling such as an extension;
- a significant deterioration of the fabric of the building.

If an invalid certificate is offered then there is a failure to comply with the regulations. In the circumstances no certificate is produced.

Failure to produce an Energy Rating Certificate does not have consequences in conveyancing terms. Failure to comply with the regulations renders the person concerned liable to prosecution. A person who contravenes any requirement of the regulations commits an offence. The offence is punishable by fine which is limited to €5,000.00 or if there is an obstruction of an authorised office imprisonment.

These regulations are in their early stages. There will be discussions in the media which you should pay attention to.

If you would like to find out more then here are two useful websites:-

- <http://www.environ.ie/>
  
- <http://www.sei.ie/>

## ***A COUPLE OF SUGGESTIONS***

If you are a landlord then you should for everybody's sake including your own be more careful about selecting your tenants. A bad tenant will be a problem for you as landlord and for the rest of the inhabitants. It will cause the other occupiers grave problems and you will not be popular.

A bad tenant can make a lot of noise, can over crowd and may not be caring about hygiene. Bad hygiene can lead to vermin including cockroaches.

If you are a landlord and living abroad then the onus to find a good tenant is greater because the problems will be magnified.

As a landlord you should always have a key of your apartment.

Anybody having repairs, particularly a landlord should be very careful. A new bath or shower not properly sealed can do untold damage and you may find yourself responsible.

## **CONCLUSION**

Apartment culture is slowly becoming the norm in this country. The quality of workmanship has greatly improved and so living in an apartment can provide a high standard of comfort, good security and good access to our transport system.

This has been the way in mainland Europe and indeed in Britain for a long time. Apartment living has been slow to catch on here but in the last fifteen years the attitude and the accommodation have changed dramatically. Everybody now knows somebody who lives in an apartment.

To take the first steps towards a comfortable existence in an apartment scheme it is important to have an energetic committee that freely gives of its time to ensure that the highest standards are maintained.

Because of the various services that have to be provided to an apartment block it is critical that a Managing Agent is appointed. There should be a close and constructive working relationship between the committee of the Management Company and for the Managing Agent to both understand what is required and that what is required is delivered. In the delivery of the service it makes prudent sense to invest in the scheme. It is always possible to improve the scheme. There are opportunities both in relation to the internal and the external common areas proving to have a very beneficial knock-on effect so much so that there are some apartment schemes that are so well run that they actually have a waiting list regardless of the financial climate.

Most importantly the members through the Management Company should be prepared for all eventualities and should have a well-funded sinking fund fully capable of dealing with needs as they arise.

If you follow this conclusion then your stay in the apartment will be enjoyable and the return on your investment will be profitable.

### ***About Liston & Company:***

We look upon apartments with a passion.

It is a slightly complicated legal subject but like anything when you come to understand it, it is easy. We have been privileged to have been able to realise our dreams and to put in place legal documents for apartment schemes.

In any scheme in which we are involved we have come to recognise that there is no precedent. Every single document is tailored to the circumstances that have been presented to us and we can happily and proudly say that they have worked. Apartments for which we have drafted the leases have been bought and sold and re-sold.

This office has been closely associated with the education of both students of Law and our own colleagues. We have continuously lectured to students for over thirty years. In that time our knowledge has grown greatly.

We have been involved in more in-depth lectures with our colleagues.

We have participated with committees in the Law Society in relation to proposals to improve the system and in relation to responses to reports produced by government agencies. It has been a happy experience for us.

Should you wish you could find out more about us if you visit

<http://www.liston.ie/>