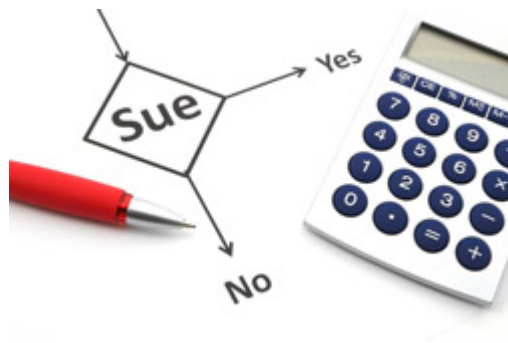


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## Suing the HOA management board

15 Nov 2011

Is it possible to sue the HOA (Home Owners Association) management board for not running the HOA correctly? If so, would it be advisable or would you suggest trying alternative routes first?



If there is no reason to believe that the law or specific provisions of the HOA's governance documentation have been contravened, dissatisfied owners should wait for the next opportunity to elect different executives or stand for election themselves.

These questions lead automatically to other questions: what does "correctly" mean? By what standard is this judgement being made, and by whom? Has someone or some entity suffered material damage? Is the action contemplated against an individual HOA executive, against the executive committee as a whole or against the association itself? Who wants to bring this action? The answers to these questions may place limits on what can be done.

If there is no reason to believe that the law or specific provisions of the HOA's governance documentation have been contravened, dissatisfied owners should wait for the next opportunity to elect different executives or stand for election themselves. Executives of HOAs are not personally liable for errors or omissions in their duties if they were made while the executives were acting in good faith. Only deliberate and knowing wrongdoing might bring liability.

If there has been some contravention of the law or the governance documentation of the HOA, it is usually best to first try approaching the executives informally, perhaps in a polite note, just to alert them to the concern. It may be that the concern is unfounded, already being dealt with or that the executives are unaware there is anything wrong, and will take action upon being alerted.

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If the members remain dissatisfied, they should check the governance documentation to see what, if any, dispute resolution process is provided by the association, and if there is a process provided, usually arbitration, follow that course. This step should be followed whether the association is a non-profit HOA company or a common law association. It is not uncommon for the governance documentation of an HOA to make an arbitrator's award final and binding. In that case, the members would not be able to take the matter any further.

If necessary and possible, the next step is to go outside the HOA and, in the case of a common law association, that means going to court. For non-profit HOA companies, if an offence has been committed, the Companies Act provides some alternatives to a court action.

The Act lists a number of activities that are offences and if a member believes that the executive or the company is committing one of these, they may apply to the Companies Tribunal for adjudication on the matter. The Tribunal must act quickly and according to the principles of natural justice. The Tribunal is free to hold its hearings in any manner it feels appropriate – depending on the circumstances, the proceedings could be formal or informal, confidential or public. The Tribunal will hear all the evidence and issue a decision supported by reasons.

The members may alternatively file a complaint with the Companies and Intellectual Property Commission (the Commission). The Commission may then appoint an inspector to investigate the complaint and, depending on the result of the investigation, may issue a compliance notice, call a meeting with the complainants or refer the matter to the National Prosecuting Authority. - **Anton Kelly**