PART I

Introduction and content

1 Introduction

1. Overview

Condominium law has not previously been the subject of a Common Core project. This can be partly attributed to the common perception that condominium law is simply a set of practical rules designed to solve daily problems in condominium schemes, and is therefore not worthy of detailed academic scrutiny. Additionally, condominium law is principally based on statutory law rather than fundamental concepts of property law. Nevertheless, condominium law has proved to be an excellent topic that lends itself to discussion of hypothetical scenarios. In many ways this is preferable to the abstract presentation of legal systems by reference to principles, rules and exceptions to the rules. It is also consistent with the factual approach of the Trento project, which is directed at proving that the answers to specific hypothetical situations are broadly similar irrespective of the particular rule or principle used to arrive at the answer. As a result of the practical nature of condominium law the selection of factual situations that form the basis for the various case studies was relatively straightforward, and many of the difficulties associated with dogmatic rigidity were avoided.

The aim of the Common Core Project is to provide a general picture of the different rules in various jurisdictions across Europe. The editors are asked to provide methodical and reliable information without forcing uniformity where it does not exist. The scope of the present project is not, however, limited to the current law. The section on recent developments in the final part of the book identifies beneficial future trends towards the harmonisation and codification of condominium law. This is not a stepping stone towards a European Civil

Code, but rather it is a tentative first step towards the eventual possibility of harmonisation in the field of housing law across Europe.

2. The genesis and structure of the book

The project was initiated at the annual meeting of the Common Core Project in June 2009. The first draft of the questionnaire was discussed and eventually approved in an altered form that highlights the opposing views held by parties in relation to problematic issues in the sphere of condominium law. The questionnaire consists of two parts. Part I contains a set of general questions on different aspects of condominium law. Part II sets out a list of specific case studies. The main aim of the general part was to furnish information for the editor to write the introductory chapters found in Part I of the book.

Chapter 2 contains a survey of the historical development of the institution of condominium. Chapter 3 outlines the origins and development of condominium legislation of the jurisdictions presented in this book. Chapter 4 records the many faces of condominium, while Chapter 5 gives an account of the establishment of condominiums and basic concepts of condominium law. Because of length restraints, some of the information provided by the national reporters, for example on the structure of parking spaces and on certain management issues, could not be included in Part I.

Part II of the book contains the responses of the individual national reporters to ten case studies posed in the questionnaire. The case studies cover the following issues: the purchase of a unit based on building plans; the restrictions on the sale and letting of apartments; the responsibility for the maintenances of the various parts of a condominium scheme; the restrictions on the powers of use and enjoyment of one's unit and the common property; mechanisms to deal with an owner who falls into arrears with the payment of levies; how jurisdictions deal with an offensive owner who makes life miserable for his co-residents; whether owners are obliged to put up with a plethora of rules introduced by the manager; the formal validity of resolutions; the rights and obligations of tenants who reside in a scheme; and issues involved in the modernisation of a condominium building.

Part III is devoted to the most recent developments in the sphere of condominium law.

3. Terminology

The only significant problem encountered with terminology was the designation of condominium legislation. The decision was made to use an almost literal English translation of the terms used to describe the statute of a particular jurisdiction. This occasionally resulted in slightly unusual terms, such as the Law on Apartment Ownership for Austria, Germany and France; the Law on Owned Apartments for Denmark; the Law on Owned Units for Norway; the Law on Unit Ownership for Poland; the Law on Horizontal Property for Spain; and the Law on Ownership of Storeys for Greece.

4. Structure of condominium

In most of the jurisdictions represented, the condominium concept consists of three components. These are (a) individual ownership of an apartment; (b) co-ownership (joint ownership) of the land and the common parts of the building; and (c) membership of an incorporated or unincorporated owners' association.[1] The purchaser of an apartment therefore acquires ownership of his apartment, a co-ownership share in the common property and becomes a member of the apartment owners' association. Consequently, condominium straddles both the law of property and the law of associations. Two of its components, namely, individual ownership of an apartment and co-ownership of the common areas, pertain to the law of property, while the third element falls under the law of associations.

Condominium regimes across the world are generally divided into either unitary or dualistic systems.[2] Under the former, primary significance is given to the owners' co-ownership in the common property. An apartment owner is in the first instance regarded as a co-owner of the land and buildings that comprise the scheme; the exclusive rights of use accorded to each owner with regard to a specific part of the building is merely regarded as an ancillary incident carved out of the co-ownership of the land and the buildings. Unitary systems, or nuances thereof, had been adopted mainly in legal systems that were unwilling to break completely with the maxim *superficies solo cedit* and

[1] Poland: Law on Unit Ownership art. 3 s. 2 and art. 6; Estonia: Law on Apartment Ownership § 1(1).

[2] Aeby *et al.*, *La propriété des appartements. Ses aspects juridiques et pratiques* (1983), nos. 39, 42, 43; Givord and Giverdon, *La copropriété* (1987), nos. 157–72.

considered their notion of co-ownership sufficiently flexible to accommodate exclusive rights of occupation in particular apartments in a condominium building.[3]

Under a dualistic system, two autonomous species of rights, namely, individual ownership of an apartment and co-ownership of the common property are combined to form a completely new type of composite ownership. Most dualistic systems regard individual ownership as the most important element of this new composite ownership. This makes most dualistic systems at odds with construction techniques that regard foundations, outside walls and roofs of the building as parts of the building without which the building cannot exist. Historical, sociological and psychological considerations have[4], however, played a role in perceiving the individual apartment as the primary object of this new composite right of ownership.

The tripartite structure is unknown to the ***English*** Commonhold and Leasehold Reform Act of 2002. The commonhold association is a private company that owns the common facilities and the common parts of the building and all unit holders are members on the basis of one share per unit.[5, 6] It is not a threefold unity consisting of private ownership of units combined with a co-ownership share in the common parts and membership of a management body corporate. Commonhold could be regarded as a new form of freehold ownership with special statutory attributes,[7] suggesting that individual ownership is the more important right. It could equally be argued that, having regard to the difference between freehold ownership of units and ownership of the common parts by a corporate body, that there is an even balance between the two sets of rights.

The legal position in ***Ireland*** is almost identical. The common areas are owned absolutely by the Owners' Management Company (OMC) and unit holders have no co-owned shares in the common areas. Unit leases confer rights of use and enjoyment, with common areas and facilities. As directors of the OMC are drawn from the unit lessees, the

[3] The Netherlands, Norway and Italy have apparently adopted a unitary system. See for Italy: Bigliazzi *et al.*, *Diritto Civile* (vol. II, *Diritti Reali* (1988), p. 320 contra: Terzago, *Il condominio. Trattato teòrico-pràtico* (2000), pp. 16–24.

[4] See van der Merwe, 'Apartment Ownership' (1994), s. 27. The French reporters stress that the French want to acquire exclusive ownership of their apartments and would not settle for being just one of the co-owners of the whole building.

[5] CLRA 2002 s. 25(1) and 2004 Regs reg. 9. [6] Model CCS Ann. 3 par. 3.

[7] Commonhold Bill 1996 cl. 1(1) (Lord Chancellor's Department 1996).

unit holders in effect are the owners of their leases. As a result of their compulsory membership of the OMC they together control the affairs and management of the company. The status of the property held by Irish long lessees can be seen as being primary, and that of the property held by the OMC is evidently secondary.

In Tenement Management Schemes (TMS) in ***Scotland***, there is at most a twofold unity of private ownership of individual flats and co-ownership of common property. There is no automatic management body. It is certainly not a unitary system because the Scottish approach has always been individualistic rather than collective.[8] Where the title deed is silent on the issue of ownership, the statute divides up the building including parts such as the roof, the ground (*solum*), ceilings, floors and boundary walls into individual ownership as far as possible.[9] Under the statute the common property is limited to the stairs, close, a lift, any access path and facilities such as rhones, pipes, flues and cables serving more than one flat.[10]

In contrast, Development Management Schemes (DMS) do recognise the third element in the possible threefold unity, namely, the membership of the management body (the owners' association). In fact, the membership of the owners' association is defined exclusively by the status of ownership of a unit, without the need to go through any other procedure such as notification or registration as members.[11] With regard to the first two elements, the enabling order does not specify the distribution of ownership in a tenement. Presumably the rules in the Tenements (Scotland) Act 2004 will continue to apply if a DMS title deed is silent on this particular point. In reality this is most unlikely as the ownership of parts is probably one of the most important concerns for any developer or potential purchaser. However, it is worth noting that the concept of scheme property is imported into DMS,[12] which suggests a continued intention to sever the connection between ownership and maintenance.

The ***Swedish*** real estate cooperative (*Bostadsrätt*) can be seen as a unitary system in which the housing estate (consisting of several houses or a multi-unit building consisting of individual apartments)

[8] Van der Merwe, 'The Tenements (Scotland) Act 2004: A brief evaluation' (2004), p. 211.
[9] Tenements (Scotland) Act 2004, s. 2. [10] Tenements (Scotland) Act 2004, s.3.
[11] Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009, Sch. 1 rule 2.3.
[12] Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009, art. 20.

is owned by the association, whereas the shares of the individual members entitle them to lease a specific house in the estate or an apartment in a multi-unit building. The new Swedish form of condominium – *ägarlägenheter* – has a dualistic structure. The ownership of the *ägarlägenhet*, or individually owned three-dimensional unit, is combined with a co-ownership share in the common property of the scheme and these two components are accorded equal importance.

2 Genesis of condominium*

1. Introduction

The modern concept of condominium has evolved over many centuries. In this chapter the historical development of this institution will be traced and it will be indicated how, ignited by the quest for home ownership, the institution gained worldwide acceptance despite constant doctrinal antagonism from traditional property concepts.

2. Ancient law

Individual ownership of units in multi-unit buildings seems to have originated several thousand years before the Christian era in Oriental legal systems.[1] Possibly the oldest condominium deed still extant records the donation and transfer of part of a building by a husband to his wife in the Jewish colony in Elephantine (ancient Egypt) during the fifth century BC.[2, 3]

* An earlier version of this chapter has been published in a special edition of *Fundamina, Libellus ad Thomasium* in 2010. The present publication is with the permission of *Unisa* Press.

1 Pappulias, 'Zur Geschichte der Superficies und des Stockwerkseigentum' (1906), pp. 363–4; Cuq 'Etudes sur les contrats de l'époque de la première dynastie babylonienne' (1929), pp. 423–78; Bärmann, *WEG* (1958), pp. 1–12; Ferrini 'La proprietà divisa dei diverse piani di una casa' (1930), pp. 131–3; Maroi 'La proprietà degli alberi separata da quelle del fondo' (1935), pp. 349–72; Ferrer and Stecher, *Law of Condominium, with Forms, Statutes and Regulations* (1967), Vol 1 paras 31–2; Natelson, 'Comments on the historiography of condominium: The myth of Roman origin' (1987), pp. 17–58.

2 Roberts, *Oxford Dictionary of the Classical World* (2005), p. 253 records that Elephantine was the capital of an administrative district in Upper Egypt, on an island, occupied till the Arab period as a military post on the frontier with Nubia. Jewish mercenaries formed a garrison there from the 26th Dynasty (664–525 BC) onwards and established a temple of Jahweh.

3 Samuels, 'The condominium existed in Biblical times' (1963), p. 4 notes that the deed is preserved in Brooklyn Museum, New York.

The concept of transferring parts of a building probably stemmed from the colony's location on an island where land for improvement was scarce and where the acute housing shortage forced the citizens to erect multi-storeyed buildings, which were then divided into several ownership units.

There is evidence that this institution was endorsed in the ancient law of Chaldea. A charter dating from the time of King Irmerum of Sippar (2000 BC) documents the sale of the lower storey of a house to a third party as a tavern while the upper storey remained the property of the seller.[4] The pioneering use of sun-dried bricks to build houses in ancient Chaldea advanced the construction of multi-storeyed buildings.[5] From Chaldea the institution of horizontal property spread through the whole of the Orient. There is evidence that the institution was approved in ancient Egypt, Syria, Judea and Greece.[6, 7] For ancient Greek references to separate ownership of parts of a building, researchers point to passages in Homer's *Odyssey* (XIX-594) and in Herodotus, *The Histories* (II 4 40).[8]

Ancient Islamic law also recognised the separate ownership of individual storeys and apartments in one and the same building.[9] The laws applied by the traders of North Africa provided for individual ownership of separate parts of buildings that they erected around oases in the desert.[10]

3. Roman law

3.1. *Pre-classical Roman law*

The prevailing view is that individual ownership of apartments was unknown in Roman law because of the predominance of the maxim

[4] Cuq, 'Etudes', p. 458; Bärmann, *WEG* (1958), p. 4; Batlle Vásquez, *La propiedad de cases por pisos* (1960), p. 13.
[5] Bernard, *Le Propriétaire d'Appartement, ses droits, ses obligations et ses rapports de copropriété* (1929), p. 16; Cuq, 'Etudes', pp. 458–9; Flattet, *La proprieté par etages* (1956), p. 600.
[6] Nezikin, *Babylonian Talmud. Baba Mezia* (1935), ch.10; Fernandez Martín-Granizo *La ley de propiedad horizontal en el derecho español* (1983), pp. 115–16 who cites two *Mishna* in Spanish at 115 no. 8.
[7] Pappulias,'Zur Geschichte', pp. 363–4; Fernandez Martín-Granizo, *Propiedad Horizontal*, pp. 112–6.
[8] Fernandez Martín-Granizo, *Propiedad Horizontal*, p. 113; Cuq, 'Etudes', p. 459 and *Etudes sur le Droit Babylonienne* (1910), p. 185.
[9] Fernandez Martín-Granizo, *Propiedad Horizontal*, p. 116 refers to this phenomenon in the zouks of Beirout.
[10] Aeby *et al.*, *La propriété des appartements. Ses aspects juridiques et pratiques* (1983), p. 41.