

CHAPTER II

THE CONCEPT OF TITLES IN MID-AIR AND ITS INTRODUCTION INTO WEST MALAYSIA

"Titles in mid-air", "Titles in the air", "Strata Titles" and "Subsidiary Titles" all mean the same thing. The National Land Code, 1965,¹ uses the term "Subsidiary Titles". Nowhere in the Code is the term "Strata Titles" or "Titles in mid-air" or "Titles in the air" used. The New South Wales Conveyancing (Strata Titles) Act, 1961,² the New South Wales Strata Titles Act, 1973,³ and the Singapore Land Titles (Strata) Act, 1967,⁴ use the term "Strata Titles".

Prior to 1960 Strata Titles were unheard of though there was much debate as to whether there could be such a concept as Strata Titles. The Torrens system of land registration recognises the principle that subdivision of land may be horizontal as well as vertical. But it was not until Victoria passed the Victoria Transfer of Land (Stratum Estates) Act, 1960,⁵ that the principle of the

¹Act No. 56 of 1965.

²Act No. 17 of 1961 (as amended by Act No. 55 of 1961).

³Citation unavailable at time of writing.

⁴Act No. 41 of 1967.

⁵Act No. 6646.

horizontal subdivision of a single building into lots or parcels or units was put into practice. Basically the scheme of the Act was that a building could be subdivided into units, and a "service company" could be formed for the purpose of carrying out the common purposes of the proprietors of the units, including the provision of common services, the maintenance, repair and insurance against fire of the building as a whole, and the control and maintenance of the residual land or common property. The service company was incorporated under the Companies Act, and the title to the curtilage was transferred to that company. The shares in the company were divided into groups, each group corresponding to a "stratum estate" and being allotted to the proprietor of the stratum estate. Then the service company entered into a "service agreement" with the proprietors of the stratum estates governing the maintenance of the common parts of the building and its curtilage and the control of the services available to the registered proprietors.

There is not, however, any provision in the Act, which makes it compulsory for the incorporation of a service company and the making with it of a service agreement in relation to a building subdivision. All appropriate easements in favour of the registered proprietors of the stratum estates were shown on the plan of subdivision and the benefit thereof conferred on the proprietors by virtue of Section 98 of the

Act.⁶

In 1961, New South Wales followed suit and passed the Conveyancing (Strata Titles) Act.⁷ This Act, while accepting the principle of subdivision of a building into "strata" and leaving "residual land" or common property in line with the provisions of the Victoria Transfer of Land (Stratum Estates) Act, 1960,⁸ dispensed with the necessity of incorporating a "service company" and the registration of "service agreements". Instead, on the registration of the strata plan, there comes automatically into existence a "body corporate" consisting of all the proprietors of the strata plan. The Act imposes certain basic duties and confers certain basic rights and powers on the body corporate.

The New South Wales Conveyancing (Strata Titles) Act, 1961,⁹ gave rise to an entirely new form of ownership of and title to land. It enables land to be divided both horizontally and vertically. It enables a party to hold

⁶ Francis, E. A., The Law and Practice relating to Torrens Title in Australasia, Vol. II, p.95.

⁷ Act No. 17 of 1961 (as amended by Act No. 55 of 1961).

⁸ Act No. 6646.

⁹ Act No. 17 of 1961 (as amended by Act No. 55 of 1961).

ownership of a slice of airspace many feet above the ground as distinct from ownership of the ground itself. At common law, ownership of land involved (theoretically) ownership of the airspace above; a block of flats many storeys high was owned in totality by the person who owned the land. Thus the concept of Strata Titles or Titles in mid-air is based on the principle that land may be the subject of a horizontal as well as a vertical subdivision.

There are basic differences between this new form of division and conventional subdivisions. First, the subdivision involves a division bound by both horizontal and vertical planes, compared with a deposited plan which results in parcels or units bounded by vertical planes only. Secondly, a new method of defining parcel boundaries is introduced. Boundaries are to be defined by physical features instead of by mathematical and survey information. A purchaser of a lot in a subdivision of vacant land must at his peril ascertain the true boundaries, lest he trespass or encroach on his neighbour's land, and he can only ascertain these boundaries by employing standard survey techniques. But the purchaser of a parcel in a strata plan has no such problem, his parcel boundary is where the floor, wall, or ceiling is actually built. To encroach on a neighbour's parcel he would have to physically move one of these structural features. The need for survey precision disappears. 10

In 1965, the National Land Code¹¹ was passed. It repealed all existing land laws. It introduced the concept of Titles in mid-air or Strata Titles into West Malaysia although the term used in the Code is "Subsidiary Titles". It contained provisions which follow closely those of the New South Wales Conveyancing (Strata Titles) Act, 1961.¹² Under the Code it is now possible for the landowner to build a multi-storey building and to sell a portion of the floor of the said building. Titles called Subsidiary Titles can then be issued for all the parcels corresponding to the floor spaces converted into dwelling units (flats) or offices, etc. The boundaries of each parcel will correspond with the walls of permanent construction separating the various dwelling units or offices on each floor.

The Code also introduced the "management corporation" which is a body consisting of all the subsidiary proprietors of the parcels within the subdivided building. It corresponds to the body corporate which is created under the New South Wales Conveyancing (Strata Titles) Act, 1961.¹³

With the introduction of Strata Titles into West Malaysia, the devices which have been resorted to earlier on to confer the nearest practical equivalent to ownership were rendered no longer necessary. Agreements for the sale

¹¹ Act No. 56 of 1965.

¹² Act No. 17 of 1961 (as amended by Act No. 55 of 1961).

¹³ Ibid.

of flats assumed a different form altogether from their previous counterparts. They contained provisions framed in different ways but are similar in substance, all providing for the issue of separate Subsidiary Titles once payment has been made in full and for their transfer to the purchasers. Below are some examples of the new provisions found in agreements for the sale of flats:

Example A:

The Company hereby undertakes as soon as possible to obtain the subdivision of the said Building of flats into parcels, each parcel representing a flat or shop or basement and each parcel to be covered by a separate subsidiary title in accordance with Chapter 4 of Part Nine of the National Land Code.

Upon issue of such separate subsidiary title provided the Purchaser shall have paid to the Company the full purchase price and all other moneys payable under this Agreement the Company shall execute all acts and documents necessary to effect the transfer of the title to the said Flat to the Purchaser.

Example B:

The Vendor shall upon completion of the block of buildings on the said land take all reasonable steps and use his best endeavours to obtain the approval of the competent authority for subdividing the said buildings into parcels with a view to obtaining a separate subsidiary title to the said shophouse / flat.

On the issue of the subsidiary title to the said shophouse / flat provided the Purchaser shall have paid to the Vendor the full purchase price herein and all other moneys payable by the Purchaser hereunder and has performed and observed all the terms, conditions and stipulations on the Purchaser's part herein contained the Vendor shall execute and do and cause to be executed and done a valid and registrable transfer and all such other documents and acts and things as maybe necessary to vest the said shophouse / flat in the name of the Purchaser or of his nominee as the registered proprietor thereof free from all encumbrances.

Example C:

The Vendor shall take all reasonable steps and use its best endeavour to obtain the approval for the subdivision of the Centre (i.e. the Building) under the provisions of the National Land Code, 1965, so as to lead to the issue of a separate subsidiary title to the Premises.

Provided that the Purchaser shall have paid to the Vendor the full purchase price and all other moneys (if any) payable hereunder and shall have duly observed and performed the various terms, conditions and stipulations herein to be observed and performed by him, the Vendor shall within days either of the date of such payment as aforesaid or of the date of the issue of the relevant separate subsidiary title, whichever shall be the later, execute a valid and registrable transfer of the same in favour of the Purchaser or the Purchaser's nominee or nominees.

Some agreements contain a proviso providing for a possible rejection by the registering authority of the developer's application for Subsidiary Titles. The

24

proviso is put into the agreement to ensure that should the developer's application for Strata Titles be rejected the agreement will not be frustrated, by providing for the transfer of an undivided share in the land (i.e. the land on which the building sought to be subdivided stands) as an alternative to the transfer of a Strata Title. The proviso may be phrased in the following manner:

Provided always that in the event of the above application for subdivision to lead to the issue of a separate subsidiary title to the said shophouse / flat being disallowed or rejected by the authority having power in that behalf such rejection shall not vitiate or annul the sale evidenced by this Agreement and upon payment by the Purchaser and all other Purchasers of the other shophouses and flats containing in the said (No.) blocks of buildings of which the said shophouse / flat forms part to the Vendor of the balance of the purchase price and all other moneys which shall be due under the terms of this Agreement in due time the Vendor shall transfer an undivided share in the title to the said land in favour of the Purchaser or his nominee free from all encumbrances.

Or alternatively, the proviso may be phrased as follows:

In the event of the application for a separate subsidiary title to the said Flat being not approved by the Appropriate Authority the Company shall PROVIDED THAT the PURCHASER shall have paid to the Company the full Purchase Price and all other moneys payable to the Company under this Agreement cause a transfer of the Company's right, title and interest in the said Flat to the Purchaser in any other manner permitted by law IN WHICH EVENT and IN CONSIDERATION OF WHICH the Purchaser shall be bound by, observe and perform all the provisions for subsidiary titles contained in the National Land Code and any subsequent Acts, Rules, Regulations and Bye-laws in respect thereof (hereinafter together called "the said Provisions") and they shall be applicable to this Agreement as if a separate subsidiary title had been issued for the said Flat and the said Provisions had been incorporated into this Agreement.

THE ADVANTAGES OF STRATA TITLES OVER THE LEASE, THE HOME-UNIT COMPANY SYSTEM AND THE SALE OF AN UNDIVIDED SHARE

1. Strata Titles confer true ownership. A purchaser of a flat or an office unit once the transfer is executed and registered, has his name registered in the title as the new owner. He enjoys the security of having his name on a title which is indefeasible. Forty-eight years ago, a contributor to the English Law Times, in an article entitled "Freehold Estates in Tenement Buildings" had regarded it as "doubtful" whether the owner of a tenement house "can execute an absolute fee simple interest" in a flat in the building. "It is more probable," he says, "that all that can be created is an estate of a defeasible nature."¹⁴

2. Financially, the proprietor of a flat is better off than the lessee of a flat or the holder of an undivided share. When he is in need of money he can rely on his Strata Title to raise a loan since banks and other finance companies are more willing to accept a title as security for a loan rather than a lease or an undivided share.

¹⁴Watts, P.R., "The Conveyance of a Flat - The Question of Defeasibility" in Australian Law Journal, Vol. I, (1928), p. 363.

3. There is free assignability unlike the lease, the home-unit company system or the undivided share system where the lessee or the co-proprietor cannot transfer his lease or his undivided share without the prior consent of the lessor (or the company's Board of Directors) or the other co-proprietors. The proprietor of a flat or office unit can sell, lease, assign or otherwise deal with his flat or office unit in any manner as long as it is permitted by law and to whosoever he likes, who is not a minor.

4. The locus standi for an action of eviction is ownership. Possession only allows an action for trespass. But this applies only to the case where the person is in possession as a lessee under an ordinary lease. A shareholder in a home-unit company who is in possession is not recognised by law as having a proprietary right so as to enable him to maintain an action of trespass or ejection.¹⁵

5. When inflation strikes and money value goes down, it is always more attractive to see one's money invested in bricks and mortar and flats can prove to be a profitable investment.

6. People who prefer owning their flats to renting or

¹⁵Tittman v. Traill (1957) 74 W.N. 284.

UNIVERSITI MALAYA

leasing them and who intend making them their permanent homes appreciate the security against a termination of their tenancy or their lease by their landlords or by their lessors.

7. Flats not falling within the Control of Rent Act, 1966¹⁶ are liable to have their rents increased by their landlords. Only ownership can protect the flat-occupiers from increases in rent.
8. There is no longer any need as in the case of a home-unit company to go to the trouble and expense of floating a company, issuing shares and allotting leases of different types of flats according to the class of shares held.
9. The risk that the lease may be invalid on the ground that it is abnoxious to the Rule against Perpetuities is removed.
10. There is no necessity for home-unit companies to exist and consequently no necessity to amend the Companies Act, 1965¹⁷ to provide for the reduction of capital by home-unit companies.

¹⁶ Act No. 56 of 1966.

¹⁷ Act 125 (Revised - 1973).