LEGISLATION

STRATA TITLES IN NEW SOUTH WALES

By a strata title is meant a title to a lot in a subdivision of space above the land surface. In legal theory land may be defined by both horizontal and vertical boundaries, and an estate in fee simple may exist in respect of land so defined.[1]

In England the definition of a stratum by existing monuments (e.g. a flat in a certain building) is recognised, and a title to a stratum so defined may be dealt with by normal conveyancing procedures. In New South Wales the practice has been to define lots in a subdivision by precise land survey, and not by monuments, and the three dimensional survey required for strata subdivision is difficult and costly. Nor would such survey result in a satisfactory title system, because it would define portions of space, which might not precisely conform with monument boundaries, such as the boundaries of a particular flat, especially when in the course of time a building moved on its foundations. Definition of land by monuments is not, however, unknown in New South Wales. It occurs commonly in the description of the subject-matter of short term leases. But where it is intended to lease part of a parcel of land for a period exceeding five years, or to convey or otherwise dispose of such part so as to make it available for separate occupation, it is now legally necessary to obtain the consent of the local government authority to the subdivision (Local Government Act, 1919, ss.4 and 323), and the provisions of that Act are designed only for subdivision by survey.

I. *Subdivision by Monuments*

A system of strata titles, then, requires legislation to authorise and facilitate subdivision by monuments. There are also other problems of considerable practical importance. Thus it is necessary to have a clearly defined set of rights ensuring the mutual effective enjoyment of the various lots. These rights must "run with the land", and regard must be had to the limitations in the law regarding covenants running with the land. Again provision must be made for the management and the control of the building. Generally, the strata system and the existing conveyancing law must be correlated to ensure that undue complication in conveyancing is avoided.

A Bill, entitled "Conveyancing (Strata Titles) Bill, 1959", has passed the first reading stage in the New South Wales Legislative Assembly and the second reading has been deferred to enable interested persons to examine the Bill, and express their views upon it.[2]

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[1] *Resumed Properties Department* v. *Sydney Municipal Council* (1937) 13 L.G.R. 170.
[2] *General Editor's Note.* This Bill was prepared privately by a panel of lawyers on

Clause 2 defines "common property" as meaning so much of the land for the time being comprised in a strata plan as is not comprised in any lot shown in such plan. "Lot" means land shown as such in a strata plan. "Parcel" means the land comprised in a strata plan. The term "strata plan" is defined to mean a plan which is described in the title or heading thereto as a strata plan and which purports to divide land comprised therein into two or more strata.

By Clause 5 a strata plan shall—

(a) delineate the external surface boundaries of the parcel and the location of the building in relation thereto;
(b) bear a statement containing such particulars as may be necessary to identify the title to such parcel;
(c) include a drawing illustrating the lots and distinguishing such lots by numbers or other symbols;
(d) define the boundaries of each lot in the building by reference to floors, walls and ceilings, provided that it shall not be necessary to show any bearing or dimensions of a lot;
(e) show the approximate floor area of each lot;
(f) be endorsed with a schedule complying with the provisions of Clause 18 of the Bill; and
(g) contain such other features as may be prescribed.

Unless otherwise stipulated in the plan the common boundary of any lot with another lot or with common property shall be the centre of the floor, wall or ceiling, as the case may be.

Every plan lodged for registration must be endorsed with or accompanied by a certificate—

(a) of a surveyor, that the building shown on the plan is within the external surface boundaries of the title stated in the plan;
(b) of the town or shire clerk of the local council, that the proposed subdivision of the parcel, as illustrated in the strata plan, has been approved by the local council;
(c) pursuant to s.317A of the Local Government Act, 1919, in respect of the building.

By Clause 20 the provisions relating to the subdivision of land contained in the Local Government Act, 1919 are not to apply to any subdivision effected under the Bill but the local government authority is given a discretion, subject to appeal to the Land and Valuation Court, to refuse approval of the proposed subdivision. One effect of these provisions is that a strata plan cannot be registered until the building to which it relates has been completed to the satisfaction of the local council (Local Government Act, 1919, s.317A). This ensures that the title to a lot will not be defective because the building in which

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instructions from Civil and Civic Contractors Pty. Limited. The first draft was by Mr. J. Baalman, of the Bar of New South Wales (formerly Senior Examiner of Titles in the Registrar-General's Department). After circulation, and comments from financial institutions, and governmental and semi-governmental bodies, the draft was then considered, together with the comments, by a committee consisting of Mr. B. P. Macfarlan, Q.C. (now Mr. Justice Macfarlan of the Supreme Court of New South Wales), and Messrs. A. F. Rath, B.A., LL.B., and P. J. Grimes, LL.B. (an Assistant Examiner of Titles). Messrs. J. Baalman, and R. M. Stonham (of the Bar of New South Wales) assisted the committee in its early deliberations. The committee produced its fourth revision of the original draft on 17th July, 1959, and this draft was presented to the Attorney-General, who referred it to the Property Law Revision Committee, consisting of L. W. Taylor (Chairman), Solicitor and Challis Lecturer in Conveyancing, University of Sydney, his Honour Judge C. D. Monahan, Chairman of the District Court Judges, and J. Baalman.

In the final stage Messrs. Rath and Grimes conferred with representatives of major lending institutions and with the Committee of the Incorporated Law Institute. After considering the views of these and other bodies on the fourth revision, they prepared the fifth revision on 30th October, 1959. It is this fifth revision (with modification of its controversial clause providing for separate valuation, rating and taxing of lots) which is now before Parliament.

it is situated is liable to demolition under s.317B of that Act, or to an order prohibiting its use or occupation under s.316 of the same Act.

These clauses provide for definition of lots by monuments, whilst preserving the powers of the local government authority to control and regulate subdivision. The method of definition is simple, and depends for its effectiveness on the relative permanence of the sort of building likely to have approval under the legislation. The plan of subdivision may alter the manner of definition of lots provided for in the Bill, so as to suit the particular building. For example, in his definition of boundaries in the plan, the subdivider may ensure, if he so desires, that the pipes and ducts for gas, electricity and other services pass through common property wherever possible.

II. *Common Property, Powers and Liabilities*

Clause 10 provides that the common property shall be held by the lot proprietors as tenants in common in shares proportional to the unit entitlement of their respective lots. Clause 18 provides that every plan lodged for registration as a strata plan shall have endorsed upon it a schedule specifying the unit entitlement of each lot and that such unit entitlement shall determine—

(a) the voting rights of proprietors;
(b) the quantum of the undivided share of each proprietor in the common property;
(c) the proportion payable by each proprietor of contributions levied on his lot for the maintenance of the building.

The combined effect of these clauses, with the provisions already considered, is that lots, together with their associated shares in common property, may be conveyed, or otherwise disposed of, in accordance with existing conveyancing law. Thus where the parcel on which the building is erected is under the Real Property Act, 1900 and the subdivider has a fee simple interest in that parcel at the time of registration of the strata plan, the Registrar-General, on the sale of a lot, is to issue a certificate of title to the purchaser, certifying that the purchaser is the owner in fee simple of his lot, and that he is entitled to a defined share, as tenant in common, of the common property. Under the provisions of the Bill, the subdivider need not have a fee simple title to the parcel, and if he has not, then the titles to the lots would be subject to the limited title of the subdivider at the time of registration of the plan. Once a subdivider has sold a lot, his own title is no longer a title to the parcel, but only to the remaining lots and their associated shares in common property.

Where the title of the parcel is under the Old System, dealings in lots will also be under that System as the Bill is at present framed. Some Old System titles are notoriously difficult to investigate, and even in simple cases the titles lack the certainty and indefeasibility of titles under the Real Property Act. When buildings containing many flats come under the scheme of the Bill, there may be a considerable multiplication of separate Old System titles. This is not a fearful prospect, except to lawyers having little knowledge of that System, especially as in many instances, at least, there would have been a thorough investigation of the title to the parcel before the building was erected. But it would not be a difficult task to amend the Bill so as to provide, in the case of a parcel under the Old System, that conveyancing in lots after registration of the strata plan should be in accordance with the Real Property Act. The certificate of title to a lot in such a parcel could be given the same effect as a certificate of title at present has under the Real Property Act, subject only to defects existing in the title to the parcel at the date of registration of the plan. Even this limitation on indefeasibility could be removed after the lapse of a period of time sufficient to have disclosed whether there is any likelihood of the existence of such defects.

Clauses 6, 7 and 8 provide for implied easements. Thus there is an easement for support existing between lots, and between lots and common property. Easements are implied for the passage of such services as water and sewerage; and there is created a novel easement of shelter.

III. *The Body Corporate, its Duties and Powers*

The proprietors of lots in the registered plan by virtue of Clause 15 form a body corporate. The body corporate is to insure the building to its full replacement value (unless the proprietors by unanimous resolution otherwise resolve) and to keep the common property in a state of good and serviceable repair. It may establish a fund for administrative purposes and levy contributions on proprietors. The contribution is due and payable on the passing of a resolution to that effect and is recoverable from the proprietor entitled at the time of the passing of the resolution and from the proprietor at the time of action brought both jointly and severally.[3] The body corporate on the application of a proprietor or any person authorised by him shall certify—

(i) the amount of any contribution due or payable by the proprietor;
(ii) the manner in which such contribution is payable;
(iii) the extent to which such contribution has been paid by the proprietor;

and in favour of any person dealing with that proprietor such certificate shall be conclusive evidence of the matters certified therein. To meet the possibility of the body corporate failing properly to carry out its duties, there is a provision for an application to be made to the Supreme Court in its equitable jurisdiction for the appointment of an administrator. The Court may in its discretion "on cause shown" appoint an administrator for such period and on such terms as it thinks fit and the administrator shall have such of the powers and duties of the body corporate as the Court determines (Clause 22).

The building is to be regulated by by-laws. These fall into two categories, those which may be changed only by unanimous resolution, and those which may be changed by the body corporate (Clause 14). The by-laws of the first category are set out in the First Schedule and prescribe fundamental duties of the proprietors and the body corporate as well as additional powers of the body corporate and the rules of its internal management. The second category of by-laws is set out in the Second Schedule. Very few by-laws appear in this Schedule, and it is obvious that they are intended merely as indicative of the sort of by-laws the body corporate may adopt. One of them provides that "when the purpose for which a lot is intended to be used is shown expressly or by necessary implication on or by the registered strata plan, a proprietor shall not use his lot for any other purpose, or permit the same so to be used".

The Bill itself states merely that the Second Schedule by-laws may be altered by the body corporate; but By-law 36 in the First Schedule provides that the by-laws in the Second Schedule may be amended by special resolution of the body corporate and not otherwise. By-law 37 (also in the First Schedule) defines a "special resolution" as meaning a resolution passed at a general meeting of which at least fourteen days' notice specifying the proposed resolution has been given by a majority of not less than three-fourths of the total unit entitlement of the lots and not less than three-fourths of all members. Thus the Second Schedule by-laws, as they appear in the Bill, or as they may be added to or varied, cannot be altered or repealed except by special resolution, provided that By-laws 36 and 37 of the First Schedule are not themselves altered. The by-laws for the time being in force, by virtue of Clause 14 (6), bind the body corporate and the proprietors to the same extent as if such

[3] *Council of the Municipality of Ulmarra* v. *Notaras* (1929) 29 S.R. 501 (N.S.W.).

by-laws had respectively been signed and sealed by the body corporate and each proprietor, and contained covenants on the part of the body corporate with each proprietor and on the part of each proprietor with every other proprietor and with the body corporate, to observe and perform all the provisions of the by-laws.

A fundamental provision of the Bill is Clause 14(3) which provides that "no addition to or amendment or repeal of any by-law shall be capable of operating to prohibit or restrict the assignment or devolution of lots or to destroy or modify any easement implied by this Act". The intention of this provision is that no alteration of the by-laws shall be capable of changing the structure of strata titles as virtually equivalent to surface titles. The provision in its present form is not sufficiently clear, because the term "assignment" is not defined. The provision should be amended so as to make it apparent that "assignment" includes any assurance, whether by way of transfer, lease or mortgage.

One result of the body corporate structure is that on registration of the strata plan the subdivider, as owner of the whole parcel, is the sole member of the body corporate. Thus he is at that stage in a position to alter any of the by-laws. He cannot alter the unit entitlement of lots (Clause 18), or affect their free assignability (Clause 14(3)); but he can vitally change the duties of proprietors, and their rights in respect of common property, and could confer special benefits on certain lots, and special burdens on other lots, by the adoption of a different or varied set of by-laws. In the case of new buildings, it is the usual practice at present for units to be sold before the building is completed, and common for units to be sold on the basis of a plan before the building is even commenced. No doubt the practice will be the same if the Bill becomes law. In this event a purchaser will need to know what the by-laws of the building are going to be, and to have protection against any change of the by-laws between the date of registration of the plan and the date of completion of the sale (and in the case of Real Property Act land, the much later date of registration of the transfer to him). If the subdivider intends to adopt the by-laws in the Bill without modification, it would be sufficient if the contract of sale provided that the sale is conditional upon no alteration being made to those by-laws prior to the date when the purchaser becomes a member of the body corporate. If the subdivider contemplates a different or altered set of by-laws, they should be incorporated in the contract. As a further precaution, the subdivider might be required to agree in the contract not to alter the by-laws as set out in the Bill, or in the contract, as the case may be. If this agreement is appropriately worded, it would be enforceable by injunction at the instance of the purchaser.[4]

It is important to note that First Schedule by-laws cannot be secretly changed at any time. By Clause 14(4) no addition to or amendment or repeal of any such by-law shall have effect until the body corporate shall have lodged a notification thereof in the form prescribed with the Registrar-General and until the Registrar-General shall have made reference thereto on the registered strata plan. There is no provision in the Bill for the lodgment of altered by-laws with the Registrar-General, probably because such lodgment would impose an undue strain on the resources of his Department; but the body corporate on the application of a proprietor or any person authorised by him shall make available for inspection all the by-laws for the time being in force.

IV. *Insurance Problems*

Provision is also made in the Bill for the insurance of individual lots.

[4] *Ampol Petroleum Ltd.* v. *Mutton* (1955) 55 S.R. 1 (N.S.W.).

Where the building is uninsured, or has been insured to less than its replacement value, a proprietor may effect a policy of insurance in respect of any damage to his lot in a sum equal to the replacement value of his lot less a sum representing the proportionate amount to which his lot is insured under any policy of insurance effected on the building. An important case that may not be covered by this provision, or any other provision in the Bill, is the case of damage occurring to a lot as a result of a peril not covered by the insurance on the building. The Bill does not provide the type of perils to be covered by the insurance effected by the body corporate. That insurance is to cover damage to the full replacement value and it may be that on the correct construction of the Bill, as at present framed, the duty of the body corporate is to insure against every foreseeable peril. No duty, however, is cast on the insurer to see that a policy effected by the body corporate has covered every such peril, and hence it is conceivable that the body corporate (in breach, perhaps, of its duty) would fail to insure against some particular peril which in fact results in damage to a lot. If this particular peril is covered by the proprietor's own policy it would be only just that he should be paid in accordance with the terms of his own policy, because the inherent risks of double insurance have no application to such a case.

The Bill, in Clause 17, contains a further provision to the effect that, even where the building is insured to its replacement value, a proprietor may effect a policy of insurance in a sum equal to the amount secured, at the date of any loss referred to in the policy, by mortgages charged upon his lot. Where such a policy is effected the insurer is to pay insurance moneys, not to the proprietor, but to his mortgagees. The insurer's liability is limited to (i) the value stated in such policy; or (ii) the amount of the loss; or (iii) the amount sufficient, at the date of the loss, to discharge mortgages charged upon the lot—whichever is the least amount. Where the amount so paid by the insurer equals the amount necessary to discharge a mortgage charged upon the lot, the insurer is entitled to an assignment of that mortgage. Where the amount so paid is less than the amount necessary to discharge a mortgage charged upon the lot, the insurer is entitled to a sub-mortgage of such mortgage to secure the amount so paid. The terms of such sub-mortgage may be agreed upon by the insurer and mortgagees at any time, whether before or after a policy of insurance has been effected by a proprietor, and, failing agreement, the terms shall be those contained in the proprietor's mortgage.

The effect of these last-mentioned provisions is that a mortgagee, if he so desires, may take insurance moneys payable on damage to his security, in discharge or partial discharge of his mortgage. Although the Bill does not expressly so state, a mortgagee would not be bound to take the insurance moneys. If he elected not to take them, then his security would be restored pursuant to the terms of the policy effected by the body corporate. In this case there would probably be contribution between the respective insurers. Thus the Bill provides for a form of double insurance and double recovery of insurance moneys, but does so in a manner which should effectively deter any unscrupulous proprietor from causing damage to his lot for the purpose of obtaining the benefits of double insurance. All that such an unscrupulous proprietor would succeed in doing would be the substitution of an insurance company for his mortgagee.

As mentioned before, the Bill primarily proceeds on the assumption that buildings coming under its provisions will have a long lifetime. But buildings may be destroyed from accidental causes in circumstances in which the restoration of the building might work some injustice. Further, the building might reach the end of its economic life, and in this case the proprietors might desire the provisions of the Act no longer to apply. Clause 19 of the Bill provides that the building is destroyed on the happening of the following events, namely,

(a) when the proprietors by unanimous resolution so resolve; or
(b) when the Court (that is the Supreme Court in its equitable jurisdiction) is satisfied that, having regard to the rights and interests of the proprietors as a whole, it is just and equitable that the building shall be deemed to have been destroyed and makes a declaration to that effect. Where the Court makes such a declaration it may impose such conditions, and give such directions (including directions for the payment of money), as it thinks fit for the purpose of adjusting as between body corporate and the proprietors and as amongst the proprietors themselves the effect of the declaration.

In lieu of making a destruction order the Court may settle a scheme for the re-instatement in whole or in part of the building. Under this clause the Court is given wide discretionary powers. It seems that such a wide discretion in the Court is necessary, because it is impossible to foresee with reasonable certainty all the difficulties and conflicting claims that may arise. Where the Court does make a destruction order, the whole parcel vests in the former lot proprietors as tenants in common in accordance with the unit entitlement of their respective lots. Clause 12 of the Bill provides for the disposition by the body corporate, as statutory agent for the proprietors and on their direction, of the building deemed to have been destroyed.

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LAY REVIEW OF LOCAL GOVERNMENT ACTION
LOCAL GOVERNMENT ACT, 1919 (N.S.W.), S.341

The powers and functions of local government bodies are on the increase rather than on the wane. Provision is made in the Local Government Act, 1919 (N.S.W.),[1] for the bringing of appeals from decisions of Councils on applications for various approvals provided for in the Act. Section 341 of the Local Government Act provided, in its initial form, for an appeal to a judge of the District Court where a Council had refused an application made to it in respect of a subdivision or a building application. For many years such matters were dealt with by the judges of the District Court until, in 1941, the legislature thought fit to amend s.341 so as to provide that such appeals should be determined in the Land and Valuation Court.

The ambit of the matters dealt with by the Land and Valuation Court on appeal from Councils was extended by the provisions of s.342N(2) of the Act, which gave dissatisfied applicants for development approval a right of appeal from decisions of the local Council. Since 1941 a large number of appeals have been determined in the Land and Valuation Court, pursuant to one or other of these sections. However, sweeping changes to s.341 were made by the Local Government (Amendment) Act, 1958 (N.S.W.).[2] The 1958 Act set up a Board of Subdivision Appeals and a Board of Building Appeals to hear and determine appeals against decisions of Councils in respect of applications on these matters. The jurisdiction formerly exercised by the Land and Valuation Court in these matters was thereby terminated. The Board of Subdivision Appeals and the Building Appeals Board (which is more correctly described as "The Cumberland, Newcastle and Wollongong Board of Appeal") consist of five and four members respectively, all of them laymen. The Boards sit as arbitrators and have the powers and functions of arbitrators under the Arbitration Act, 1902. Appeals under s.342N(2), in respect of applications to

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[1] No. 41 of 1919. [2] No. 21 of 1958.