



Make sure you can take the knock

■ **Mike Addison** explains how trustees can ensure they are fulfilling their statutory obligations regarding sectional title insurance.

THE FIRST THING NEWLY ELECTED TRUSTEES should do is to vote for a chairperson and the second thing is to check their complex's insurance. How so?

Well, the Sectional Titles Act provides that a body corporate shall be managed and controlled via management and conduct rules, either as prescribed by regulation or as amended by the body corporate itself. The Sectional Titles Act is very clear on the four statutory functions of a body corporate in respect of insurance. Simply put, the functions are to:

- Insure the building or buildings to their replacement value against fire and other risks as may be prescribed, and to keep the building or buildings insured to their replacement value;
- Insure against any other risks that the owners determine by special resolution;
- Use any insurance policy payout received by the trustees as a result of damage to the building or buildings to rebuild and/or repair the building or buildings as far as it is possible to do so; and
- Pay the premiums on any insurance policy that the trustees have taken out.

Here's what to do

THE PRESCRIBED MANAGEMENT RULES (PMRS), particularly PMR 29, set out in more detail how insurance should be controlled, managed and administered. In my experience, this is an area that trustees often overlook, because everyone assumes "it is taken care of".

The buck always stops with the trustees, so let's take a closer look at what your new trustees can and should do, or what you should do as a trustee:

- Find out when the buildings were last valued or how the present insurance amounts were determined.
- Obtain a full copy of your present insurance policy and schedule of replacement values.

■ Do a rough "back-of-the-cigarette box" estimation as follows: take the total square metreage of the sections (from the sectional plan/participation quota schedule) and multiply it by an average building rate per square metre (see page 40 for an example). It may be a good idea to use as many as three different building rates per square metre when estimating your replacement value. Then compare your calculations with your current sum insured.

■ If you seem to be underinsured, increase your cover to at least your estimated amount, and also arrange for a professional valuer to value your buildings – this should be done every two or three years.

■ Check your policy document to ensure that the cover described matches that set out in the PMRs or your body corporate's rules. Check whether:

- The premiums are up to date.
- The address stated in the policy matches the street address of the buildings.
- The policy is a body corporate policy, such as those issued by Corporate Sure, CIA or FPA (which are underwriting managers that specialise in sectional title). A body corporate policy is preferable to a traditional commercial policy, where the body corporate relies on the insurance broker to arrange the necessary amendments and to ensure that the policy complies with the PMRs.

If the policy is not a sectional title/body corporate policy, the trustees will need to compare the cover provided with PMR 29.

□ The schedule of replacement costs, as agreed to at your recent annual general meeting (AGM), matches those reflected in the policy.

□ You have sufficient public liability cover. It should be a minimum of R10 million. It is also advisable that trustees' indemnity extension is in place. Trustees' indemnity is not a requirement, but an





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inexpensive extension that covers the body corporate against mistakes a trustee may make and for which he or she could be found liable.

- There is accidental damage cover for accidents not covered under the standard wording in the insurance policy.

- All-risks cover is in place for items that are at risk of theft, such as air-conditioning units, aerials and mounted security cameras. You need to be specific about listing the items on the outside of the building, in corridors or elsewhere that are at risk of being stolen without the thieves first having to break in. Although all-risks cover is not prescribed, it is better to have this cover than to neglect it.

- Check on who is the body corporate's appointed insurance broker, obtain a letter of introduction, check that the broker is licensed (keep a copy on file of his or her Financial Advisory and Intermediary Services Act licence), and ask the broker for his or her last written advice and comparative quotations.

- Check whether your insurance adviser has a

good understanding of and is experienced in sectional title insurance matters.

- Check whether the insurance adviser has professional indemnity cover. An insurance adviser or broker who dispenses insurance advice and who carries out the body corporate's instructions in insuring the buildings can make a mistake or advise incorrectly, resulting in a loss.

There is no statutory requirement that forces brokers to take out professional indemnity cover. However, they are obliged to disclose whether or not they hold such cover. Trustees should find out whether their broker has professional indemnity cover and should, in the interests of all the owners, deal only with a broker who can confirm that this cover is in place.

Fidelity cover is another aspect of insurance that should be considered. This is additional cover against the loss of money or property stolen by an employee.

Thus, your sectional title policy may provide you with, say, R20 000 or R50 000 in cover. >>

Example of how to estimate your building's replacement value

Property description	Square metres	Rate/square metre	Amount
Residential sections	1 000	R5 500	R5 500 000
Garage sections	200	R2 200	R440 000
Sub-total			R5 940 000
Add 10% to 15% or so for the common area			R594 000
Sub-total			R6 534 000
Add 12% for professional fees			R784 080
Add 14% VAT			R1 024 531
Add 5% for removal of debris			R417 131
Roughly estimated replacement cost			R8 759 742

>>> This essentially covers the body corporate should a trustee or employee be found to have stolen money and/or other property belonging to the insured or for which they are responsible. Under normal circumstances, the managing agent is *not* considered to be an employee.

The body corporate also needs to check it is covered by the Fidelity Fund of the Estate Agents Affairs Board (EAAB) by ensuring that all the body corporate's dealings with its managing agents, including any banking and signing arrangements, are in order and in line with legislation.

If in doubt, contact the National Association of Managing Agents or a specialist sectional title legal consultant for further information. Additional cover may be needed – the PMRs suggest that the amount

of cover, if any, should be determined by the owners.

If the body corporate manages its own accounts, the body corporate needs to decide how much cover it needs to take out to protect itself against dishonesty and the theft of body corporate money by the trustees or employees.

If the body corporate is managed by a managing agent, the body corporate's money should be held in trust and is thus covered by the EAAB's fidelity guarantee. This issue was recently highlighted by the liquidation of a well-known Cape Town-based managing agent. It is alleged that large sums of money were misappropriated.

Trustees should also check that the professionals with whom they deal have appropriate professional indemnity cover. This will include your insurance

Q&A

Graham Paddock answers your questions about owning or living in a sectional title property.

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or write to PERSONAL FINANCE, PO Box 56, Cape Town, 8000

A 'stoep' in the wrong direction

SEVERAL OWNERS OF THE GROUND-FLOOR FLATS in the large complex where I live have extended their verandas (brick foundations, tiled and roofed) onto the common property. This was done without following the procedures laid down in the Sectional Titles Act. Some of the trustees also built verandas.

I raised the issue with the trustees about five years ago. For the following five years, I was fobbed off, told to get the facts, refused permission to speak on the issue at annual general meetings and, when I finally did, what I said was not minuted.

This went on until last year, when we finally got the trustees to hold a special general meeting (SGM) on the matter. I say "we" because in the interim a



fellow owner supported me and spent something like R30 000 in lawyers' fees to get us to the point of holding the SGM. The SGM turned out to be an absolute circus, where we were both attacked at length by the trustees and the other owners as troublemakers. They passed a motion agreeing to legalise the verandas, but said the owners did not have to pay extra levies.

Surely the owners concerned have to pay extra levies and increase the value of those flats for insurance purposes?

DP Bunn

Graham Paddock replies: It can sometimes be difficult in practice to determine when a section has or has not been extended. But in your case it seems

broker (alluded to above), property valuer, auditor, attorney and managing agent.

Professional indemnity cover is designed to protect professionals against losses that result from being found negligent or responsible for such losses – for example, an error or bad advice. Thus, if the body corporate deals with professionals who have this cover, they are themselves better protected.

Although it may be assumed that a professional has indemnity cover, it is advisable that the question be asked and noted. It is encouraging that, to an increasing extent, more and more managing agents are taking out professional indemnity cover, and that trustees are starting to make such cover a prerequisite before they will employ a managing agent. Any professional engaged by the body corporate should confirm that this cover is in place.

Trustees should also confirm that a contractor who works on the common property has appropriate contractors' all-risks cover before any work begins. If, for example, a cash-strapped contractor drops a tin of paint on someone's car, causing thousands of rands in damage, who will pay if this cover is not in place? Definitely not the building's policy.

Trustees should ensure that a formal procedure and/or set of rules is in place – of which all owners should be aware – as far as contract work in and about their sections is concerned.

Bodies corporate should be aware of the requirements of the Occupational Health and Safety Act when engaging contractors to undertake work around

the buildings, particularly the common property. Trustees and managing agents who do not heed this legislation could be criminally liable if the statutory requirements have not been met properly and a worker is hurt or fatally injured on-site.

Update the schedule

REMEMBER THE SCHEDULE OF REPLACEMENT costs I mentioned earlier? Once you have had the buildings re-valued, see to it that a fresh schedule is prepared if the valuation differs from the previous one. Your managing agent should be able to help you with this. Some specialist insurance advisers are geared to assist you here, but take care: it is not the insurance company's place to prepare such a schedule – it is between you and your managing agent to get this done properly and to keep it up to date.

It should *not* be a simple photocopy of the insurance company's schedule. Instead, the insurance policy should be updated to reflect the body corporate's schedule of replacement values. Let each owner have a copy of this schedule, and have it explained, presented and approved at the next AGM.

It is always a good idea to send all owners and occupiers of units the details of insurance claims procedures and of whom to contact in case of an emergency (for example, a hotline phone number in the event of a geyser or hot-water cylinder bursting).

You can learn more about these and other important aspects of insurance at www.addsure.co.za, www.pima.co.za and www.sto.co.za □

clear that some owners have extended the floor area and the boundaries of their sections onto common property by building the verandas you describe. In this regard, the provisions of section 24 of the Sectional Titles Act apply, and those owners must have the sectional plan amended to show the additional areas.

One of the anomalies in the Act is that while a developer who builds an entirely new section must start making contributions to the administrative fund if he or she has not registered a plan that shows the section and includes an amended participation quota schedule within 90 days of the section being complete for occupation, no similar provision applies when owners extend their sections. So while developers cannot continue taking rentals without paying levies, owners can extend their sections and



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enjoy the increased living area without paying levies until they choose or are forced to register sectional plans of extension.

The owners in your scheme who have extended their sections irregularly should have started to pay levies as soon as they were able to use >>

>> those veranda extensions. Until the sectional plans are amended, these owners are contributing less than they should be towards all common expenses, including body corporate insurance premiums.

These owners, by appropriating parts of the common property and building the verandas without the necessary consents and in contravention of the procedures set out in the Act, have acted unlawfully. And, as a direct result of these unlawful actions, the body corporate has suffered loss – that is, the body corporate has lost the difference between the amounts that would have been paid had the proper processes been followed and the amounts that have in fact been paid.

Perhaps you and the other owner who supports you can do the calculations and suggest that these “lost” amounts should be recovered from the owners concerned to address the financial aspects of the illegal extensions.

Trustees exceeding their powers?

AT OUR ANNUAL GENERAL MEETING (AGM) IN May 2005, the body corporate decided to offer a one-year contract of employment to the ageing manager of our complex. This fixed-term contract (signed by both parties) came into effect on June 1, 2006 and ended on May 31, 2007.

The contract included the following clause: “The parties record that they have explicitly agreed that no further contract of employment will be entered into after the termination of this contract.” The manager, who is 73 years old this year, is still in office today. I was unable to attend the AGM in May last year. I understand this matter was not discussed, and no reference whatsoever about the manager appeared in the minutes.

My question is: can the trustees legally overrule a decision made by the body corporate?

Frans WJ Wilde

Graham Paddock replies: The first difficulty in the situation you describe is that it is not clear that the owners specifically instructed the trustees not to employ the manager for a period of longer than a year. The contract contained such a provision, but unless the minutes of the 2005 AGM indicate directly or by implication that the trustees were obliged to include that term in the contract, the trustees may simply have done so because they thought it sensible or in line with the feelings of the owners. The inclusion of this provision does not in itself restrict the trustees from later changing their collective minds.

But that brings us to the second difficulty. Even if the trustees elected in May 2005 were clear that they wanted to employ the manager for only one year, it was a different group – namely, the trustees elected at the 2007 AGM – who continued to employ the

manager after his initial contract terminated at the end of May 2007. I suggest you look carefully at the wording of the minutes of the 2005 AGM. Unless the restriction you believe was imposed is clearly stated and obviously restricts the right of future trustees to re-employ the manager, I do not think that the 2007 trustees have exceeded their management powers.

You need to see if other owners feel the same way as you do about this situation. If so, have the matter raised at the next meeting of trustees, find out what contract currently exists with the manager and see if you can obtain the support of other owners to give the trustees a clear instruction in this regard.

Remember also that the manager has rights as an employee arising from his ongoing contract of employment. Any direction given to the trustees must take account of these rights.

Rules prohibiting holiday letting

HOLIDAY LETTING IS ALLOWED IN OUR complex. Unfortunately, the holidaymakers are extremely disrespectful of the few owners in the complex. They destroy signs on the premises, overcrowd the units, swear at the guard when told to park in allocated bays only ... the list goes on. Over the “silly season” we have to spend funds to repair the damage they leave behind.

Is it possible to change the rules so that only a six-month or longer lease is permitted?

Name withheld on request

Graham Paddock replies: I believe the owners are entitled to make a conduct rule that addresses the problems you are experiencing. This rule could include a restraint on the letting of units as holiday accommodation and may also include a restraint on short-term letting where experience has proved that this results in similar problems.

In my view, holiday accommodation is “resort” use, as opposed to “general residential” use. Where in one scheme there are some owners who personally occupy their sections as permanent residents and others who let out their sections to a series of short-term residents, there is bound to be conflict between the very different needs and lifestyles of the two classes of occupiers.

If a substantial number of owners feel that the behaviour you describe is serious enough to warrant body corporate action, I suggest that the trustees obtain professional help. Find out if the title conditions, the scheme rules or the applicable zoning scheme regulations prevent the use of units for holiday letting.

If so, the trustees have a legal obligation to prevent this activity. If not, they should seek assistance to draft, adopt and lodge a conduct rule that will stand up to the close scrutiny to which it will be subjected by the investor owners who are using their units as holiday letting businesses. □