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## THE DISTRIBUTION OF OWNERSHIP IN AN APARTMENT OWNERSHIP OR CONDOMINIUM SCHEME

### INTRODUCTION

Most legal systems recognise that apartment ownership relates to two distinct physical components of the land and buildings comprised in the apartment ownership or condominium scheme. These are firstly apartments, flats or units which are intended for the exclusive use by apartment owners and secondly, common property or common elements which are intended to be used collectively by all the owners. In most condominium statutes these components are combined into an indivisible composite entity consisting of an apartment coupled with an undivided share in the common property.<sup>1</sup> Even in countries, like Scotland which construe the new entity created in terms of the Tenements (Scotland) Bill<sup>2</sup> as a flat to which a right of common property in certain parts of the tenement scheme is attached as a pertinent, a distinction is still drawn between parts of the scheme which form part of the flat or apartment and parts of the scheme which are considered part of the common property.

This distinction is important for the following reasons. Firstly, an apartment, unit or flat owner has exclusive ownership with regard to those parts of the scheme that are included in his unit, whereas he only has a form of collective ownership over the common property. This means that the owner has greater rights of use and enjoyment with regard to his or her apartment as well as more power to alter his or her apartment according to his own taste. Within the restraints of neighbour law, he or she is in principle allowed to follow his or her own discretion in enjoying and renovating the unit. Rights with regard to the common property are much more restricted. He or she has to respect that other owners has equal rights of use and enjoyment to the common property and that alterations to the common property can only be effected with the co-operation of the other owners. Secondly, the responsibility and cost of maintaining an apartment rest with the owner whereas the responsibility and cost of maintaining the common property must be borne collectively by all the owners with a share in the common property. In the United States, Germany and South Africa, the responsibility of maintaining the common property rests with the management body (unit owners' association or body corporate),<sup>3</sup> utilising contributions paid by the unit owners to a common fund. Thirdly, in some countries, like South Africa, the floor area of a particular apartment or flat plays an important role in ascertaining the participation quota (unit entitlement) of an apartment. This is the formula by which inter alia the share of the unit owner in the common property and his or her liability for common expenses are calculated. In these countries the quota is calculated on the basis of the floor area of an apartment in relation to the total floor areas of all the units. In order to ascertain the exact floor area of

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<sup>1</sup> See C.G. van der Merwe 'Apartment Ownership', Ch 5 Vol 6 *Property and Trust in International Encyclopedia of Comparative Law* s 50.

<sup>2</sup> The Bill is published in Scots Law Commission No 162, Report on the Law of the Tenement (1998) 119ss.

<sup>3</sup> This will also be true for Scotland if the developer or the flat owners have decided to adopt Scheme B for a particular tenement scheme.

each apartment, it is important to know which parts of the scheme property belong to which particular apartment. Finally, if an apartment or unit owner chooses to procure individual insurance for his or her apartment, it is important in most legal systems to ascertain precisely which part of the scheme is covered by such insurance. This aspect assumes particular importance where the management body has also procured insurance covering the whole building.

Some jurisdictions have created a further category of apartment ownership or condominium property by dividing the common property of a condominium scheme into general common property and limited common property (limited common elements). Limited common property (elements) is usually taken to refer to those parts of the building which are reserved for the use and enjoyment of one or more but not all the unit owners. In other jurisdictions parts of the common property are allocated as exclusive use areas to particular unit owners.

The aim of this contribution in honour of Alan Watson, my former mentor, colleague, friend and celebrated scholar in Roman and Comparative law, is to illustrate the distribution of ownership in four different legislative codes. For this purpose, I have chosen one common law statute namely the Uniform Common Interest Communities Act of the United States, one civil law statute namely the German *Wohnungseigentumsgesetz* of 1951 as amended, and two mixed legal jurisdictions' statutes namely the South African Sectional Titles Act of 1986 and the Tenements (Scotland) Bill of 1998. A brief introduction will precede the discussion of the distribution of ownership in each jurisdiction.

## UNITED STATES

### General background

Borrowing extensively from European and Latin American experience, Puerto Rico was the first North American jurisdiction to promulgate a statute on apartment ownership or condominium in 1958<sup>4</sup> Despite this model, condominium schemes were still created on a common law basis in California and other states.<sup>5</sup> This changed with the amendment in 1961 of the National Housing Act.<sup>6</sup> This amendment empowered the Federal Housing Administration to insure mortgages on condominiums authorised by state law. For this purpose the Federal Housing Administration published a Model Statute<sup>7</sup> for the creation of condominiums compatible with its standards. Within days Hawaii adopted condominium legislation based on this model and by 1963 more than 30 states had passed condominium statutes patterned either on the Puerto Rican model or on the model provided by the Federal Housing Administration. By 1969 all 50 states, including the District of Columbia, Puerto Rico and the Virgin Islands had enacted legislation enabling the establishment of

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<sup>4</sup> The Horizontal Property Act of 1958. Puerto Rico had in fact already passed condominium legislation as early as 1951. The initial legislation was revised in 1958.

<sup>5</sup> See Berger 'Condominium – Shelter on a Statutory Foundation' 1963 Colum.L.R.1002-1003 for examples of condominiums that predate legislative recognition.

<sup>6</sup> By National Housing Act tit II s.234

<sup>7</sup> According to Berger *op. cit.* 1003 this Model Statute of 1962 was patterned on an earlier New York proposal rather than on the Puerto Rican model. For a reprint of the full text of this model statute, see e.g. Rohan and Reskin *Condominium Law and Practice* App B-3.

condominiums.<sup>8</sup> These ‘first generation’ statutes, contemplating primarily single high rise building condominiums, soon proved too skeletal to regulate this fast-growing concentrated form of housing. Consequently some states enacted more detailed ‘second generation’ statutes dealing with matters like consumer protection and the development of condominium projects in stages. The varying and frequently inappropriate terminology used by these statutes as well as the diversity in detail made it extremely difficult for national financial institutions and purchasers across state boundaries to evaluate the suitability of condominium documents and financial arrangements in the various states. Furthermore, these statutes did not address many actual or potential problematic areas involving such matters as termination of the condominium regime, expropriation, insurance and the interests of mortgage debtors on foreclosure.<sup>9</sup>

Primarily to resolve these and other matters, the National Conference of Commissioners of Uniform State Law, a national organisation devoted to the attainment of uniformity in state legislation, approved the Uniform Condominium Act (UCA) at their annual meeting in 1977.<sup>10</sup> The Act was approved by the American Bar Association in 1978 and by 1980 it was enacted, mostly with only minor amendments, in at least 14 states. As a result of the legislative processes in these states and a reconsideration of the Act by the drafting committee of the Uniform Planned Community Act which evaluated a wide variety of multiple land ownership regimes similar to condominiums, a number of amendments were introduced in 1980.<sup>11</sup> In 1982 the Uniform Condominium Act (1980) was consolidated together with two other multiple real property ownership regimes, the Model Real Estate Cooperative Act (1981) and the Uniform Planned Community Act (1980) in the Uniform Common Interest Ownership Act.<sup>12</sup> By 1994 UCIOA had become the law in at least five States, while the Uniform Condominium Act, or substantially similar laws, exist in 21 States.<sup>13</sup>

## **Distribution of ownership**

### Unit

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<sup>8</sup> See Rohan and Reskin *op. cit.* App B-1 for the statutes currently in force.

<sup>9</sup> See the Commissioners’ prefatory note to the Uniform Condominium Act (7 ULA 114 (suppl. 1983))

<sup>10</sup> The Uniform Condominium Act was the product of seven drafts prepared over a period of two years by a Special Committee appointed for this purpose.

<sup>11</sup> For a discussion of the 1980 Act, see Garfinkel, ‘The Uniform Condominium Act 28 Practical Lawyer 43 –65; Gillaspie ‘LB 433: A new Legal Framework for Nebraska condominiums’ 17 (1984) Creighton Law Review 382; Ohlemeyer ‘The Uniform Condominium Act in Missouri’ 49 (1984) Missouri Law Review 596.

<sup>12</sup> See Geis ‘Beyond the Condominium – the Uniform Common Interest Ownership Act’ 17 (1982) Real Prop. Prob. & Trust J. 65-80. All references in this contribution are to the Uniform Common Interest Ownership Act (1994) approved and recommended for enactment in all the states in July/August 1994 and approved by the American Bar Association on February 14, 1995.

<sup>13</sup> See the prefatory note to the UCIOA para. 1. For the latest state of affairs, see Rohan and Reskin *op. cit.* App. B-1. See also Buck ‘Beware the Inadvertent Condominiums’ 22 (1987) Real Prop. Prob. & Trust J. 65-80.

The most important entity created in terms of Uniform Common Interest Ownership Act relating to condominiums, is the *condominium* which consists of two basic components: the *unit* coupled with an undivided share in the *common elements*. Although it is possible in terms of the Act to divide airspace into units,<sup>14</sup> a unit is as a rule a physical portion of a building designated for separate ownership. This is borne out by the definition of a ‘unit’ as ‘a physical portion of the condominium designated for separate ownership or occupancy’.<sup>15</sup> Note that a unit is described as a tangible, physical part of the condominium project rather than a right in, or claim to, a tangible physical object. What is included in a unit in terms of the Act will depend on the description thereof in the developer’s declaration filed on record with the appropriate registering authority.<sup>16</sup> Although the developer has complete freedom to incorporate any part of the building as part of a unit it happens rarely in practice that certain indispensable parts of the condominium are designated as part of a unit.

With regard to boundaries, the Uniform Act has opted for the planes of the inside surfaces of the unfinished walls, ceilings or floors as the outside boundaries of units rather than the centre line of the walls, ceilings or floors. When the declaration merely defines unit boundaries in terms of floors, ceilings and perimeteric walls,<sup>17</sup> the Act provides that ‘all lath, furring, wallboard, plasterboard, plaster, panelling, tiles, wallpaper, paint, finished flooring, and other materials constituting any part of the finished surfaces thereof are a part of the unit’<sup>18</sup>. One important consequence of this is that external structural elements of boundary walls, floors or ceilings, could never form part of a unit. They are always common elements, which must be maintained by the unit owners’ association. Another consequence is that an owner is not in principle entitled to construct a niche or even to hammer in a nail into any boundary feature without the co-operation of the other owners.

With regard to the components of a unit, the Uniform Act states that all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.<sup>19</sup> If indicated on the project documents,<sup>20</sup> the main components of a unit may be complemented with either contiguous or non-contiguous parts of the condominium. It may thus include unenclosed contiguous spaces such as balconies, verandas or patios. Where a balcony is included in a unit, the inner surface of the walls, ceiling and floor of the balcony forms the external boundaries of the unit.<sup>21</sup> If the walls are not the full height of the unit,

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<sup>14</sup> ‘Real estate’ is defined in s 1-103 (21) of the Act so as to include ‘parcels with or without upper or lower boundaries and spaces that may be filled with air or water’.

<sup>15</sup> S 1-103(31).

<sup>16</sup> See s 1-103(31) and s 2-105(a)(5). In terms of the latter section, the declaration must contain a description of the boundaries of each unit created by the declaration, including the unit’s identifying number.

<sup>17</sup> In a townhouse project, it may be desirable that the unit boundaries, it may be desirable to describe the unit boundaries in the declaration as the exterior surfaces of the roof and exterior walls with the center line of the party walls constituting the perimeteric boundaries of the units in that plane, and the undersurface of the bottom slab dividing the unit itself from the underlying land. See the Commissioners’ comment 1 to s 2-102.

<sup>18</sup> S 2-102(1).

<sup>19</sup> S 2-102(3).

<sup>20</sup> These are the declaration and plats and plans of the condominium.

<sup>21</sup> This follows from s 2-102(1).

imaginary lines being a vertical or horizontal<sup>22</sup> continuation of the internal surface of the existing wall or ceiling would presumably qualify as the external boundaries of the unit. In addition, non-contiguous portions of the condominium such as underground garages or parking lots, storage lockers or similar facilities may also be included in the project documents as part of a unit, provided they are not designated as limited common elements.

### Common elements

In the allocation of common element components, the older United States' condominium statutes based on the Model Statute of the Federal Housing Administration followed the inclusive approach by providing a list of such components. Since the developer is allowed a wide discretion to designate most common elements as part of a unit in the project documents, these lists were usually not divided into mandatory and permissive sections. These statutes, some with minor variations, adopted the list supplied by the Model Statute.<sup>23</sup> The list includes the following: the land on which the building is located; foundations, columns, girders, beams, supports; main walls, roofs, halls, corridors, lobbies, stairs, stairways; fire escapes, entrances and exits of the building; the basement, yard, gardens, parking areas and storage places; premises for lodgings for janitors or persons in charge of the building; installations for central services supplying inter alia electricity, gas, heating, air-conditioning and incinerating; elevators, tanks, pumps, motors, fans, compressors, ducts and other apparatus and installations destined for common use; community and commercial facilities as provided in the project documents; and all other parts of the project necessary or convenient for its existence, maintenance and safety.<sup>24</sup>

The more recent United States' statutes, following either the Uniform Condominium Act or the Uniform Common Interest Ownership Act, employ the exclusive approach and define common elements as all portions of the condominium other than the units.<sup>25</sup> Two special provisions in the Uniform Common Interest Ownership Act supplement this. The first special provision is contained in the definition of a 'unit' which states expressly that all portions of boundary walls, floors or ceilings of a unit except the finished surfaces thereof are part of the common elements.<sup>26</sup> The second special provision concerns any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture, which lies partially within and partially outside the designated boundaries of a unit. If any portion of such item serves only that unit, it is a limited common element allocated solely to that unit; if any portion thereof serves more than one unit or any portion of the common elements it is part of the common elements.<sup>27</sup> The rationale for inserting this provision is to minimise disputes in condominium administration with respect to liability for repair of pipes and other components of the building which unit owners may expect the association to pay for and which the association

<sup>22</sup> See Rosenberg *Condominium in Canada* no. 601.2 and *Proprietors Strata Plan no 6522 v. Furney* [1976] 1 N.S.W.L.R. 412 at 415 for the interpretation of similar provisions in Canadian and New South Wales' statutes.

<sup>23</sup> Model Statute of 1962 s 2(f).

<sup>24</sup> This list is supplied by Rosenberg *Condominium in Canada* no.108.2. See further Rohan and Reskin *Condominium Law and Practice* no. 6.01(1) and (2) and Powell and Rohan *Powell on Real Property* VII B no. 633.23.

<sup>25</sup> Uniform Common Ownership Interest Act s 1-103(4).

<sup>26</sup> S 2-102(1) *in fine*.

<sup>27</sup> S 2-102(2).

may wish to have repaired by unit owners.<sup>28</sup> A third special provision was added in 1994 to include as common elements any other interests in real estate for the benefit of unit owners which are subject to the declaration.<sup>29</sup> The purpose of this amendment was first to clarify that common elements may include easements or other forms of servitudes, which benefits either the unit owners' association or all the nit owners in the condominium. Examples of such interests include access easements to a landlocked parcel on which the condominium is located and easements for shared parking. A further purpose of the amendment was to enable condominium associations to acquire real estate (as for example additional parking areas or open space) in addition to the land originally submitted to the declaration without the formalities of an amendment of the declaration to redefine the boundaries of the condominium.<sup>30</sup> Any real estate physically locate outside the boundaries of the condominium thus acquired by the association would automatically become a common element.<sup>31</sup>

The differentiation between the components constituting common elements and components that are part of the unit is as already indicated particularly important for the question of maintenance. The Uniform Act, subject to certain exceptions, makes the association responsible for the maintenance of common elements and each unit owner individually responsible for the upkeep of his or her unit.<sup>32</sup> In the field of insurance, the distinction between unit components and common element components is of importance in the case of condominium projects, which contains units not divided by horizontal boundaries. In such projects only the common elements need to be insured and not the unit components.<sup>33</sup> In a normal high-rise configuration, the unit owners' association will normally insure both the unit components (exclusive of improvements inside the individual units) and the common element components and the cost of such insurance will be a common expense borne by the association.<sup>34</sup>

### Limited common elements

The UCIOA defines limited common elements firstly, as portions of the common elements allocated by the declaration for the exclusive use of one or more but fewer than all the units.<sup>35</sup> Examples are special corridors, stairways, elevators and sanitary services common to units of a particular storey, parking spaces, laundry rooms, porches, patios, balconies and stairways contiguous to and serving only one or more owners exclusively.<sup>36</sup> Limited common

<sup>28</sup> See Commissioners' comment 2 to s 2-102. The comment also points out that problems that arise as a result of the negligence in the use of the components – such as stoops and pipes – are resolved by s 3-107. This section imposes liability on a unit owner who causes damage to the common elements. Furthermore s 3-115(c) permits the association to assess common expenses 'caused by the misconduct of any unit owner' exclusively against that person. This could also include clean-up costs incurred as a result of the unit owner's misuse of the common elements.

<sup>29</sup> S 1-103(4)(ii).

<sup>30</sup> This would typically require a two-thirds vote of the unit owners under s 2-117(a).

<sup>31</sup> See comments 6 and 7 to s 1-103 of the UCIOA.

<sup>32</sup> S 3-107(a).

<sup>33</sup> S 3-113(a) and (b).

<sup>34</sup> S 3-113(a). The association can allocate the cost of the insurance on the basis of risk if the declaration so requires. See s 3-115(c)(3).

<sup>35</sup> S 1-103 (19).

<sup>36</sup> See Rohan and Reskin *Condominium Law and Practice* no. 6-01(5).

elements further include common elements for the exclusive use of one or more but fewer than all the units by operation of section 2-102(2) or (4).<sup>37</sup> The first subsection refers (as already noted) to any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture which lies partially within and partially outside the designated boundaries of a unit. If any portion of any such item serves only a particular unit it will be considered limited common property allocated solely to that unit. The second subsection provides that any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but allocated outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

The notion of limited common interest is employed in the UCIOA in order to achieve a more equitable distribution of the cost of maintaining that particular area by the actual users thereof. The UCIOA contemplates that a developer (declarant) will fund all common operating expenses during the fledgling stage of the project, that is until a sufficient number of units have been conveyed to warrant assessing the unit owners.<sup>38</sup> However once a unit owners' association has been established and assessments have been made, all units, including those owned by the developer, are obliged to contribute. The association is obliged to make assessments at least annually based on a budget adopted at least annually by the association. In general all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration.<sup>39</sup> The UCIOA, however, stipulates that the declaration may provide that the expenses pertaining to the maintenance, repair and replacement of limited common elements must be assessed only against the units to which those common elements are assigned either equally or in any proportion the declaration provides. It further provides that expenses betitting fewer than all the units must be assessed exclusively against the units benefited. Finally the costs on insurance must be assessed in proportion to the risk and most importantly the costs of utilities must be assessed in proportion to usage if the declaration so provides.<sup>40</sup>

## GERMANY

### General background

During the Germanic period something akin to apartment ownership was already known in medieval Europe especially in those parts which later became the modern Germany. Under such names as *Stockwerkseigentum*, *Geschosseigentum*, *Herbergsrecht* and *Kellerrecht*, storeys of buildings acquired in individual ownership were used mainly for residences whilst separate rooms served as business premises, for example as shops, taverns and butcheries.<sup>41</sup> Interestingly, documentary evidence indicates that during the 12<sup>th</sup> century parts of buildings were already conveyed in individual ownership in Germany to be exploited as public

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<sup>37</sup> S 1-103(19).

<sup>38</sup> S 3-115(a). For reasons why the developer would do this, see comment 1 to s 3-115.

<sup>39</sup> S 3-115(b). For the allocation of interest in the declaration, see s 2-107. See further the definition of 'common expenses' and 'common expense liability' in s 1-103(5) and (6) respectively.

<sup>40</sup> S 3-115 (c)(1)-(3).

<sup>41</sup> See in general von Gierke *Deutsches Privatrecht* II (Sachenrecht) (Binding ed) 39-41; Bärmann *Wohnungseigentumsgesetz Kommentar* (ed 1 1958) 6-8; Bärmann, Pick and Merle *Wohnungseigentumsgesetz. Kommentar* (ed 4 1980) 25.

houses.<sup>42</sup> The *Stockwerkseigentum* of Germanic law was a primitive and undeveloped form of apartment ownership. Storeys in high-rise buildings were usually subdivided in individual ownership with the owner of the top storey owning the roof, the owner of the bottom storey owning the land and the owners of the other storeys owning only their particular storeys. Permeated by the notion of individualism, management and maintenance of the building was left to the individual owners themselves without any central administration body to deal with these matters. The rights and duties of the owners were not clearly demarcated, in most cases no common property was recognised and there was no mechanism to solve disputes amongst owners. The endless disputes amongst unit owners swiftly drew the designation of *Streithaueser* or houses of dissent.<sup>43</sup> The unsatisfactory experience with *Stockwerkseigentum* led to the non-recognition of apartment ownership in the codifications of the German states of Prussia and Saxony in the late 18<sup>th</sup> and mid-19<sup>th</sup> centuries respectively and the unqualified acceptance of the Roman maxim *superficies solo cedit* in the German Civil Code of 1900. According to this maxim a building are not capable of being separated from the soil and thus belongs with the inclusion of all its parts, to the owner of the soil.

The devastation of World War I and especially after World War II caused a desperate housing shortage coupled with an almost pathological psychological yearning for home-ownership. This compelled German legislators to reconsider a form of apartment ownership as a means of spreading home ownership to a larger segment of the population. The idea that home ownership would bring not only social and economic stability but also political stability played a particularly important role in war-damaged Germany overrun by thousands of homeless people.<sup>44</sup> Due to the initiative of Carl Wirths, a member of the German Federal Parliament, special legislation on apartment ownership was promulgated in West Germany in 1951.<sup>45</sup>

## Distribution of ownership

### Unit

Like most Western European statutes,<sup>46</sup> the German condominium statute does not contain a list of the components that can form part of a unit (*Wohnung, Raum* or *Gegenstand des Sondereigentums*). The reason for this is that the real estate developer and apartmentowners are allowed a certain amount of autonomy to decide that certain parts of the scheme, which

42 See for the Schreinsurkunde of Cologne of 1135 till 1142 A.D., Möller *Die Problematik des Raum- und Stockwerkseigentums* (thesis Frankfurt am Main 1937) 7.

43 See in general Huber *Geschichte des Schweizerischen Privatrechts* (1886-1893) III 241; Leyser 'The Ownership in Flats. A Comparative Study' 1958 (7) *I.C.L.Q.* 33.

44 Carl Wirths who is regarded as the father of the German *Wohnungseigentumsgesetz* suggested in the first commentary on the statute written together with Weitnauer, that this was the primary justification for the promulgation of the German statute. See Weitnauer *Gesetz über das Wohnungseigentum und das Dauerwohnrecht* (1972) 286 for the text of the first edition.

45 Law on apartment ownership and long-term residential rights (*Gesetz über das Wohnungseigentum und das Dauerwohnrecht – Wohnungseigentumsgesetz*) of 15 March 1951, *BGBI. I* 175. For the legislative process, see Bärmann *Kommentar* (ed 1) 65-72.

46 See in general Van der Merwe 'Apartment Ownership' in Drobnig and Zweigert (eds) *International Encyclopedia of Comparative Law* Vol VI Property and Trust Ch 5 s 107.



are usually designated as common property, can be included as components of apartments.<sup>47</sup> Therefore one has to refer to the project documents (plan of subdivision) to ascertain which parts of the scheme had been allocated by the developer or the mutual agreement of the owners to particular apartments.<sup>48</sup>

The German statute envisages an apartment or non-residential unit as part of the condominium building, which is intended for exclusive and independent use. Only parts of a building that are clearly isolated (*abgesondert*) from other apartments and the common property should form part of an apartment.<sup>49</sup> It does not appear that apartment can consist of portions of land or delimit cubic airspaces.<sup>50</sup> Parts of the surrounding masonry isolating an apartment from other apartments and the common property must therefore be included in an apartment. In this regard the statute provides that only components of the building which can be altered, destroyed or inserted without duly encroaching on the rights of unit owners and without changing the external structure of the building can be included in an apartment.<sup>51</sup>

The German statute does not attempt to describe the boundaries of an apartment or unit. The criterion of independence and exclusiveness, however, implies that apartments must most probably be isolated from each other and the common property by physical features such as floors, walls and ceilings. The above requirement as to the components of an apartment also implies that structural components of the boundaries of apartments or units can never form part of an apartment. The German position thus approximates the position in the UCIOA that regards the planes of the inside surfaces of the unfinished walls, ceilings or floors as the outside boundaries of units rather than the centre line of the walls, ceilings or floors. In the case of parking spaces, the German statute makes an exception to the requirement that a unit or part of a unit must be clearly isolated. It provides that parking spaces may be established in condominium building (usually in the basement) as part of a unit as long as they are distinct entities and clearly demarcated on the surface of the floor by some permanent physical features.<sup>52</sup>

In Germany it is accepted that an apartment need not be confined to one room or a set of rooms on a particular floor of the building. Certain contiguous or non-contiguous parts of the building could form a component of an apartment. Thus balconies as well as cellars and

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<sup>47</sup> Law of 1951 s 5 par. 3.

<sup>48</sup> Law of 1951 s 7 par. 3 and 4.

<sup>49</sup> Law of 1951 s 3 par. 2 sent. 1 reads: '*Sondereigentum soll nur eingeräumt werden, wenn die Wohnungen oder sonstigen Räume in sich abgeschlossen sind*' (individual ownership should be established only if the apartments or other rooms form an isolated unit). Since this is a permissible (*soll*) condition, non-compliance does not invalidate the scheme. On this requirement, see Bärmann, Pick and Merle *Wohnungseigentumsgesetz, Gesetz über das Wohnungseigentum und das Dauerwohnrecht, Kommentar* (ed.7 1997) no. 37-50 and Bub 'Die Anforderung an die Abgeschlossenheit von Räume als Voraussetzung für die Begründung von Wohnungseigentum' *Festschrift Bärmann und Weitnauer* (Münich 1990) 69-90.

<sup>50</sup> Bärmann, Pick and Merle *op. cit.* s 3 no 17.

<sup>51</sup> Law of 1951 s 5 par 1. See further Bärmann, Pick and Merle *op. cit.* s3 no. 3

<sup>52</sup> See Law of 1951 s 3 para 2 sent.2. Lines which are merely painted on the surface of the floor are not considered sufficient. Low concrete or metal walls, firmly fixed railings and presumably also a line of faced bricks built into the concrete surface would be acceptable. See further Henkes, Niedenführ and Schulze *Wohnungseigentumsgesetz, Handbuch und Kommentar zum Wohnungseigentumsgesetz mit Anmerkungen zur Heizkosten- und Heizungsanlagen-Verordnung* (3ed. 1995) s 3 no. 17 and 18; Röhl *Münchner Kommentar zum Bürgerlichen Gesetzbuch Vol 6 Sachenrecht* (3ed. 1997) s 3 WEG no.59.

garages (including parking spaces) can form part of a residential or non-residential apartment as long as they are described as such in the constitutive documents.<sup>53</sup>

### Common property

The German statute initially defines common property exclusively by excluding land and those parts of the scheme, which form part of an apartment or which is owned by a third person.<sup>54</sup> Thus land including facilities on the land such as swimming pools and tennis courts are always common property. The same applies to all those parts of the building that do not form part of the apartment. Thus the presumption is that all the components of the building are common property except if they are included in an apartment. Consequently a component of the building is classified as common property whenever there is doubt as to its classification.<sup>55</sup> However, it then continues to enumerate in broad terms which parts of the scheme constitute common property. The Act makes it clear that all structural parts of the building namely parts that are important for the existence and stability (*Bestand und Sicherheit*) of the building are necessarily common property. Further components of the common property are all those parts the alteration of which would affect the outside appearance of the building. This would include all outside walls, balconies, windows, doors and other appurtenances to the outside walls. Further all components of the building which are destined to serve the apartment ownership community<sup>56</sup> rather than the individual owners are part of the common property.<sup>57</sup> This applies in the first place to staircases, entrances, corridors, lifts and laundrettes. It further applies to all common facilities for instances to central heating installations and other installations as well as pipes, wires and ducts serving the community of owners as opposed to an individual owner.<sup>58</sup>

### Limited common elements and rights of exclusive use

Some German commentators endeavours to entertain notions similar to the United States' idea of limited common property to the common property in schemes consisting of more than one building. They suggest that the ownership in the entrance, staircase, and lift serving a particular building could be construed in two ways. These items either belong in a kind of shared individual ownership (*Mit-Sondereigentum*), or in a distinct kind of co-ownership which are isolated and independent from the general common property (*abgesondertes Miteigentum*) to the apartment owners which they serve.<sup>59</sup> The same construction is also applied to the non-load-bearing parts of the boundary walls between individual apartments.<sup>60</sup> Although the main aim of especially the distinct co-ownership classification is to arrive at a

<sup>53</sup> Law of 1951 s 7 par. 4 no.1. The additional rooms must (with the exception of parking spaces) be clearly isolated and indicated with the same colour and number on the plans. See Bärmann, Pick and Merle *op. cit.* s 5 no. 18; Henkes, Niedenführ and Schulze *op. cit.* s 7 no.13.

<sup>54</sup> Law of 1951 s 1 par. 5

<sup>55</sup> See Henkes, Niedenführ and Schulze s 5 no. 5.

<sup>56</sup> According to the German Federal Court BGH 1981 NJW 455 this includes all parts, denial of common use of which would infringe an interest protected by the law.

<sup>57</sup> Law of 1951 s 5 par. 2.

<sup>58</sup> Henkes, Niedenführ and Schulze *op. cit.* s 5 no. 18 and 19.

<sup>59</sup> Bärmann, Pick and Merle *op. cit.* s 5 no. 42.

<sup>60</sup> See Bärmann, Pick and Merle *op. cit.* s 5 no. 7, 27 and 66.

fairer distribution of maintenance expenses, both these constructions are not popular in practice.<sup>61</sup>

Though not sanctioned by the *Wohnungseigentumsgesetz*, the German Federal Court has recognised that rights of exclusive use (*Sondernutzungsrechte*) can be created to parts of the common property.<sup>62</sup> Since these rights are created by agreement between the unit owners, it in principle only creates personal rights to that particular part of the property. It is, however, accepted in German practice that these rights can be registered in the land register.<sup>63</sup> Whether such registration has the effect of creating a real right in favour of the particular owner, is still disputed.<sup>64</sup> The German Federal Court has taken the tantalising view that registration does not create a new category of real rights but a right with real effect.<sup>65</sup> One real effect is that the right of exclusive use once registered is enforceable against particular successors in title such as purchasers of units and donees.<sup>66</sup>

## SCOTLAND

### General background

From medieval times, Scotland (especially the city of Edinburgh), recognised a form of apartment ownership that had an uncanny resemblance to Germanic *Stockwerkseigentum*.<sup>67</sup> This is shown by the brief exposition of the law of the tenement in Stair's *Institutions* published in 1681.<sup>68</sup> The owner of the topmost storey in a tenement building was the owner of the roof, while the land belonged to the owner of the ground floor. The owners of the intermediate floors owned the portion of the outer wall which enclosed. The common passages and stairs belonged to the owners of the units to which they formed an access. The doctrine of common interest subjected owners to maintain their apartments. The owners of the lower storeys had to provide support to the upper storeys, while the owners of the upper storeys had to provide cover to the lower storeys and were not allowed to increase the burden on the lower storeys. Although some individual tenement schemes worked fairly well the lack of a central organisation and an effective mechanism to enforce reciprocal obligations prompted the following remark concerning tenement buildings in the 18<sup>th</sup> century:

<sup>61</sup> See Röhl Münchener Kommentar s 5 WEG no 22; Henkes, Niedenführ and Schulze op. cit. s 5 no. 26.

<sup>62</sup> BGH of 24 Nov 1978, 73 BGHZ 146,147.

<sup>63</sup> These rights fall under the regulation of the use of the common property (*Gebrauchsregelung*) contained in Law of 1951 s 5 par 4 and s 10 par 2.

<sup>64</sup> See especially Schnauder 'Die Relativität der Sondernutzungsrechte' *Festschrift Bärman und Weitnauer* (1990) 567ss; Mostert 'The Regulation of Exclusive Use Areas in terms of the Sectional Titles Act 95 of 1985 of 1986: An Evaluation of the Existing Position and Suggested Alternatives' 1997 *Stellenbosch L.R* 332, 343-345.

<sup>65</sup> BGH of 24 Nov 1978, 73 BGHZ 146, 148.

<sup>66</sup> It is not enforceable against universal successors under a will and it is uncertain whether it will give some kind of priority on insolvency..

<sup>67</sup> According to Frank Wordsall *The Tenement; A Way of Life* (1979)1 the tenement or 'land' was in existence as early as the sixteenth century.

<sup>68</sup> Stair *Institutions* II.7.6.

‘Every house is a complete house, occupied by a separate family; and the stair being common to them all is generally left in a filthy condition; a man must tread with great circumspection to get safe housed with unpolluted shoes.’<sup>69</sup>

The explosion of tenement construction in the nineteenth century caused a modest increase in case law that competed with local customs for supremacy. By the end of the century Rankine summarised the existing case law in his seminal work *Landownership* and suggested solutions for the apparent defects that remained in the law of the tenement. Despite these deficiencies, no special legislation was considered necessary to cope with the admittedly less acute shortage of housing after the two World Wars in Scotland than on the continent of Europe. By the end of the twentieth century a quarter of the housing stock in Scotland consisted of tenement buildings.<sup>70</sup> The law was, however still based on a handful of cases mixed with local customs and disputed extrapolations of academics. In practice, a heavy reliance was placed on expert conveyancers to clear up the mess by supplying title documents of tenement buildings with appropriate conditions.<sup>71</sup>

This unsatisfactory state of affairs eventually led to the publication of a Report on the Law of the Tenement,<sup>72</sup> by the Law Commission in 1988, the first in a series of reports on property law.<sup>73</sup> The report was preceded by the publication of a discussion paper on the law of the tenement in 1990,<sup>74</sup> followed by extensive consultation with interested parties<sup>75</sup> and two seminars on the topic.<sup>76</sup> Against this background final recommendations as well as a draft Tenements (Scotland) Bill were published in the Report of 1998. This draft legislation will be promulgated as a statute of the new Scottish Parliament in the near future.

The Scottish Law Commission acknowledged that the common law of the tenement although vigorous and constantly refined by case law during a period of over two hundred years, was defective in a number of respects primarily in failing to provide for ‘a proper mechanism for decision –making and management.’<sup>77</sup> However, it adopts a minimalist approach<sup>78</sup> as evidenced by the two general sets of reform proposals. The aim of the first set is to restate the existing common law principles applying to tenements<sup>79</sup> so as to clarify them

<sup>69</sup> Life in 18<sup>th</sup> century Edinburgh as evidenced by Smaller Humphrey Clinker quoted in Davis ‘Condominium and the Strata Titles Act 1966 (9) *Canada Bar J.* 471.

<sup>70</sup> Scottish Homes, *Scottish House Condition Survey Main Report 1996*, 35.

<sup>71</sup> See in general *Report on the Law of the Tenement* par 2.1

<sup>72</sup> Report on the Law of the Tenement, Scot Law Com No 162 published on 25 March 1998 (cited as Report).

<sup>73</sup> Property law is included in the *Fifth Programme of Law Reform*: Scot Law Com No 159(1997) item 6 paras 2.32-2.42.

<sup>74</sup> Discussion Paper No 91 – Law of the Tenement, published December 1990.

<sup>75</sup> These included legal practitioners, academics and representatives of the Property Managers Association Scotland Limited, the Royal Institution of Chartered Surveyors in Scotland and the Royal Incorporation of Architects in Scotland

<sup>76</sup> The seminars were held on 7 September 1995 in Edinburgh and on 25 September 1996 in Glasgow.

<sup>77</sup> Report para 2.30

<sup>78</sup> See in general P.F Smith, ‘Owning Flats: Scottish or English Style?’ 2000 *Scottish Law and Practice Quarterly* 38 and 42 where the author refers to the lightness of touch of the Scottish reform proposals since much more freedom is allowed to individual title deeds. At 46 he states that the aim of the proposals was to *reform* rather than to *rewrite* the existing law.

<sup>79</sup> See in general K.C.G. Reid, ‘The Law of the Tenement’ 1983 *JLSS* 472.

and to restate them in modern language.<sup>80</sup> The second set is aimed at filling ‘a widely acknowledged gap’ in the existing law by providing a proper system of management in the form of two alternative schemes for the management and maintenance of tenements. These management schemes borrowed extensively from existing schemes in title deeds and thus offer continuity rather than an abrupt break with the past. Furthermore they are not rigid or compulsory but optional<sup>81</sup> in the sense that developers and conveyancers may adopt their own management schemes in the title deeds pertaining to particular tenement buildings. Both with regard to the distribution of ownership and the provision of management and maintenance schemes, the law proposed is essentially a background law, applying in the absence of express provisions in relevant title deeds. This caution not to disturb existing titles is based on the acceptance that the new law should apply both the new as well as existing tenements. Consequently, the reform can be described as evolutionary rather than revolutionary.<sup>82</sup>

## **Distribution of ownership**

### Introduction

When examining the Scottish proposals on the distribution of ownership in tenement scheme, it must always be kept in mind that the Scottish proposals only present a background or residual law. The proposals provide certain basic rules but leave it to the discretion of developers and their conveyancers to modify or even disregard these rules when preparing title conditions for the conveyance of flats in a tenement building.<sup>83</sup> Unlike the position in South Africa and under the Uniform Condominium Act, there are no demarcation of boundaries in sectional plans or on plats and plans, but merely a description of the applicable boundaries in the provisions of the draft legislation. In general, the proposals contain merely a restatement of the common law rules on the distribution of ownership even if some of these rules have been criticised as inequitable. The justification for this is that a disturbance of existing rights would contravene the provision in the European Convention on Human Rights that property rights should not be appropriated without compensation.<sup>84</sup> In the distribution of ownership, the Scottish law remains essentially individualistic in that a tenement is still basically viewed as a series of separate houses built on top of the other.<sup>85</sup> This is entirely different from the approach in The United States and South Africa where an apartment building is divided into various composite units, consisting of a apartment inextricably linked to an undivided share in the common property. Put differently, an entirely new statutory composite res is created and then divided into two components and allocated to either individual property or common property.

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<sup>80</sup> Report para 1.2

<sup>81</sup> Thus Scheme B is a voluntary scheme: Scots Law Com No 162, para 6.1.

<sup>82</sup> See also Smith op. cit. 46.

<sup>83</sup> See Report par. 3.8.

<sup>84</sup> See Report par. 3.3

<sup>85</sup> See K.Reid ‘Property Law: Sources and Doctrine’ in K. Reid and R. Zimmermann (eds.) *A History of Private Law in Scotland Volume I Introduction and Property* 216.

The Scots tenement reforms are aimed at effecting a decisive shift from individual ownership to common ownership.<sup>86</sup> This remark does however, not apply to the distribution of ownership in a tenement building since this aspect is clarified rather than altered in the proposals. It should rather be seen in the context of the proposals for reserve management schemes. In Germany, overt emphasis is placed on the importance of common property in an effort to guarantee proper maintenance of the structural parts and common facilities. In Scotland the thrust of the reforms is to retain the existing distribution of ownership between individual and common property but to compensate for that by providing reserve schemes for the common maintenance of the building and the ‘strategic parts’ of a tenement.<sup>87</sup>

### Unit<sup>88</sup>(flat)

In Scotland, a flat (apartment or business unit) is not defined by reference to a sectional plan or a plat or plan as in the United States, but by a description in the title documents. The provisions of the draft legislation apply only if the boundaries and pertinents of units are not constituted in the title documents.<sup>89</sup> According to these provisions a flat is described as a dwelling-house or any business or other premises in a tenement building.<sup>90</sup> In practice a flat consists of the airspace bounded by walls, floors and ceilings up to the median line of the particular flat.<sup>91</sup> This result was achieved because the Scots reformers rejected the approach that the boundary structures between individual flats are the common property of neighbouring flatowners<sup>92</sup> and adopted a simplifying approach by designating the mid-point of the dividing structure as the boundary between flats. Thus they accepted that ‘the boundary between two flats on the same level should be the mid-point of the common wall, while the boundary between an upper and a lower flat would be the centre line of the joists’.<sup>93</sup> The owner of the particular flat owns the wall separating the common passage from an individual flat in the inside up to the midpoint.

An exception is, however, made where the wall, floor or ceiling forms the outer shell of the building. Where a wall forms the outside boundary of a flat, such external surface also belongs to the owner of the flat, which it bounds.<sup>94</sup> Thus ownership of a flat extends to any

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<sup>86</sup> Scot law Com No 162, *Report on the Law of the Tenement* (1998) para 3.1: ‘Under the suggested new code there would be a move away from the individualism of the common law to a more community-based distribution of rights and obligations’.

<sup>87</sup> See also P.F. Smith op. cit. 43

<sup>88</sup> Note that the definition of ‘unit’ in cl 30(1) of the Tenements (Scotland) Bill is much wider than in other jurisdictions including besides flats (apartments and business units) also the close and the lift as well as any other three-dimensional space not comprehended by a flat, close or lift.

<sup>89</sup> Tenements (Scotland) Bill cl. 1

<sup>90</sup> Tenements (Scotland) Bill cl 30(1) s.v. ‘flat’.

<sup>91</sup> Tenements (Scotland) Bill cl 2(1) which reads ‘the boundary between any two contiguous units is the median line of the structure that separates them; and a unit (a) extends in any direction to such boundary.’ See also Report par 4.19.

<sup>92</sup> See eg Cameron ‘The Law of the Tenement – Walls, Passages and Stairs’ (1960) II Conv Rev 102.

<sup>93</sup> Report para 4.19.

<sup>94</sup> Tenements (Scotland) Bill cl. 2 (1) (b) (i) and (ii) which provides that a unit ‘extends to and includes the solum or any structure which is the outer surface of the tenement building’ or

outside section of a wall whose inside is within any flat. The result is that the outside walls of the building are owned in individual sections corresponding to the different flats in the same building.<sup>95</sup> If the outer boundary is formed by the top ceiling or the roof, not only the ceiling or roof, but also the triangular airspace created by the sloping roof belongs to the owner of the top flat which it bounds.<sup>96</sup> The rationale for allocating the triangular airspace to the owner of the top flat is to enable him to insert a dormer window in that airspace<sup>97</sup> immune from objections by the other owners that this would affect the stability or aesthetic appearance of the building.<sup>98</sup> If the nethermost boundary of a flat is the solum or land underneath the building,<sup>99</sup> the solum, the foundations of the building and cellars belong to the owner of the flat on the ground floor.<sup>100</sup> In addition the owners of all ground flats enjoys the additional benefit that all airspace surrounding the building (with the exception of the triangular airspace formed by a sloping roof) belong to them.<sup>101</sup> Thus the special favour<sup>102</sup> shown to the ground floor owner at common law is not altered by the proposed reforms. Does his ownership of the soil entitle him to dig out a wine cellar underneath his flat? This discussion of the notion of a flat shows clearly that the Scottish law remains fundamentally individualistic in that a tenement is still primarily viewed as a series of separate houses built on top of the other.

The problems encountered with regard to windows, doors and other items forming part of the outer boundary of the unit, is solved by allocating all such doors, windows and other items to the flat or unit which it serves.<sup>103</sup> One result of this would be that a door entering upon the close would belong wholly to the flat, which it serves.<sup>104</sup>

## Right of common property

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‘extends to the boundary that separates the unit from a contiguous building that which is not part of the tenement building’.

<sup>95</sup> Report para 2.10.

<sup>96</sup> Tenements (Scotland) Bill cl. 2(3) and (7).

<sup>97</sup> See *Sanderson’s Trustees v Yule* (1897) 25 R 211 esp at 216 (Lord President) and 218 (Lord Adam).

<sup>98</sup> See Smith op. cit. 44 who points out that in France and in most other jurisdictions such works would be classified as an improvement to common property requiring the consent of a weighty majority of owners voting in the owners’ general assembly. Since this rigid rule makes it difficult to carry out desirable work such as installing entry-phones, Smith prefers the minimalist Scottish approach.

<sup>99</sup> The Tenements (Scotland) Bill cl 30(1) defines ‘solum’ as ‘the ground on which the building is erected’.

<sup>100</sup> Tenements (Scotland) Bill cl 2(4).

<sup>101</sup> Tenements (Scotland) Bill cl 2(6). Note that all land not built upon (including garden areas) belong to the owners of the various ground flats as pertinents in proportionate shares: Tenements (Scotland) Bill cl 3(3).

<sup>102</sup> Report par 2.9.

<sup>103</sup> Tenements (Scotland) Bill cl 2(2) states that for the purposes of boundaries ‘where the structure separating two contiguous units, is or includes something (as for example, but without prejudiceto the generality of the subsection, a door or window) which wholly or mainly serves only one of those units, the thing is in its entire thickness part of that unit’.

<sup>104</sup> Note that the definition of ‘unit’ in cl 30(1) of the Tenements (Scotland) Bill includes inter alia flats and any close or lift.

In principle the Tenements (Scotland) Bill does not expressly subdivide the tenement building into flats and common property. Instead it draws a distinction between flats and other units in a tenement not included in a flat and allocate a right of common property in these other units as pertinents to the flats, which they serve.<sup>105</sup> It assumes that a close or lift serves more than one tenement and grants a right of common property therein to all the flats served by these units.<sup>106</sup> If a close or lift does not afford a means of access to a flat, no right of common property in the close or lift attach as a pertinent to that particular flat.<sup>107</sup> The law reformers opted for rough justice and allocated shares in such right equally amongst the owners of the flat, which it serves.<sup>108</sup> An exception is made in the case of a chimneystack. There the right of common property is divided amongst the various flatowners served by it in proportion to the number of flues in the stack serving a particular flat in relation to the total number of flues in the stack.<sup>109</sup>

The Bill mentions three examples of components of a tenement, which fall under the description of other units. The most important is the close<sup>110</sup> which is the enclosed space in a tenement building which does not form part of a flat. It consists of the connecting passage, stairs and landings, which together constitute a common access to two or more of the flats from the outside.<sup>111</sup> The close extends to the three dimensional airspace formed by a sloping roof which forms the outer boundary of the close, as well as the part of the solum bounded by the close. This urge for consistency seems somewhat peculiar, since the rationale for allocating the triangular airspace seems out of place in the case of the close where the insertion of dormer windows is not envisaged. The second example of another unit is the lift,<sup>112</sup> which includes the shaft and the operating machinery.<sup>113</sup> A right of common property is allocated in the close and the lift as a pertinent to all the flats, which it serves. It appears somewhat inconsistent that the roof and airspace above and underneath the lift shafts are not treated the same as the areas which bound the close. The third category comprises other three dimensional spaces in the building not covered by the description of either a close or a lift which is presumably treated in the same way as the close and the lift. In addition the Bill provides that any land pertaining to a tenement excluding the land underneath the tenement (solum), shall attach as a pertinent to the bottom flat most closely adjacent to such land.<sup>114</sup> Any part of the land that constitutes a path, outside stair or other way affording access to any unit other than that flat is excluded from this provision<sup>115</sup> and dealt with in the next category covered by the catchall phrase ‘other pertinents.’ This category includes miscellaneous parts of the tenement such as paths, outside stairs, fire escapes, rhones or downpipes, flues, conduit cables, tanks and chimneystacks. If the unit wholly serves only one flat, it is attached

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<sup>105</sup> Tenements (Scotland) Bill cl 3(1).

<sup>106</sup> Tenements (Scotland ) Bill cl 3(1).

<sup>107</sup> Tenements (Scotland) Bill cl 3(2).

<sup>108</sup> Tenements (Scotland ) Bill cl 3(5).

<sup>109</sup> Tenements (Scotland) Bill cl 3(5) in fine.

<sup>110</sup> Tenements (Scotland) Bill cl 3(1)(a).

<sup>111</sup> See the definition of ‘close’ in the Tenements (Scotland) Bill cl 30(1).

<sup>112</sup> Tenements (Scotland) Bill cl 3(1)(b).

<sup>113</sup> See the definition of ‘lift’ in the Tenements (Scotland) Bill cl 30(1).

<sup>114</sup> Tenements (Scotland) Bill cl 3(3). The owners of the bottom flat presumably also share the land most closely adjacent to the close.

<sup>115</sup> Tenements (Scotland) Bill cl 3(3).



as a pertinent to that flat; if it serves two or more flats, a right of common ownership is attached as a pertinent to those flats to the extent that it serves them.<sup>116</sup>

### Scheme property

In practice title deeds regularly provides for the maintenance and management of the common elements of the scheme. If this is not done, individual owners must carry out repairs of their own accord or are obliged under the doctrine of common interest to do so on account of the physical proximity of benefited and burdened property.<sup>117</sup> The common interest in the property is construed either as a proprietary interest in the whole building<sup>118</sup> or no more than an ‘equitable restriction’ on tenement owners.<sup>119</sup> The management scheme A, contained in the Bill endeavours to develop the idea of common interest by providing that certain parts of the building that are used in common or are fundamental to the stability of the tenement, should be collectively maintained.<sup>120</sup>

In order to provide for the collective management and maintenance of a tenement building under Scheme A, the Bill creates an additional category of tenement property namely ‘scheme property’ besides individual and common property. The rationale for the creation of this peculiar kind of property is that certain parts of the tenement preserved as part of a flat are considered of vital importance to the essential fabric of the scheme. Therefore the individualism of the common law preserved in the distribution of ownership in a tenement, had to make place for collective responsibility for maintaining the structural integrity of the tenement by designating these part ‘scheme property’. In the large majority of tenements this result is attained under the title deeds but the titles of older tenements are sometimes silent or extremely inadequate.<sup>121</sup> Thus management scheme A, will mostly apply only in those older schemes which does not have a management scheme or where there are serious gaps in the scheme and to new tenements which have adopted Scheme A.<sup>122</sup>

Scheme property under Scheme A does not encompass all parts of a tenement. Since owners can be expected to maintain their own flats, individual property is excluded. In principle, scheme property consists of two elements namely any part of the tenement, which is the common property of two or more owners and certain strategic<sup>123</sup> parts of the tenement. Common property includes any part of a tenement (including any garden or other ground),

<sup>116</sup> Tenements (Scotland) Bill cl 3(4).

<sup>117</sup> Reid ‘Common Interest’ (1983) 28 *JLS* 428 at 429.

<sup>118</sup> See Lord Dunedin in *Smith v Guiliani* 1925 SC (HL) 45 at 59 in the context of a statutory award of costs (under s 381 of the Glasgow Police Act 1866) of a part demolition of a tenement building.

<sup>119</sup> Lord Ardmillan in *Taylor v Dunlop* (1872) 11 M 25 at 31

<sup>120</sup> In contrast to a collective management scheme such as Scheme A, common interest, as laid down by the Institutional writer Bell in his *Principles* s 1086, is individualistic: it requires each tenement owner to maintain his own wall for example. He retains the property in the wall, so that he can alter it as he thinks fit ‘provided he does not endanger the common interest’. See also Smith 44.

See par 5.1 and 5.9.

<sup>122</sup> Tenements (Scotland) Bill cl 5(1).

<sup>123</sup> The parts is strategically so important to the building as a whole that they require to be maintained in common. See par 5.4.

which is the common property<sup>124</sup> of some or of all the owners.<sup>125</sup> Thus apart from the individual flats, their roofs and outside walls, other parts of a tenement form part of more than one flat which they serve. Thus depending on the nature of the tenement, common property can include a long list of items ranging from rhones, down pipes, soil pipes, entry-phone systems, the close, common lighting and heating systems to outside pathways and fire-escapes. In practice it may happen that this list will be substantially extended in the title deeds, which means that the precise content of scheme property will vary from tenement to tenement.<sup>126</sup> Strategic property includes those parts of the tenement that must preferably be adequately maintained by all the owners in order to preserve the structural integrity of the building and the individual flats. It includes all the external surfaces of the building (outside walls, the roof,<sup>127</sup> the solum and the foundations and part of the gable wall that is part of the tenement building) as well as load-bearing walls inside the building.<sup>128</sup> Although they do not fall into the Bill's definition of common property, some of them may be common property under the titles and accordingly already qualify as scheme property.<sup>129</sup> On account of its mandatory nature and the fact that experts disagree on the definition of 'structural significance', scheme property are restricted to the absolute minimum (load-bearing walls). It does not automatically include any part of the building that is of structural significance regardless of nature such as floors, joists and columns.<sup>130</sup> In addition, certain parts of the tenement are excluded from the definition of scheme property on the ground that the owner of a particular flat should maintain them. These are ground floor offshoots from an individual flat like rear kitchen extensions and protruding shop fronts; chimney stacks or flues which are not common property;<sup>131</sup> and doors, windows,<sup>132</sup> skylights,<sup>133</sup> vents or other openings which serve a particular flat.<sup>134</sup>

These proposals will rearrange the maintenance liabilities of tenement owners.<sup>135</sup> At common law the owners on the top storey must maintain the roof while the maintenance of the walls, foundations and other structural parts fall on the owners of the lower storeys. Under the proposals all owners will share in the maintenance of the scheme property. To a certain measure, these changes balance out. The owner of a lower flat will incur some liability for maintaining the roof,<sup>136</sup> but will also lose some liability to maintain the walls.

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<sup>124</sup> This in turn depends on the application of the service test as explained in par 4.23 – 4.32 and recommendation 4(g)-(k)

<sup>125</sup> Tenements (Scotland) Bill, Schedule 1 rule 1 para 1.2(a).

<sup>126</sup> Report par 5.5. In the case of flats registered in the Land Register, one should look at the A (property) section of the land certificate.

<sup>127</sup> Including any rafter or other structure supporting the roof: Schedule 1 rule 1 para 1.2(a)(iv).

<sup>128</sup> Schedule 1 rule 1 para 1.2(b).

<sup>129</sup> Report par 5.6.

<sup>130</sup> Report par 5.7.

<sup>131</sup> Chimney stack which serves two or more flats will be common property and hence scheme property on that ground.

<sup>132</sup> Dormer windows are also included except for the roof surrounding thea dormer window. See par 5.8.

<sup>133</sup> See Report par 5.8.

<sup>134</sup> They should be common property only where they serve the close or other common part of the building

<sup>135</sup> Report par 5.10. See also Smith *op. cit.* 45

<sup>136</sup> Smith *op. cit.* 45 assumes that this will presumably be on a regular rather than an emergency basis.

The owner of a top flat would have to contribute to the cost of maintaining the outer wall of the lower flats. Inevitably the exchange will not always be fair especially where responsibility for the maintenance of the roof is added. Since existing title provisions are not affected, the object of the proposals is merely to replace a background law that was universally seen as unfair with a new background law aimed at an equitable distribution of costs. While a reduced responsibility for maintaining the roof might lead to an increase in the value of top flats a corresponding decrease in the value of lower flats is not foreseen.<sup>137</sup>

The Scottish reformers accept that ‘maintenance is a right not a duty’ and do not place owners collectively under a duty to repair or maintain scheme property. In the normal course of events, an owner who wishes to have a repair carried out will put the matter to the vote. If a majority is achieved the repair can be carried out under scheme A. If not, the owner can seek to enforce the obligation to repair scheme property from the other owners or repair the property himself and recover the cost from the other owners.<sup>138</sup> By contrast the South African provisions place the body corporate under a mandatory obligation to repair and maintain the common parts of the building in a good state of repair as part of their duty to manage.<sup>139</sup> The trustees as executive branch of the body corporate can thus act without waiting for a resolution of the body corporate in general meeting.

## SOUTH AFRICA

### General background

Whereas no special legislation on apartment ownership has up to now been introduced in Great Britain,<sup>140</sup> common law systems outside Great Britain recognised that the so-called common law condominium patterned on the British model relying primarily on the conveyancing skills, was surrounded by too many uncertainties, to achieve universal popularity. Supportive legislation was therefore considered necessary to encourage prospective purchasers and institutional lenders to invest in apartment ownership schemes and to simplify the task of the conveyancer. For these and other reasons the Australian states considered it necessary to introduce special legislation on apartment ownership or strata titles. The most sophisticated Australian statute, was the New South Wales Conveyancing (Strata Titles) Act of 1961 later replaced by the Strata Titles Act of 1973.<sup>141</sup> It served as model not only for later condominium statutes of the other Australian states, but also for the condominium statutes of the various Canadian states, New Zealand, Singapore, Malaysia and South Africa.<sup>142</sup>

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<sup>137</sup> Report par 5.10.

<sup>138</sup> Report par 5.45-5.46 and part 7.

<sup>139</sup> Sectional Titles Act 95 of 1986 s 37(1)(j). See van der Merwe *Sectional Titles Vol I* in Van der Merwe and Butler *Sectional Titles, Share Blocks and Time-sharing* (loose-leaf 1995-2001) 14-13 as to its mandatory character.

<sup>140</sup> For a discussion of reform proposals and a draft Bill on Commonhold, see P.F. Smith ‘Owning Flats: Scottish or English Style?’ 2000 *Scottish Law and Practice Quarterly* 36ss.

<sup>141</sup> This statute is the most detailed statute on apartment ownership in the world. This statute which is almost six times longer than its predecessor of 1961 is unnecessarily detailed and complex.

<sup>142</sup> For special legislation introduced in Australia, New Zealand, Canada, Singapore and Malaysia, see Van der Merwe ‘Apartment Ownership’ Ch 5 of Vol 6 *Property and Trust in Drobnig and Zweigert International Encyclopedia of Comparative Law* s 11-13.

South Africa has a mixed legal system combining civilian Roman-Dutch law with British common law. The system is uncodified and modern developments results mainly from case law and legislation. South African property law has remained mainly civilian with only a few English influences. Thus the maxim *superficies solo cedit* was taken over from Roman-Dutch law with the result that separate ownership in buildings or parts of buildings apart from the land was not recognised. Just as in European and American legal systems, legislation was thus necessary to introduce a system of condominium or ownership of sections of a building. The main reason for introducing sectional ownership in South Africa was as in other countries, to provide urgently needed residential accommodation for all income levels within commuting distance from centres of employment.<sup>143</sup> Another reason was that the main alternative to sectional ownership namely share-block company schemes, proved unsatisfactory. Share-block companies are something akin to American Real Estate Cooperatives with a company owning the building and the purchase of share-blocks entitling the purchaser to occupy a flat in the building. The fact that the purchaser's investment is not protected in the case of the insolvency of the share-block company, made this an unpopular alternative.<sup>144</sup>

The idea was first mooted in the early 1950's and draft bills were introduced in 1956, 1957 and 1964 in the House of Assembly to provide for the registration of title deeds to sections of buildings. Select committees reported favourably on the New South Wales legislation and unfavourably on the practice of share-block schemes. The recommendations of a special commission of enquiry appointed in 1970 led to the promulgation of the first Sectional Titles Act in 1971.<sup>145</sup> In the course of time voices raised for the adoption of a second-generation statute as in the American states, were satisfied by the promulgation of the second Sectional Titles Act in 1986.<sup>146</sup> While leaving the basic structure and the main principles of sectional ownership intact, the new act streamlined registration and introduced several new mechanisms to cope with modern demands. The Sectional Titles Act of 1986 has been amended several times, most importantly by the Sectional Titles Amendment Act of 1997.<sup>147</sup>

The South African legislation has been greatly influenced by the New South Wales Act and to a lesser extent by the German *Wohnungseigentumsgesetz* of 1951 and the Israeli Cooperative Houses Law of 1961. Thus a primarily common law statute was transplanted on the primarily civilian South African law of property. This has led to an attempt to harmonise the concept of sectional ownership with traditional ideas concerning single and composite property objects, exclusive ownership, traditional co-ownership in undivided shares and the essentials of the body corporate or incorporated association which manages the scheme's affairs.<sup>148</sup>

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<sup>143</sup> For various reasons for introducing condominium, see van der Merwe 'Apartment Ownership' s 24-29.

<sup>144</sup> For a comparison between share-block and similar schemes and condominium, see Van der Merwe 'Apartment Ownership' s 489-500; Van der Merwe and Butler *Sectional Titles, Share Blocks and Time-sharing* (ed1 1985) 451-454.

<sup>145</sup> Act 66 of 1971.

<sup>146</sup> Act 95 of 1986.

<sup>147</sup> Act 44 of 1997. For a critical evaluation of the innovations introduced by this Act, see van der Merwe 'The Sectional Titles Amendment Act of 1997: A Critical Evaluation' 1998 *THRHR* 170.

<sup>148</sup> See most recently Van der Merwe 'Sectional Titles' in Joubert (ed) *The Law of South Africa* First Reissue Vol 24 s 165-171.

## Distribution of ownership

### General

The Sectional Titles Act has created a new composite thing, namely a *unit* consisting of a *section* together with an undivided share in the *common property* of the scheme apportioned according to the participation quota of the section.<sup>149</sup> The component parts of a unit are indivisible. Legal transactions encompass the entire unit and separate transactions cannot normally<sup>150</sup> be concluded in respect of the unit or its accompanying share in the common property.<sup>151</sup> Since a unit is deemed to be land (real property) and urban immovable property,<sup>152</sup> ownership of a unit can be registered in the Deeds Registry and the Deeds Registries Act apply *mutatis mutandis* unless otherwise provided.

### Section

A section is defined as ‘a section as shown on a sectional plan.’<sup>153</sup> The Act requires that each section in a condominium scheme must be defined with reference to its floors, walls and ceilings and distinguished by a separate number on the sectional plan.<sup>154</sup> A sectional plan must in addition show the floor area of each section to the median line of its boundary walls.<sup>155</sup> The Act further provides expressly that the common boundary between any two sections or between a section and the common property is the median line of the dividing floor, wall or ceiling.<sup>156</sup>

A section is thus basically a cubic entity formed by the walls, ceilings and floors of a residential apartment or business premises, with the median lines of the boundary walls forming the vertical boundaries and the median lines of the floors and ceilings forming the horizontal boundaries of a section.<sup>157</sup> Since parts of the surrounding masonry and other materials comprising the boundary walls, floors and ceilings up to the median line are included in a section, a section always has physical substance and is not confined to a piece of enclosed airspace. None of the problems encountered by those American states on condominiums that accepted the notion of airspace- condominiums are thus relevant to South African law.<sup>158</sup>

<sup>149</sup> Sectional Titles Act 96 of 1986 s 1(1) s v ‘unit’. In non-residential schemes the developer determines the participation quota. In residential schemes, it is allocated in proportion to the floor area of each section.

<sup>150</sup> A statutory exception is created by s 17 dealing with transactions regarding the common property.

<sup>151</sup> S 16(3). Even insurance of a section is deemed to cover its share in the common property: s 16(4)

<sup>152</sup> S 3(4).

<sup>153</sup> S 1(1) s v ‘section’ read with ss 2(c) and 6(2)(d).

<sup>154</sup> s 5(3)(d).

<sup>155</sup> S 5(3)(e).

<sup>156</sup> S 5(4).

<sup>157</sup> Note the somewhat wider definition in the New South Wales Strata Titles Act 68 of 1973 s 5(3): ‘A reference in this Act to a cubic space includes the reference to a space contained in any three-dimensional geometric figure that is not a cube.’

<sup>158</sup> See in general Risk R.C.B. ‘Condominiums and Canada’ 1968 University of Toronto L.J.22-23 and 25; Sinclair A.M. ‘Condominium in Canada’ 1968 Canadian Bar Review 11.

The boundaries of a section are identified with reference to physical data and not with reference to survey beacons as in the case of conventional plots of land. The Act allows such boundaries to be defined either with reference to the floors, walls or ceilings thereof or in a manner acceptable to the surveyor-general.<sup>159</sup> The surveyor-general would presumably accept sections that only have a roof and no ceiling, sections without solid walls and parking blots in a parking garage which do not have walls but are sufficiently demarcated as sections by permanent beacons and a survey in accordance with the Land Survey Act.<sup>160</sup> The fact that a section must be part of a building excludes the possibility of structuring sections entirely without at least a floor, roof or walls.

Apart from the main component, a section can include an adjoining stoep, porch, balcony, atrium or projection if shown as part of the section on the sectional plan.<sup>161</sup> Since these terms must be given their ordinary meaning, it is difficult to include courtyards, patios and carports under these terms.<sup>162</sup> These appurtenant parts need not be defined with reference to floors, walls or ceilings but again in a manner acceptable to the surveyor-general.<sup>163</sup>

A section can further include non-contiguous parts of the scheme such as laundries, servants' quarters and garages that are not in close proximity to the main component. The regulations only require that these rooms must be given the same numbers on the sectional plans as the sections to which they belong.<sup>164</sup> A section may thus consist of various portions of a building. Thus the main residential component (comprising several rooms) may be supplemented with a garage and a laundry. As long as they are identically numbered on the sectional plan, they constitute one section even though these components are situated at different extremities of the building.

### Common property

In terms of the Sectional Titles Act the term 'common property' consists of three components.<sup>165</sup> Firstly, it includes the land on which the condominium scheme is situated. This encompasses all land, whether it is the soil underneath the building, land for the yet undeveloped parts of the scheme or developed land.<sup>166</sup> The fact that the land is necessarily part of the common property has the following consequences. One, the owner of a section on

<sup>159</sup> S 5(5)(b) read with reg 5(1)(l).

<sup>160</sup> Act 8 of 1997. Painted lines would be unacceptable, but not a line of face bricks cemented into the concrete floor.

<sup>161</sup> S 6(2)(d).

<sup>162</sup> For more detail, see van der Merwe Sectional Titles Vol I in Van der Merwe and Butler *Sectional Titles, Share Blocks and Time-sharing* (loose-leaf 1995-2001) 3-8 – 3-9.

<sup>163</sup> S 5(5)(b) read with reg 5(1)(l).

<sup>164</sup> S 5(6) read with reg 5(1)(k)(iii). Non-adjointing parts of the building, eg garages, need not necessarily be incorporated in the residential sections: they can be registered as separate sections (by allocating distinctive numbers on the sectional plan) or as exclusive use areas, or left as part of the common property of the scheme. This mechanism provides greater marketing flexibility, but problems related to on-street parking can arise and the homogeneity of the project can be impaired if non-residents are allowed to acquire garages in a residential project.

<sup>165</sup> S 1(1) s v 'common property'

<sup>166</sup> All improvements on the land, whether they are trees, flowers, vegetables, gardens and lawns or special amenities like parking areas, drying yards, swimming-pools, tennis-courts or children's playgrounds, are included.

the ground floor has no special rights in the soil underneath his or her section; he cannot excavate in order to provide himself with a new wine cellar. Two, portions of the land can never form part of a section; a garden area or parking space cannot be incorporated as part of a section.<sup>167</sup> Secondly, the common property comprises all parts of the condominium buildings that are not included in a section. Examples are the outer shell, the roof and the foundations of the building, all means of access to sections, ventilation shafts, common installations and radio and television antennas (intended to serve all the owners?). Means of access include inter alia entrances, lifts, lobbies, hallways, stairways, passages, landings, foyers and fire escapes. Self-contained portions of a building can be designated for common use for example laundries, garages, an indoor swimming pool, a crèche, a recreation hall and storage facilities. Even separate buildings can be reserved by the developer as common property for example a detached building to serve as a club house, community hall or a residence for a caretaker. Finally, common property includes land referred to in section 26 of the Act. Section 26 deals with the extension of a condominium scheme by the addition of land to the common property. The aim of the addition is primarily<sup>168</sup> to provide additional amenities and facilities to the members of the scheme.

#### Exclusive use areas

An 'exclusive use area' is defined in the Act as part or parts of the common property for the exclusive use of owner(s) of one or more sections, as contemplated in section 27.<sup>169</sup> In principle sectional owners must make reasonable use of the common property and may not therefore appropriate any part of the common property for their exclusive use. Developers, however, soon realised that the need for certain portions of the common property to be allocated to individual sectional owners to be utilised as parking bays, courtyards, patios, garden areas, store-rooms, attics, basements and even outer shells of buildings for advertising purposes.<sup>170</sup> The Sectional Titles Act of 1971 did not provide for the creation of exclusive use. Consequently, mechanisms such as notarial leases, servitudes and the amendment of the rules (regulations) of the scheme were employed to establish exclusive use areas, with the amendment of the rules being the most popular.<sup>171</sup> On account of developer malpractices,<sup>172</sup> inter alia collecting the cost of maintenance of these areas as common expenses and retaining these areas as 'nest-eggs' after leaving the scheme, the Sectional Titles act of 1986 provided stringent technical rules for the registration of exclusive use areas. The high cost of surveying exclusive use areas and public demand then prompted the legislator to revive the cheaper, old method of providing for exclusive use areas in the rules of the scheme. One thus

<sup>167</sup> They can, however, be incorporated as exclusive use areas in terms of s 27.

<sup>168</sup> Since the Sectional Titles Amendment Act 44 of 1997 the use of the additional land was not restricted to facilities and amenities but could be used for the erection of additional condominium buildings.

<sup>169</sup> S 1(1) s v 'exclusive use area'. See further on exclusive use areas, Mostert 'The Regulation of Exclusive Use Areas in terms of the Sectional Titles Act 95 of 1986: An Evaluation of the Existing Position and Suggested Alternatives' 1997 *StellLR* 324-347.

<sup>170</sup> In *Body Corporate of the Solidatus Scheme No SS23/09 v De Waal* [1997] 3 All SA 91 (T) 76 parking areas, eight patios or stoeps and eight balconies were allocated as exclusive use areas.

<sup>171</sup> See van der Merwe and Butler *Sectional Titles, Share Blocks and Time-sharing* (ed1 1985) 177-180.

<sup>172</sup> See further van der Merwe 'Sectional Titles' in Joubert *The Law of South Africa (LAWSA)* vol 24 s 262.

have to distinguish between real (genuine) exclusive use areas pursuant of section 27 of the Act and personal (non-genuine) exclusive use areas established by inserting special rules in the model rules of the scheme in terms of s 27A.

The mechanism of exclusive use areas are therefore utilised to provide some or all the unit owners with inter alia exclusive parking or garden areas carved out of the common property of the scheme. These areas are indicated on the sectional plan that shows the individual sections and the common property of the scheme. As already indicated, exclusive use areas can be created in two ways, namely, either as independent real rights registered in the sectional title register, or as mere personal rights included in the rules of the scheme. As independent real rights, they can be reserved by the developer on registration of the sectional plan and then transferred by unilateral cession to some or all the individual owners.<sup>173</sup> Else they can be created by unanimous consent of the body corporate and allocated to some or all the sectional owners.<sup>174</sup> The purpose for which exclusive use areas are to be used must be clearly indicated on the sectional plan and they must be uniquely numbered.<sup>175</sup> Exclusive use areas may only be transferred to another owner in the same scheme.<sup>176</sup> Special arrangements are made for allocating the cost of the upkeep of the exclusive use area to the holder of the right of exclusive use.<sup>177</sup>

## COMPARISONS AND CONCLUSIONS

From the above survey it is clear that the provisions on the distribution of ownership are, except perhaps in the case of the South African statute, not mandatory, but merely provides a background law where distribution had not been regulated in more detail in the project documents. The United States' and Scottish developer has complete freedom to designate any part of the building either as part of a unit (flat) or as part of the common elements. This is to a large extent also true of their German counterpart who is, however, not allowed to designate certain parts of the building which are usually common property as part of a unit. The South African developer has the least flexibility in this regard. He is only allowed to make minor adaptations to the statutory distribution of property in the model rules of the scheme when registering it as a sectional title scheme.<sup>178</sup>

The South African statute is the most comprehensive with regard to various components constituting a unit (section). It provides clearly that a section can consist of the main set of rooms, together with certain contiguous parts (eg a balcony) and also non-contiguous parts (eg a garage in the cellar of the building). Although the other statutes provide less express detail, the same result is either tacitly assumed in their statutory provisions or it can be expressly provided for in the title documents.

The statutes which provide for the delineation of sections in plats and plans (or sectional plans) provide a much clearer picture of what parts of the condominium property is included

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<sup>173</sup> S 27 (1) and 27(1A). For a summary of the differences between genuine and non-genuine exclusive use areas, see van der Merwe *Sectional Titles Vol I* in Van der Merwe and Butler *Sectional Titles, Share Blocks and Time-sharing* (loose-leaf 1995-2001) 11-24.

<sup>174</sup> S 27(2) and (3).

<sup>175</sup> S 27(1)(a) and reg 5(1)(k). For more details, see van der Merwe 'Sectional Titles' in LAWSA vol 24 s 262.

<sup>176</sup> S 27(4).

<sup>177</sup> S 37(1)(b).

<sup>178</sup> See van der Merwe 'Sectional Titles' in LAWSA vol 24 s 277.



in a section. In this regard the Scottish Bill that provides merely for the description of flats in the title documents is the least satisfactory.

With regard to the boundaries of units (sections or flats), the South African statute and to some extent the Scottish Bill, have accepted the median line of the boundary floors, walls and ceilings as boundaries. This facilitates the driving of nails into the walls for hanging pictures and even the alteration of the inside of section up to the median line for example by fashioning a niche in the inside of the outside wall.<sup>179</sup> However, the problem is that certain structural parts of the building may be located wholly or partially within the boundaries of a section. The owner will in principle be inhibited from altering these parts on account of statutory implied reciprocal servitudes (easements) of subjacent and lateral support.<sup>180</sup> The crucial point is, however, that since these structural parts are considered part of the section, the individual owner will be responsible for their repair and upkeep that could amount to a considerable expense. The Scottish position is somewhat basically similar. Again the midpoint of the dividing walls, floors or ceilings is taken as the boundary between neighbouring flatowners. This means that flatowners are in principle allowed to freely alter their side of the wall. Express provisions in the Bill<sup>181</sup> prohibiting interference with support or shelter however, as under the South African Act, inhibit this power. The problem is, however, that flatowners would like their South African counterparts be responsible for the maintenance of structural parts of the building located inside their flat. The only exception allowed by the Bill is loadbearing walls which are considered 'scheme property' and thus subject to collective repair. The legislator's unwillingness to include any other structural parts in the definition of 'scheme property', leaves the owner concerned unprotected against considerable expenses in repairing a structural part which forms part of his flat. The American UCIOA avoids this problem by designating the unfinished walls, ceilings and floors as the outside boundaries of the flat. The UCIOA thus warrants the non-alteration and simultaneously the common maintenance of all structural parts of the building. The problem about driving nails into the outside walls of a unit and of inside alterations reaching into the unfinished walls, floors or ceilings, has, however, not been solved.<sup>182</sup> The German statute reaches perhaps, the most acceptable result by refraining from express provisions on the boundaries of units, and by providing that all structural parts of the building should be common property. The implication is that the driving of nails and the alteration of inside portions of outside boundaries are allowed as long as structural parts of the building is not affected.

The position with regard to doors and windows in outside or inside walls of a unit differs in the four statutes discussed. The position is perhaps the most unsatisfactory under the South African statute where the ownership of these items seems to depend on which part of the median line they are located. The only apparent solution is presumably to designate them either as part of the section or part of the common property in the rules of the scheme. In Germany the courts have held that the outer portions of doors and windows are common property whereas the inner parts belong to the individual units.<sup>183</sup> German academics

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<sup>179</sup> This is, of course, subject to limitations contained in the statutory implied reciprocal servitudes (easements) of subjacent and lateral support referred to in the next sentence.

<sup>180</sup> Sectional Titles Act 95 of 1986 s 28. See van der Merwe 'Sectional Titles' in *LAWSA* vol 24 s 228

<sup>181</sup> Tenements (Scotland) Bill cl 13.

<sup>182</sup> Except if appropriate provision has been made in the project documents.

<sup>183</sup> OLG Koeln 1981 NJW 585.

however, argued against the division of doors and windows into inside and outside portions and insisted that since the alteration of these items could affect the harmonious outside appearance of the building, they should be classified as common property.<sup>184</sup> This is in principle the position adopted by the American UCIOA which provides that windows and doors which only serve a single unit, should be allocated as limited common elements to that particular unit.<sup>185</sup> The Scottish Bill has opted for the opposite solution by allocating doors and windows to the flats that they serve.<sup>186</sup> We have seen that as a result of this the owner of a door, which fronts on the close will be the sole proprietor of that door. This provision facilitates the replacement of doors and windows by the owners concerned with items of their choice.

The position of service items such as wires and down pipes supplying individual units with electricity and water are difficult to tract in the South African Act. In principle their allocation as part of a section or the common property again depends on which side of the median line they are located. If this is the case, a sectional owner may not only have wide powers with regard to pipes and wires inside the median line of his boundary walls, but would also, more importantly, be responsible for their maintenance. This position is, however, countered by two other sections in the Act. The first places an obligation on the owner to allow an authorised person to enter his section to inspect, maintain, repair or renew items capable of being used in connection with the enjoyment of any other section or the common property.<sup>187</sup> The second creates reciprocal servitudes of passage through individual sections for these wires, pipes and ducts.<sup>188</sup> These provisions seem to imply that these items are common property subject to collective maintenance wherever they are located. This is the solution adopted by the UCIOA that provides that wires and pipes that serve more than one unit or the common property, whether located within or partially outside the boundaries of a unit, are always to be classified as common property. The German statute presents a similar solution. It provides that all installations and facilities that serve all unit owners can never be part of a unit.<sup>189</sup> Wires and pipes that only serve a single unit will, however, be considered part of a section as long as their alteration does not affect the common property.<sup>190</sup> The Scottish Bill that classifies inter alia wires and down pipes under the catchall category of other pertinents achieves the most satisfactory result. If the wire or down pipe wholly serves only one flat, it is attached as a pertinent to that flat; if it serves two or more flats, a right of common ownership is attached as a pertinent to those flats to the extent that it serves them.<sup>191</sup>

<sup>184</sup> Bärmann, Pick and Merle *op.cit.* s 5 no. 36; Weitnauer *op. cit.* s 5 no.9.

<sup>185</sup> See *supra*.

<sup>186</sup> See *supra*.

<sup>187</sup> Sectional Titles Act 95 of 1986 s 44(1)(a).

<sup>188</sup> S 28(1)(a)(ii) and (b)(ii).

<sup>189</sup> See *supra*.

<sup>190</sup> See Weitnauer *op. cit.* s 5 no. 11.

<sup>191</sup> See *supra*.. See further Report on the Law of the Tenement par 4.25. The legal position with regard to entry-phone systems, television aerials, satellite dishes should be governed by similar principles. Depending on the service test, it should be regarded either as belonging to the flat which it serves or as part of the common property. Thus the individual phones of an entry-phone system should be allocated to the individual flats it serves, while the common wiring should be treated the same as all other common wiring. Television aerials and satellite dishes, including their wiring should be allocated to the individual flats that they serve. See also Report par 4.23. The Tenements (Scotland) Bill cl 20 expressly entitles an owner to fix television aerials and satellite dishes to the outside surface of any roof of the tenement or to

The UCIOA, the German and the South African divides the land and buildings comprised in a condominium scheme into components which belong to a unit and components that belong to the common elements. To each unit, an undivided share in the common elements is attached thus creating in effect a new composite thing. The share value for each unit is determined by a fixed formula. In Scotland the position is different. The building is divided into flats and 'other units'.<sup>192</sup> The term 'other units' covers most of the components (for example the close and the lift) that are classified as common elements in the other jurisdictions. Applying the service test, not an undivided share in such units, but a right of common property is attached as a pertinent to the flat that they serve. Peculiarly the service test is not employed to determine the share in the right of common property in the unit. Such share is distributed equally amongst the owners served by the particular unit and not according to the use made by the owners of that particular unit.<sup>193</sup>

Under the UCIOA, the German and South African statutes land is always treated as common property. So-called bare land condominiums<sup>194</sup> where a plot of land is divided into several caravan sites and sold off to prospective purchasers, is not permissible under any of these statutes. Nor is it possible to add land (eg a parking space) as part of a unit except in South Africa in the form of an exclusive use area. Under the South African statute and the UCIOA land added to the condominium scheme at a later stage is incorporated into the existing common property. The Scottish treatment of land is peculiar. In accordance with an individualistic trend, land, including the surrounding airspace is treated as part of the property of the owner of the ground floor to which it is most closely adjacent. It attaches as a pertinent to that flat and allows ground floor offshoots like kitchens and protruding shop fronts. This is quite different from the other jurisdictions where the land is treated as common property. This means that all kinds modern developments that occur in the field of condominium law like the extension of units, the erection of common facilities and the development of a condominium project in stages are not regulated by the Bill but must be catered for in the project documents.<sup>195</sup>

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any chimney stack and to lead any wires or cables required from the aerial or dish to his or her flat.

<sup>192</sup> This term is very confusing in the condominium context where it usually refers to the parts of the building that are individually owned.

<sup>193</sup> In most condominium schemes it would be equitable to endeavour to distribute the cost of maintaining such common elements as a staircase and especially a lift in accordance with the use made thereof by the owners of the various units. For the application of this test of 'objective utility' see van der Merwe 'Apartment Ownership' s 161.

<sup>194</sup> For a survey of statutes that provides for this type of condominiums, see Van der Merwe 'Apartment Ownership' s 69. See inter alia Beale and Kohls 'Site condominiums as Alternatives to Conventional Subdivision Platting' 1989 MichBar J. 1188-1192; Soles 'Site Condominiums – Fast Homes for a Price' 6 Colley L.Rev. 511-526; Buck 'Drafting Dockominium Documents' 1988 (4) Pract. Real Est.Lawyer 27-39

<sup>195</sup> The first step will be to designate the land as common property and then to add title conditions covering the development envisaged. The provisions of the Bill will particularly straightjacket the development of shopping centres and other big commercial concerns as condominiums.