# CHAPTER 14

# HORIZONTAL SUBDIVISION

## 1 Prefatory

1.1 At least the position of this chapter offers no particular difficulty. As 'horizontal subdivision' was not included in the chapter on multiple ownership, it must immediately follow that chapter, for the problems of horizontal subdivision are essentially those of co-ownership. Indeed, it is only given a chapter on its own because it now so often receives individual attention; in North America, more than a hundred articles on this subject have been published in legal periodicals alone under the title of 'condominium', which is the Latin for 'co-ownership'. In England the word 'condominium' is ordinarily used for 'joint sovereignty' or 'joint control of a state's affairs vested in others' (for example, the Anglo-Egyptian Sudan 1898-1955, or the present Anglo-French administration of the New Hebrides). In North America, however, it is specially used not only for the common parts of buildings which are subdivided horizontally into individually owned units ('flying freeholds' as they have been called) but also for the co-ownership of central amenities and facilities — such as a car park, swimming pool, tennis court, or library and common room — in a building estate comprising a number of individually owned dwellings which may even be single-storeyed. This latter form of development does not involve horizontal subdivision, but poses the same basic question: how to give an exclusive right of absolute ownership in the individual dwelling, allowing no interference by others, whilst combining this right with the common ownership of the common parts of the building or building estate, in the *management* of which some form of majority rule must be accepted, since management cannot be subject to individual veto. Thus the individual may find his own wishes overridden, for the ownership of the individual dwelling cannot be separated from the co-ownership of the common parts (which themselves are incapable of severance) and therefore to that extent it is inevitably subject to 'interference by others'.

1.2 "Condominium has qualities that make a wonderful banner: obscure origins in the distant past, no firmly established use in our legal inheritance, and a learned and colourful sound. The same fuss has been made under different banners, 'Strata Titles', 'Horizontal Property', and 'the ownership of flats';[1] these share the absence of an established use, but not the obscure origins and the fine sound."[2] To this list we can add 'multi-storey buildings' which is the title used in the Hong Kong legislation, and 'subdivided buildings', the title of Part Twenty-Five of the Malaysian National Land Code. These latter titles indicate

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[1] A flat can be defined as a self-containcd horizontal division of a building. This is generally known as an 'apartment' in North America.

[2] R C B Risk 'Condominiums and Canada' 18 *University of Toronro Law Journal* (1968) 1

the true nature of the present problem which has been precipitated by modern techniques enabling ‘high-rise’ buildings to proliferate and thus intensify difficulties arising out of their ownership. Not only do those who live in flats want to own their own homes but the initial owners of the building wish to divest themselves of their responsibility, particularly when there is rent control, a feature of modern legislation which often makes leasehold property a dubious investment.

1.3 Horizontal subdivision is no new phenomenon. It is obvious that it was bound to happen as soon as buildings of more than one storey enabled one unit of operation to overlie another and to be independently occupied. Horizontal subdivision did not even have to wait for double-storey building; the single-storey dwelling owned separately from the land it stands on is well known in customary tenures, and the separate ownership of individual trees (sometimes with multiple ownership of the tree itself) has long been the bane of the ‘tidy administrator’, though he may not have been accustomed to think of it as ‘horizontal subdivision’. Some countries even provide for a compulsory readjustment of the interests of the parties so that a tree or building shall not be owned separately from the land on which it stands.[1]

1.4 The ownership of ‘land’ divided non-vertically is by no means strange to English land law. As defined in the Law of Property Act 1925 'land’ includes land of any tenure, and mines and minerals, whether or not held apart from the surface, *buildings or parts of buildings (whether the division is horizontal, vertical, or made in any other way*)”.[2] Buildings, however, do not have that everlasting characteristic which is the unique feature of a land parcel created by vertical subdivision unlimited by any division in the horizontal plane. This necessarily raises the question of what is to happen when the building finally ceases to exist. Leasehold is essentially more appropriate to this situation, for leasehold with its reversion caters for the expectancy of termination, whereas ‘ownership’ is unlimited in time. Theoretically the airspace occupied by a building or any part of it could be permanently defined by co-ordinates and so be capable of re-establishment, even though the ‘monuments’ (i.e. ceiling, walls and floor) had been removed, but this could serve no practical purpose once the building had been demolished; it could only be an impediment to redevelopment.

1.5 What is to happen on demolition is unlikely to seem a pressing problem to the owner of a flat in what appears to be a very durable building, but there are other problems, both of ownership and management, which are of immediate importance, not only to the owners but also to the public at large, and these require immediate solution. These problems, it should be noted, are problems of general land administration; they are only marginally our concern in that registration of title will facilitate their solution.

## 2 The problem of horizontal subdivision

[1] e.g. Cyprus Immovable Property (Tenure, Registration and Valuation) Law 1946 s29
[2] s205(1)(ix) (our italics)

2.1 The basic question is how the rights and duties of the owners of the flats (units of operation but, of their nature, not everlasting) are to be related to the ownership of the land parcel on which the whole building stands and which, in our legal definition, *is* everlasting. Who owns the common part of the property, the stairs and lifts, the roof and the surrounds, not to mention the land surface on which the building stands? How are the fabric of the building and its common services to be maintained? How is the cost of this maintenance to be distributed amongst and collected from the flat-owners? Who will represent the flat-owners in legal proceedings in respect of the whole building, either against or on behalf of the owners; for example, if somebody slips on a defective stair or something falls from the roof and injures a passer-by, who is to be held responsible? On the other hand, who will take action if the building is threatened by, say, building construction on a neighbouring site?

2.2 These are just the kinds of problem which we discussed in the last chapter as being typical of multiple ownership; they are sufficiently adverse to good land use and development to have justified the abolition of tenancy in common in England and Wales by the Law of Property Act 1925. Anyone who has had experience of the difficulty of securing good development when agricultural land is co-owned by a large number of persons will at once appreciate the difficulties likely to be encountered administratively in respect of a multi-storey building. Clearly some legislative provision is essential.

2.3 It should be noted that the problem cannot be made to go away merely by enacting (as Tanganyika did in the Land Registration Act 1953) "that no parcel shall be divided otherwise than vertically".' Horizontally subdivided buildings are a fact of life. Even if it is possible to refuse to recognize 'freehold' subdivision, long-term 'leasehold' subdivision (lasting, perhaps, for as long as the building lasts) will create interests which must be capable of registration, and this necessitates definition and description of the subdivided unit. Arrangements must also be made for the management of and responsibility for the common parts. The lessor should not be allowed to disappear as soon as he has disposed of long leases at a nominal rent having collected their full value by way of premium. The problems will still be there; only the terminology will be different.

2.4 The principle of classical Roman law with regard to the ownership of buildings was *superficies solo cedit* (the building belongs to the land). But separate ownership of different storeys of houses, and even individual rooms, has long been known in Europe, going back as far as the twelfth century in some German cities. In France this type of ownership has been common since the late Middle Ages in various regions — in particular Grenoble, Rennes, and Lyons. Some Swiss towns have a long experience of it, and the excessive splitting up of the ownership of houses and the lack of clear rules covering the maintenance and repair of the building have been the cause of many disputes.[1]

[1] This information is derived from a valuable and much-quoted article by J Leyscr of Melbourne University on 'The Ownership of Flats — A Comparative Study' 7 *International and Comparative Law Quarterly* (January 1958)

## 3 The English approach

3.1 The English approach to this problem has been, as might be expected, largely empirical. English lawyers have for centuries been accustomed to devising processes to accommodate the wishes of their land-owning clients, and a little matter like the ownership of 'land' subdivided non-vertically would scarcely be allowed to defeat their ingenuity. A famous example of such a subdivision is Albany in London, built in the first decade of the nineteenth century and divided into chambers (apartments) owned freehold. An added piquancy for the English lawyer is that, since the sale of these chambers is subject to the approval of the trustees of Albany, the freehold appears to be 'conditional', though English land law does not admit 'conditional freehold'.

3.2 Two kinds of horizontal subdivision of buildings can be distinguished in England: 'maisonettes' and 'flats'. A *maisonette* may be described as a self-contained flat possessing its own separate entrance from ground-floor level. It differs from an ordinary flat in that it does not share any passages or stairs with other flats in the same building. In essentials it is a semi-detached house divided from its partner horizontally instead of vertically. A pair of maisonettes, however, may themselves be attached to another pair, or may form part of a terrace.[1]

3.3 An anomaly of English land law is that the burden of a positive covenant (such as an undertaking to maintain a wall or fence) cannot be made to run with the servient (i.e. burdened) land, so that it is enforceable against subsequent owners. This is a handicap to adjoining owners, particularly where houses are semi-detached, and still more so to the owners of maisonettes where the degree of interdependence is even greater than with semi-detached houses. One astonishing method of tying up the respective parties is the expedient of cross-leases combined with cross-ownership: the ground-floor occupier owns the first floor whilst the first-floor occupier owns the ground floor, each granting the other a lease for, say, 2,000 years. HM Land Registry, which prides itself on being able to register anything allowed by law, makes no difficulty in registering such a bizarre arrangement; but it is questionable if it truly satisfies the desire for home ownership which is a very important consideration.

3.4 Failure to satisfy this desire is a criticism that can also be made of vesting the ownership in a co-operative society, a device which has been used not only in the United States, but also in Australia and New Zealand, when large buildings are divided into apartments. The co-operative owns the building. Each of the apartment-owners owns a share in the co-operative and gets a lease of his apartment, but this does not give him a feeling of secure ownership. "The warm feeling is chilled by the cumbersome legal framework. Can most owners instinctively and comfortably say, 'I own my apartment'?"[2]

3.5 We need not worry about maisonettes — they are a relatively small and specialized problem; our real concern is with subdivision into fiats which make use of common entrances, lifts and stairs, and of which there may be a large

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[1] See George *The Sale of Flats* 25

[2] Risk 'Condominiums and Canada' 6

number in a single building. The logical arrangement is for the owner of the building to be replaced by a management company, the shareholders of the company consisting of the flat-owners. The schemes framed by English lawyers on these lines appear to be reasonably effective, and it can be argued that there is no need for legislative intervention. This argument, however, is similar to the argument advanced by that school of opinion which believed that registration of title was unnecessary because private conveyancing could do all that was needed. It is of course not only in the field of land law that political decisions have to be made on the need to legislate. In a perfect world where nobody did any wrong and everybody did his duty, there would be no need for any formal law. But the world is by no means perfect; laws must not only be made, they must be enforced. Obviously there is limitless scope for argument on what should be left to conscience and ordinary social and business behaviour and what should be regulated by law. Race relations and trade unionism are recent and still controversial examples; companies are an example from earlier times, though none would now doubt the need for legislation in this field.

## 4 The need for legislation

4.1 It would, however, seem unnecessary for us to rehearse the arguments for and against making legislative provision for the ownership of flats since, in the last forty years or so, much of the world has been convinced that special legislation is essential. Most of the major countries of Western Europe enacted enabling legislation between 1930 and 1955, and since 1961 all the States of the United States except Vermont have passed statutes based on a Model Act prepared by the Federal Housing Authority.[1] Such legislation, however, is not against a background of registration of title and therefore, strictly speaking, is outside our subject.

4.2 In England ‘Special Problems of Blocks of Flats and Other Multiple Units’ were examined by the Wilberforce Committee on Positive Covenants Affecting Land which reported in July 1965. The Committee did “not consider that in future any horizontal division of buildings or the erection of any horizontally divided units should be permitted without the imposition of certain minimum obligations”. These “should apply to all buildings with horizontally divided units which come into existence after the enactment of the appropriate legislation”.[2] But legislative wheels turn slowly in Great Britain, and no legislation has yet been enacted.

4.3 The Committee “found the position operating in Scotland of particular interest, since in that part of the United Kingdom separate ownership of the different floors of buildings has long been a common practice”.[3] Where there is no contractual arrangement between the proprietors of parts of the house, a number of obligations known as the “law of the tenement” automatically apply. Where there is an arrangement “it frequently takes the form of the appointment

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[1] See ibid 12

[2] Wilberforce Committee Report (1965) 24 para 47

[3] Ibid 21 para39

of a 'factor', who is a general agent and manager, appointed by the owners of the flats. He is responsible for seeing to the maintenance and repair of the building and of all the common parts, for the collection of the contributions and, where necessary, for the enforcement of the various covenants."[1] The Committee understood that this system works well in practice, but nevertheless saw fit to quote (if only in a footnote) a fictional description of eighteenth-century Edinburgh (from Smollett's *Humphrey Clinker*): "Every storey is a complete house, occupied by a separate family; and the stair, being common to them all, is generally left in a very filthy condition; a man must tread with great circumspection to get safe housed with unpolluted shoes."[2] This, rather rudely, highlights a problem which, obviously, only legislation can resolve; it cannot be left merely to 'conscience' or 'ordinary social behaviour'.

4.4 The Wilberforce Committee also studied the system introduced in New South Wales by the Conveyancing (Strata Titles) Act of 1961 which they described as follows:

> "Very broadly this system provides for the registration in the local equivalent of our Land Registry of a detailed plan showing the exact boundaries of the building and of the various units in it (the 'Strata Plan'). Certificates of title to a registered unit are issued upon registration, and each unit carries with it a share of the common parts. The proportion which the value of each Unit bears to the total value of the building constitutes the basis for that unit's liability to contribute towards common expenditure and for its owner's share in the common parts and his voting rights in the management of the building. Each unit owner holds shares in a body corporate which automatically comes into existence on registration of the Strata Plan and he has powers and duties in relation to the management and upkeep of the building. Easements of support, shelter, and the passage of water, sewerage, drainage, gas, electricity and other services are implied in favour of and against each unit. The body corporate acts through a council elected by the unit owners. If a unit owner fails to comply with his obligations to maintain and repair his own unit, or to contribute towards the common expenditure, the body corporate is empowered to bring proceedings in the courts against him. In the event of serious damage being suffered by the building and in case of its complete destruction, powers are conferred on the court to decide on the application of any insurance money and on the disposal of the property and the distribution of the proceeds of any sale... A Strata Titles system would in our opinion supply a ready-made and effective scheme for implying all necessary easements and covenants and for providing an effective machinery of management and enforcement."[3]

4.5 From our point of view it is this Act (the New South Wales Conveyancing (Strata Titles) Act 1961) which really clinches the argument for it shows how well this essential legislation fits in with registration of title. An excellent handbook comprising annotations on the Act and a section on the practice relating to strata titles has been written by those mainly responsible for drafting

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[1] Ibid 22 para 40

[2] Ibid 21n

[3] Ibid 23 para 42

it.[1] In a foreword it was explained that "While the common law gave some recognition to the ownership of land in strata, in the opinion of many the definition of that recognition was in important respects too uncertain to meet the needs of an abounding society. It is also true to say that the exigencies of the situation had produced adaptations of existing forms and procedures, though there were people who saw in these adaptations defects of significance. Thus there was conceived the idea of a statute, enacted *ad hoc*, to meet the emergent situation."[2] It was claimed that the Act was completely novel and without precedent; it could fairly be labelled "Made in Australia".[3] Moreover, "After the first reading of the Bill further action was suspended for over a year to enable interested bodies to make criticisms and suggestions. Many did so; as a result the Act represents not so much a scheme devised by a drafting committee as one embodying the considered views of a community, it is all the sounder for that reason."[4]

4.6 The New South Wales Act, which has been entirely successful, has since been copied in other Australian States and in some Canadian Provinces. It was the basis of an Act for Singapore to be used in conjunction with the Land Titles Ordinance 1956 (drafted on Torrens principles).[5] Part Nine of the Malaysian National Land Code (1965) deals with the 'Sub-division of buildings' and follows similar principles. Even in Hong Kong, which has resisted the adoption of registration of title and sticks to a deeds system,[6] the Multi-Storey Buildings (Owners Incorporation) Ordinance was enacted in 1970, thus illustrating the need for legislation, irrespective of whether the title is registered or not. This Ordinance is of particular interest in view of the exhaustive study of the maintenance and management of flats in Hong Kong made by a working party whose report was issued in May 1962,[7] a study appreciatively referred to by the Wilberforce Committee.[8]

4.7 We suggest that it can be accepted without further discussion that it is imperative to enact legislation wherever there is multiple-storey building, and there are instruments ready to hand which make the task comparatively simple.

## 5 Salient features of strata title legislation

5.1 A version of the New South Wales Act prepared in 1972 as a model for inclusion in the Registered Land Acts of the Eastern Caribbean is included in Book 2 as Part VA of the Kenya Registered Land Act 1963. It is not difficult to read and understand, but the following brief description of its salient features may assist those who have to consider the introduction of such legislation.

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[1] A F Rath, P J Grimes, and J E Moore *Strata Titles* v
[2] Ibid
[3] Ibid xi
[4] Ibid
[5] See 11.10.3
[6] See 6.7
[7] Report of Working Parry on Sub-divided Buildings (1962)
[8] Wilberforce Committee Report (1965) 22 para 4l

5.2 *The plan of strata lots*. The proprietor of a parcel on which a building of more than one storey has been or is to be constructed submits a plan to the Registrar showing the lots into which it is subdivided and the approximate floor area of each. It should be noted that, since the boundaries of the lots are demarcated by physical features (the floor, wall, or ceiling as actually built), it is unnecessary to have recourse to a land surveyor except to ensure that the building ties within the boundary of the parcel. The plan must have endorsed on it a schedule specifying in whole numbers the unit entitlement, whether based on value or floor area, of each strata lot.

5.3 *Registration of strata lots*. If the Registrar is satisfied with the application he opens a register in respect of each strata lot, and the proprietor of the lot is then able to deal with it just like any other proprietor.

5.4 *Establishment of strata lot corporation*. The registration of the strata lots automatically establishes a strata lot corporation consisting of the proprietors of the strata lots, and the common property is vested in this corporation (though some statutes do not do this; for example, in New South Wales the common property is held by the proprietors as tenants in common in shares proportionate to the unit entitlement of their respective lots).[1] The duties of the corporation include the duty to keep the building in good repair, to insure it, to pay rates and taxes, and comply with notices served by any competent public authority. The corporation has power to establish a fund, raised from its members, and to enter any lot for the purpose of repair. Any summons, notice, order or other document may be served on a strata corporation by post, or by placing it in the receptacle which the corporation is bound to provide for the purpose.

5.5 *Easements*. The necessary easements for support, shelter, and for the passage of water, drainage, etc. are implied, and this alone saves substantial effort in dealing with the matter by private agreement.

5.6 *Administration*. The management of the property is regulated by bylaws made by the corporation, but standard bylaws are provided in a schedule to the Act, and apply until other bylaws are made. A strata lot corporation, any member thereof, or any person having an interest in a strata lot, may apply to the court for the appointment of an administrator to manage the affairs of the corporation. This is a valuable safeguard since, for ordinary administrative purposes, it is essential that it should be possible to replace an inefficient management committee. It should be made clear in the Act that application for such a replacement may also be made officially (e.g. in Hong Kong the Attorney-General may apply).[2]

5.7 *Disposition of the common property* can only be made with the unanimous agreement of all members of the corporation as well as any other person appearing from the register to have any interest in any of the strata lots. The need for unanimity is obviously a debatable point.

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[1] Conveyancing (Strata Titles) Act 1961 s9(I)

[2] Mufti-Storey Buildings (Owners Incorporation) Ordinance s31(1)(d)

5.8 *Destruction of the building*. The building is deemed to be destroyed when the members by unanimous resolution so resolve or the court so declares, and the corporation thereupon holds the parcel in trust for all its members in shares proportional to their respective unit entitlements.