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Paddocks PRESS

LEVIES
WHAT YOU REALLY NEED TO KNOW...

WHAT IS PADDOCKS PRESS?

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INSIDE THIS ISSUE:

By Andrew Schaefer

By Jennifer Paddock

Whether you are an owner, a trustee, a managing agent or an attorney, you will agree that levies are essential to the efficient running of sectional title schemes. Often referred to as the "life-blood" of the body corporate, owners have to pay levies and trustees, managing agents and attorneys may have to collect them. Every person involved in a sectional scheme needs to understand how levies work, from the procedures to be followed when they are raised to the consequences of non-payment.

Why are levies raised?

Each body corporate is required in terms of section 37(1)(a) of the Sectional Titles Act of 1986 ("the Act") to establish an administrative fund sufficient, in the opinion of the body corporate, to cover its expenses. A body corporate's expenses include the repair, upkeep, control, management and administration of the common property (including reasonable provision for future maintenance and repairs), payment of taxes and other local authority charges for electricity, gas, water, fuel, sanitary and other services to the building/s and land, any premiums of insurance, and sufficient for the discharge of any duty or fulfillment of any other obligation of the body corporate. Levies are raised to raise funds necessary to pay for these expenses and usually make up the bulk of the money credited to the body corporate's administrative fund.

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WHAT DOES BODY CORPORATE INSURANCE COVER?

The Sectional Title Act requires the Body Corporate to insure the buildings to the value of their full replacement cost. The insurance covers all the sections and all improvements to the common property. The premiums for the Body Corporate's insurance form part of the monthly levies, it should however be noted that the Body Corporate insurance only covers damage and destruction of the buildings. It does not cover the contents of your section. You must make sure that your furniture, fittings and personal belongings are separately and adequately insured by means of a suitable policy.

If you feel that your section is worth more than the amount for which it is insured, you are at liberty to increase the amount for which your section is insured, for which you will have to pay the extra premium. This would include improvements to any individual unit, if the owner has done improvements and these have subsequently increased the value of the unit, these improvements must be added to the insurance schedule with *...to page 4*

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How are levies raised?

The outgoing trustees estimate the body corporate's expected expenditure in the next financial year and this budget is considered at the annual general meeting ("AGM"). Once approved by owners, perhaps with alterations, the trustees meet again to divide the estimated expenditure between the owners and work out what amount each owner must pay as an ordinary levy, in what installments the levy will be paid and what rate of interest will be charged on overdue levy payments. The trustees then notify each owner of the amounts due and each owner is then liable to pay such levies, normally in monthly instalments.

How is the quantum of each owner's levy contribution determined?

The approved budget of estimated expenditure is normally divided amongst owners in accordance with each owner's participation quota ("PQ"). The PQ is a fraction worked out by dividing the floor area of each owner's section as shown on the sectional plan by the total of all the floor areas of sections in the scheme. For example, if owner A's section has a floor area of 50 square metres and the sum of all the sections floor areas is 1000 square metres, then owner A's PQ will be 0,0500 or 5% because 50/ 1000 = 0,05.

However the PQ formula for levy liability is not absolute; it can be varied if the correct procedure is followed. Section 32(4) of the Act makes it is possible for the developer when opening the sectional title register, or later for the body corporate by special resolution, to make rules under section 35 by which the liability of the owners to make levy contributions is modified so as not to be based on the PQ formula. But where an owner is adversely affected by the adoption of a rule in this regard, his written consent must be obtained. A rule of this nature could be adopted in a scheme where the owners specially resolve that owners of ground floor sections should not have to contribute towards lift maintenance costs, or where it is specially resolved that owners will pay an equal amount of levies, provided of course that those owners who are negatively affected give their written consent.

Special levies

In terms of prescribed management rule ("PMR") 31(4) the trustees may from time to time raise special levies for expenses which are necessary but were not budgeted for in the estimated expenditure approved at the last AGM. Trustees do not have the power to raise a special levy when a budgeted expense exceeds the approved estimate. They can only raise a special levy for unexpected expenses which were not included in the budget. These special levies may be payable in one lump sum or by such instalments as the trustees think fit.

It is important to note that the trustees alone have the power to raise special levies for genuinely necessary and unbudgeted expenses. Many owners think that because they were not consulted by the trustees or did not vote in favour of a special levy, that it was invalidly raised. Not so! Trustees are under no obligation to consult owners in this regard and are entitled to raise special levies in accordance with the provisions of PMR 31(4).

When do levies and special levies become payable, who is liable to pay them and what happens when units change hands during a financial year?

In terms of section 37(2) levies are due and payable on the passing of a resolution to that effect by the trustees of the body corporate and may be recovered from the persons who were owners of units at the time when the resolution making the levies due and payable was passed. This means that the person who owned the unit when the levy became due and payable is the only person from whom the body corporate may legally recover the levy.

This can become a contentious issue when, for example, a special levy is raised and becomes due and payable after an owner has sold his unit but before the transfer of ownership has taken place. As soon as the unit has been transferred from the seller to the purchaser the seller may believe that he is not liable to pay the special levy because he is no longer the owner of the unit. But because the seller was the owner at the time the special levy was raised and became due and payable, the body corporate is legally entitled to recover that special levy only from the seller and has no legal entitlement to recover the special levy from the purchaser as the new owner. Similarly, if the day after transfer has occurred a special levy is raised for something that occurred 'before the *...to page 3*

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...*from page 2* purchaser's time' – the purchaser as the owner at the time the special levy was raised and became due and payable is liable to pay the special levy.

To avoid disputes arising regarding levy liability, the seller may assign his levy liability obligations to the purchaser with effect from the date of transfer. Strictly speaking, the seller and the purchaser are not able to conclude such an agreement on their own. The body corporate must accept the benefits of such an agreement, releasing the seller from his statutory obligation and acquiring a contractual right to recover the outstanding levies from the purchaser. This can be achieved by way of a "tripartite agreement" entered into by the seller, purchaser and body corporate.

Can an owner ever legally withhold a levy payment?

If an owner believes for some reason that the body corporate owes him money, he may also believe that he is fully entitled to withhold his levy payments, to 'set-off' the debt he believes is owed to him. Imagine this scenario: an owner has had water leaking into his section and the leak is clearly emanating from a defect in the common property. The owner has asked the body corporate on numerous occasions to repair the defect, yet after two months the body corporate still has not done so. The frustrated owner resorts to employing a contractor to repair the common property defect and foots the bill which comes to R2000. His levies are R1000 per month so he decides that he will not pay levies for two months to set-off the money he believes is owed to him by the body corporate. Although this action may sound reasonable it is not legally justified. One is only entitled to set-off a "liquid debt" once a matter has been adjudicated by an arbitrator or a judge. Therefore an owner cannot simply decide to set-off what he considers to be the amount of his claim against the body corporate by withholding his levy payments without the matter being adjudicated. He must continue to pay his levies and can attempt to recover the money spent on repairing the common property defect through the legal channels of litigation or declaring a dispute under PMR 71 by taking the body corporate to arbitration.

Can I ever re-claim levies that I have paid to the body corporate?

PMR 45 states that owners are not entitled to a refund of contributions lawfully levied upon them and duly paid by them. Therefore unless the owners can prove that a part or the whole of a contribution levied upon them was unlawful, they are not entitled to recover or be refunded any levies that they have paid to the body corporate.

What sanctions do I face if I don't pay my levies?

The prescribed management rules set out a 'sanction' for owners who default in their levy payments. PMR 64 provides that if any contributions payable by an owner in respect of his section or the common property have not been duly paid, that owner shall not be entitled to vote at any general meeting. However, this "no vote" sanction is only applicable to general resolutions and therefore a defaulting owner is still entitled to attend trustee and body corporate meetings, to speak and to vote for any special or unanimous resolutions. Furthermore, if a defaulting owner's bondholder has made its interest known to the body corporate it may vote on behalf of the owner for general resolutions by exercising the proxy in the mortgage bond. It is clear that this sanction is ineffective and does not act as a deterrent to owners considering not paying their levies.

An owner who continually defaults in his levy payments is effectively being subsidized by the other members of the body corporate who conscientiously pay their levies. This is not an equitable situation and the trustees or managing agent will probably arrange for the scheme's attorney to issue summons against a regular defaulter. If an owner believes that he is entitled to withhold his levy then he should declare a dispute with the body corporate under PMR 71. If an owner is in default for any other reason, he will have to defend himself in litigation procedures instituted by the body corporate to recover the arrears and will almost certainly find that he has to pay the outstanding levies, as well as interest and legal costs. ▪

Jennifer Paddock is a sectional title consultant at Paddocks. She works together with Prof. Graham Paddock and Judith van der Walt and her hourly rate is R500 plus VAT. Should you wish to consult with Jennifer, please contact Amy on 021 674 7818 to set up an appointment.

WHAT DOES BODY CORPORATE INSURANCE COVER?...continued

from page 1 ...the value and again this additional insurance will be for the owners own account.

Under the sectional title insurance policy a body corporate is only expected to pay the excess for a claim lodged which is directly related to the common property area. Should the body corporate lodge a claim on behalf of a specific unit, the unit owner is liable for the excess payments.

Procuring adequate insurance is one of the first tasks expected of the trustees after establishment of the Body Corporate. Body Corporate insurance policies must be revised annually. Ahead of each Annual General Meeting (AGM), trustees must prepare the following insurance schedules:

- A schedule reflecting the aggregate replacement value of all buildings and improvements.
- A schedule assigning the aggregate replacement value to individual units according to participation quotas.

The insurance policy must subsequently be modified according to the approved schedules. You will find any increases in the insurance premiums are clearly stipulated in the insurance schedules that accompany the notice of the AGM. With the increase in property values, it is inevitable that your rates and taxes will also increase. It is up to the members of the Body Corporate attending the AGM to approve any proposed levy increases.

Trustees and owners should check the following to avoid claims from being rejected:

- Functional and adequate fire-fighting equipment should be in place
- The scheme should not be under insured
- Equipment and building materials should be SABS approved e.g. geysers
- Sectional title insurance policies have not lapsed. ▪

SECTIONAL TITLE SCHEME MANAGEMENT STUDENTS

Congratulations to the class of December 2007 for completing the 5th presentation of the UCT Sectional Title Scheme Management Course!

Left: The Johannesburg student group

Above: The Cape Town student group

Above: The Durban student group

BACK TO BASICS

BY JUDITH VAN DER WALT

Consumption of Water

Judith van der Walt

It happens quite often in sectional title schemes that the person living in the large penthouse apartment on the twelfth floor of the building complains that he pays much more towards the scheme's water bill than the five students living in a bachelor apartment on the ground floor of the scheme. To make matters worse, ground floor apartments often have gardens and high volumes of water are used to water these gardens during hot summer months.

This situation can be clearly inequitable but it can get even worse; what about the scenario where the penthouse owner has a swimming pool on his roof deck which he constantly fills with water during the summer? Or the owner of a laundry in a mixed scheme, who uses vast volumes of water everyday of the week to run his business?

The Sectional Titles Act of 1986 requires, by default, that owners contribute to common expenses (which usually include the cost of water) based on the participation quota of their sections, which are in turn based on their floor areas. This provision does not take into account the fact that the consumption of water can, most often, not be equated with the size of an apartment or the number of people occupying such an apartment.

There are two solutions to this problem and both are provided for in the Sectional Titles Act. The first solution is to install separate water meters in each section, which water meters will measure the exact use of water by the occupants of the section. The owners can, by majority vote, instruct the trustees to install separate water meters at the Body Corporate's expense. Unfortunately, this could be very expensive, and even impractical to install separate water meters, especially in older high-rise buildings where water is supplied to each section on each floor by a number of separate pipes.

In circumstances where the water use differs vastly from section to section and it is not practical to fit separate water meters for each section, the trustees can consider having meters installed for those sections or areas of common property that consume large volumes of water, for example the laundry and apartments with swimming pools or big gardens.

The other solution is for the members of the Body Corporate to make a rule by special resolution which regulates the contributions made by owners for water consumption. But such a rule is likely to be very controversial because without water meters accurately measuring the use of water the contributions must be based on estimations. In addition, any rule that varies the effect of the participation quotas on owners' liability for contributions can only be validly made with the written agreement of those owners who are adversely affected, so those owners who believe that they will be adversely affected by the application of such a rule, by having to pay for more water than they actually consume, will be able to argue that the rule is not valid without their agreement.

I suggest a practical approach. Where separate water meters are practical throughout the scheme, they should be installed. Where they are not, the high water consumption areas in the scheme should be isolated and measured with separate meters. Only as a last resort should a special rule be made to deal with this issue. ▪

Q & A WITH THE PROFESSOR

By Prof. Graham Paddock

Notice for 'round robin' resolution

Q1: In the Sectional Titles Act it states that for a special resolution to be taken at a meeting 30 days notice has to be given. Is there any notice period required before a round robin vote is taken? Can an owner take time to study the resolution before being required to vote on paper?

A1: No notice is required for a 'round robin' procedure, but no owner is obliged to sign immediately or at all.

Moratorium on renovations

Q2: The trustees granted permission for an owner to do some renovations. The owner has fired the contractor for bad workmanship and has arranged for another contractor to finish the work. The trustees took R1000,00 from the deposit the owner paid, saying she was in breach as the original date for completion of the renovations was not met. The trustees held a meeting and have now advised the owner that there is a moratorium on owners conducting any renovations between November and April and that she must wait until the end of April next year. They say this is because they have had problems with people doing renovations over the Christmas period previously.

The work is not structural but involves some painting and skimming to a few walls, sealing of brickwork and, finishing/sealing of floors and putting in cupboards and fittings. Do the trustees have the power to pass and enforce such a moratorium on owners?

A2: To impose a moratorium in respect of an activity which has already been authorised without reference to the possibility of that moratorium also seems fundamentally unfair.

There may be good reasons for the body corporate deciding that renovations should not take place over the holiday period. But in order to make this a rule of general application it should be included in a conduct rule or, at the very least, imposed as a condition on the approval of any alterations.

Water supply pipe and geyser damage

Q3: The water pipe between the Council mains and my section was damaged and sand has now entered the pipe and washed down to my geyser, blocking the geyser filter. Please could you advise me of my rights with regards to the plumber's bill for cleaning the blocked filter and flushing the geyser?

A3: First consider the damage to the pipe, which allowed the sand in. This is outside your section, i.e. beyond the median line half-way through your section walls, so the body corporate must carry out and pay for the repair.

If the body corporate can identify the cause of the damage, it may have a claim against the person who damaged the pipe, but the primary operational and financial responsibility lies squarely on the body corporate. The fact that the pipe serves only your unit does not make it your responsibility unless it is within your section.

Secondly, consider the work done to your geyser. Whether it is inside or outside your section you are responsible to carry out and pay for the maintenance and any repairs. But if you can prove that the damage was the direct result of the body corporate's failure to repair the supply pipe, you will have a claim against the body corporate for the costs. The geyser is almost certainly insured under the body corporate's policy and this type of expense may be covered. Get the managing agent to submit the claim and make sure that the body corporate pays any "excess" or "first payment" because of its responsibility for the damage.

No pets rules made under the old Act

Q4: Our scheme was registered under the 1971 Sectional Titles Act and our rules provide that no pets are allowed. Has any court decided that a new owner has a right to bring in pets whatever the previous rules said?

A4: The 1986 Act did not interfere with the conduct rules (then called Schedule 2 rules) of schemes registered before mid-1988. *...to page 7*

Q & A WITH THE PROFESSOR ...continued

...from page 6 So if your Schedule 2 rules filed at the Deeds Registry before 1988 provided that no pets at all are allowed, then that provision is still in force unless the body corporate has amended it since by special resolution and lodged the amendment at the Deeds Registry.

Police clearances for occupiers and tenants

Q5: I understand that some bodies corporate have made rules that require that all tenants and other occupants, including family members or resident adults, who are 18 years and older must be cleared by the police. The burden of responsibility falls on the letting owner or his agents.

1. Is it lawful to subject tenants and other occupiers to a police check in the name of security?

2. If one of the occupiers is found to have a criminal record can the body corporate exclude that person from the complex?

A5: The owner of a sectional title unit is entitled to let that unit unless reasonable rules, duly lodged at the Deeds Registry, restrict that right.

If the rules of a scheme do not contain a provision which restricts letting without the consent of the trustees (which is unusual) the trustees have no special rights to interfere in the relationship between an owner and that owner's tenants. Certainly they are not entitled to demand that an owner obtains a police clearance certificate before allowing any adult to occupy a unit or to exclude any person because no such certificate has been provided.

How many trustees can represent an owner who is an artificial person?

Q6. Please comment on the interpretation of the Prescribed Management Rule 5 in regard to the composition of the board of trustees, particularly in the requirement that the majority of trustees must be owners or their spouses.

Where an owner is a limited company can the sole director be elected to serve on the board together with his wife? If they are both nominated by the company, are they both considered owners or is one an owner and the other a non-owner?

A6. PMR 5 could be more clearly phrased.

An owner who is a juristic person such as a limited company can nominate one or more persons to serve as trustees, just as any natural person can. The action of the juristic person in making that nomination must be in accordance with its internal governance documents. So, for example, a director of a company who signs a nomination form must be duly authorised by a resolution of the directors unless he is the sole director.

At the AGM the body corporate can elect one or more trustees nominated by an artificial person, but only one of them can be considered to be the representative of that artificial person/owner for the purposes of satisfying the requirement that the majority of trustees be owners or spouses of owners.

In other words, where a director of a limited company owner and his spouse are both elected trustees one of them should not to be an owner and is also not "spouse of an owner" for the purposes of PMR 5(a).

Caravans and trailers

Q7: Does the rule which states the Trustees have the right to tow vehicles at the owners expense and risk also cover for the removal of caravans, trailers and boats?

A7: Yes it does; in this context the term 'vehicle' includes caravans and trailers, as well as trailers loaded with boats.

The full text of prescribed conduct rule 3(1) and (2) , headed 'Vehicles' is:

(1) No owner or occupier shall park or stand any vehicle upon the common property, or permit or allow any vehicle to be parked or stood upon the common property, without the consent of the trustees in writing.

(2) The trustees may cause to be removed or towed away, at the risk and expense of the owner of the vehicle, any vehicle parked, standing or abandoned on the common property without the trustees' consent. ▪

THANKS TO THE CONTRIBUTORS

Jennifer Paddock

Paddocks

021 674 7818—www.paddocks.co.za

Andrew Schaefer

Trafalgar Property Management

011 214 5200 — www.trafalgar.co.za

Prof. Graham Paddock

Paddocks

021 674 7818—www.paddocks.co.za

Judith van der Walt

Paddocks

021 674 7818—www.paddocks.co.za

Upcoming Events in the Sectional Titles Industry

Event	Date
UCT Trustee Training with Coleman Properties, JHB, Session 1	28 June
UCT Trustee Training with Coleman Properties, JHB, Session 2	5 July
UCT Sectional Title Specialist Realtor Course	Starts 25 August
UCT Advanced Scheme Management Course	Starts 6 October

Please contact Robyn on 021 674 7818 for more information regarding the above events or to submit an event.

ABOUT PADDOCKS

Paddocks is a specialist sectional title firm providing a range of products and services through its **Learning, Consulting, Development, Publishing,** and **Software** divisions.

Prof. Graham Paddock is the head of Paddocks, an authority on Sectional Title law and practice and an adjunct Professor at the University of Cape Town. He is the Project Manager and one of the lead consultants to the Department of Housing in the restructuring of the Sectional Titles Act and the establishment of an Ombuds Service.

Learning

Together with the Universities of Cape Town and Stellenbosch as well as the National Association of Managing Agents and other professional organisations, Paddocks Learning offers several sectional title certificate courses, seminars and conferences.

Consulting

Graham Paddock leads the consulting division and is assisted by Judith van der Walt. Paddocks Consulting deliver consulting, drafting and representation services, primarily to sectional title bodies corporate, but also to developers, owners and others involved in schemes. They consult to various levels of central and local government and act as mediators and arbitrators of sectional titles disputes. The consulting team also offers conveyancing services.

Development

Paddocks Development leverages the firm's sectional title expertise to complete niche sectional title property developments in the Western Cape.

Publishing

Since 1983, Graham Paddock has written sectional title books, pamphlets and training manuals for trustees and managing agents. Paddocks Publishing sets, prints and publishes a range of electronic and 'hard copy' sectional title publications by Graham and other authors which make Sectional Title expertise easily accessible to the South African population at large.

Software

Paddocks Software designs and manages the production and distribution of a variety of software tools which provide substantial efficiency gains to those involved in sectional title management and consulting.

Please see **www.paddocks.co.za** for more information ▪