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Property editor of the NZ Herald

Apartment blues: Time to control the body corporate managers



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Mt Wellington accountant Brent Murdoch is a worried man.

He says the management of a block of shops - he owns one and is also the body corporate chairman - illustrates precisely why there should be a change in the law on the administration of multiply-owned buildings.

Murdoch, of accounting firm Clark & Murdoch, had one body corporate manager looking after the Mt Wellington property for some years without much joy.

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"After a number of incidents we changed managers and the new one proved a lot more proficient. Unfortunately, that was sold and we got another new one. Our body corporate now has a substantial accumulation of funds for long term maintenance saved up and it is a concern to me that the system is unregulated," says Murdoch.

He says he has a good reason for attending meetings of the Body Corporate Chairs' Group: to remind himself never to buy an apartment.

"Kiwis haven't evolved into a shared accommodation situation that works," argues Murdoch. "Most Kiwis come from a stand-alone home, so when you put a lot of people together, they don't share too well -- and the law doesn't help."

Murdoch is one of many people pushing for an overhaul of the Unit Titles Act, to beef up the system which governs properties held in multiple ownership.

In Auckland, apartment owners can pay anything from a few hundred to tens of thousands of dollars a year in body corporate fees.

But in what appears to be a bizarre sleight of hand, while bodies corporate are regulated, their managers are not. That has brought grief, particularly to Auckland's rising number of apartment dwellers, many of whom assumed that buying an apartment had made their lives simpler, only to find themselves tied up in knots in the system.

In the words of house-dwelling Brian Keene, QC, president of the Auckland District Law Society and a skilled litigator with more than 37 years of experience: "I go home for peace and quiet, not to apply my skills to where I live."

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Mt Wellington accountant Brent Murdoch

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In Wellington, Neil Cooper enjoys living in an apartment in Victoria St, in the heart of the capital. But as national president of the Body Corporate Chairs' Group, set up to support body corporate chairpeople, he doesn't enjoy hearing stories of heartbreak and financial difficulties.

So Cooper wants managers regulated.

"Some body corporate management companies are a law unto themselves," he says. "There is no regulatory body governing them, no code of conduct and no disciplinary processes available when one abuses their powers. At the same time, though, they are effectively trustees of many millions of dollars of owners' money, not all of which is well managed as this case shows."

Cooper is referring to a Tenancy Tribunal decision reported on last month, in which adjudicator Brian Stephenson ruled against Body Corporate Administration, previously in charge of unit title businesses in two Auckland properties -- the Heritage Hotel in Hobson St and the City Life building, Queen St.

Nineteen claims, including issues involving accounting practices and over a sum of \$43,246, prompted Stephenson to question the body corporate system and unit title owners' lack of redress to any official authority.

"Had the same facts arisen in the context of a solicitor's trust account, the inevitable result would have been an inspection of the trust account by the New Zealand Law Society, probably followed by disciplinary action. There appears to be no comparable regulatory regime overseeing trust accounts operated by secretary/managers for bodies corporate," Stephenson wrote in his tribunal decision.

Cooper, of the Body Corporate Chairs' Group, says the latest legislation failed to remedy existing issues.

"The group is aware of less than satisfactory practices from some body corporate management companies. Bad practices have been there for years, and while the 2010 Act has addressed and reduced a number of issues, not all management companies are compliant with the Act, let alone with the intent of it," he complains.

Most managers are doing well, Cooper acknowledges, but when issues do arise, they tend to be major ones, often involving millions of dollars.

"The Act has no teeth. While the chief executive of the Ministry of Business, Innovation and Employment (MBIE) has powers to investigate breaches, the Act also states that the chief executive is not obliged to perform or exercise any of those functions or powers.

"In practice, MBIE plays no part in enforcing the Act, and information of value to chairs is limited to what is on their website," he says, although he does concede that the site has been improved recently.

Andrew Porter is general manager of one of Auckland's larger body corporate managers, Boutique Body Corporates, and shares concerns about the sector.

Key Questions

- If a body corporate manager says they use a trust account, check it is separate from their own business account.
- Check whether interest on funds held is paid to the body corporate.
- Check funds are clearly identified.
- Ensure there is a current contract between the body corporate and the manager, setting out the tasks the manager is responsible for.
- What is the degree of rigour around audit - is each account audited, or just spot audits carried out?

"We [Boutique] have a full accounting department headed by a qualified accountant. We hold all funds in a trust account but we get externally audited and we pay for that. That gives a high level of comfort," he says. "But anyone can become a body corporate manager in the same way that anyone can become a property manager."

Porter fears there could be a big failure, potentially with the loss of many millions of dollars.

Some bodies corporate keep control of their own finances, he says, which removes the potential for a manager to flee with the funds. But that system also brings potentially higher costs and more complications because, for a manager to pay bills, owners must give authorisation.

The ministry, however, says it is keeping an eye on the issues. "MBIE will continue to monitor behaviour and performance in this sector and hasn't ruled out a regulatory regime for body corporate managers should the need arise," says a spokesperson.

The Act provides rights and obligations on bodies corporate and unit owners to manage their unit title developments, with the state assisting by providing a framework for the democratic process and, if necessary, a disputes process through the Tenancy Tribunal, MBIE says.

"MBIE assists bodies corporate and unit owners to manage their own affairs and exercise their property rights by providing online material and advice over the phone or via email.

The review found that property managers are already subject to a range of obligations under general law, and that sufficient remedies exist for property owners who suffer loss when these obligations are breached.

MBIE

"The issue of regulation of property managers and bodies corporate was carefully considered when the Unit Titles Bill was taken through the parliamentary process in 2009-2010. Further to this, in 2009 a review of the property manager sector conducted by the Ministry of Justice concluded that no new regulation was necessary.

"The review found that property managers are already subject to a range of obligations under general law, and that sufficient remedies exist for property owners who suffer loss when these obligations are breached," MBIE says.

None of which offers much comfort to Milford lawyer Nick Kearney, who also cites the lack of regulation of body corporate bank accounts.

"While yearly audits are enshrined in the legislation, members can pass a special resolution removing that requirement, and if so passed, these significant accounts, that can administer millions of dollars, remain largely unregulated, unlike real estate agents' trust accounts which have a mandatory audit each year," he says.

Another worry is the lack of information that must be provided to potential purchasers in a pre-contract disclosure statement, and the lack of remedy if one is not provided.

"All the juicy information is contained in the pre-settlement disclosure statement but a purchasing decision is usually based on information provided in the [pre-contract statement]. Particularly, the pre-contract statement does not contain any information about long-term maintenance funds and purchasers can get a rude shock when this is given closer to settlement," Kearney says.

The pre-contract statement goes to a potential buyer before an agreement is signed, whereas the pre-settlement statement must be provided at least five working days before settlement and contains much more detailed information.

John Gray, president of the Home Owners and Buyers Association (Hobanz), also wants to see a law change. He says the current situation is dangerous because body corporate chairpeople and their committees have failed to realise that the statutory role of secretary has been removed from the Unit Titles Act. So they have continued to engage their former secretaries who have morphed into body corporate managers.

Last year an Australian body corporate manager misappropriated \$1 million of body corporate funds. We are lucky nothing of that magnitude has happened here, at least that we are aware of.
Liza Fry-Irvine, of Auckland law firm Pidgeon Law.

"The change to the Act was to put the power and control in the hands of the owners via their elected chairperson and committee, and all they perhaps needed was a book-keeper and for larger complexes a facilities manager. The managers have inserted themselves into the operation of bodies corporate and in many cases in the absence of a proper management services agreement," says Gray.

"Elected officers of the body corporate often don't seem to realise that they still have all of the responsibility and body corporate managers require close supervision and proper decision making procedures."

Many managers hold funds in their own bank accounts -- another potential danger.

"This is an unacceptable risk, especially when large maintenance or contingency funds are built up," says Gray. "It is arguably only a matter of time before a body corporate suffers as a result of mismanagement or misappropriation of funds.

"It also makes it very difficult if, for any reason, the body corporate decides to sack their manager and it does not have seamless access to their own funds.

"They are then dependent on their ex-manager to get around to transferring the money.

"Chairpersons and committees have been conditioned into accepting that the random auditing of their managers' accounts is an adequate substitute for a specific audit of the accounts of the body corporate, which it is not.

"When some bodies corporate have called for a specific audit, auditors have expressed some serious concerns about not being given adequate access to the accounting information and/or that proper records were not available."

Licensing is unlikely, Gray admits, because government officials have no appetite for such a step.

"Accordingly, the elected officers of bodies corporate need to take control and be supported in their role by an independent organisation such as Hobanz."

Liza Fry-Irvine, of Auckland law firm Pidgeon Law, believes New Zealand compares unfavourably with Australia.

The Issues

- Body corporate managers in NZ are unregulated.
- Only those in real estate agencies, operating under a real estate licence, are subject to oversight.
- There is no mention of body corporate managers in the Unit Titles Act 2010.
- In Australia, most managers join the voluntary Strata Community Australia, which has an accreditation system and a code of conduct.

"Various states in Australia regulate body corporate managers," she says. "Most join Strata Community Australia, a voluntary group with an accreditation system and a code of conduct, ensuring they are trained and equipped to do their job properly.

"Last year an Australian body corporate manager misappropriated \$1 million of body corporate funds. We are lucky nothing of that magnitude has happened here, at least that we are aware of."

The Auckland District Law Society's property law committee -- of which Fry-Irvine is a member -- this year tried to persuade MBIE to look again at the issue of regulation, but the bid fell on deaf ears, she says. "Parliament seems to be taking a 'don't fix what is not broken' attitude. The Tenancy Tribunal decision is a reminder that not all managers are playing by the rules and attention should be put back on regulation."

Body corporate managers handle hundred of thousands of dollars, rising to millions in some cases where they are managing repair work on a leaky building.

The Unit Titles Act put some controls on how these funds are handled but here are huge gaps, says Fry-Irvine.

"Often owners have no idea how their funds are supposed to be handled, which adds to the problem."

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