SESSION 3

Creating a 'condominium regime' from property subdivision

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Condominium properties or multi storey buildings are an important feature of Real Property development. Especially in urban areas where land is limited with inadequate housing for the increasing population, multi storey buildings subdivided as condominiums have been the solution for urban housing. In an emerging economy, condominium living can be an attractive housing option if issues of concern faced by buyers can be minimized.

The main issues of concern are connected to the following areas:

1. Title of the condominium unit & registration of the condominium property.
2. Administration, maintenance and management of the condominium property.

Introduction – concept of 'condominiums'

In Sri Lanka, Roman Dutch Law applies to Real Property. In terms of the principle ***supeficies solo cedit, (surface yields to the ground)*** which literally means - 'anything attached to land goes with the land' – the owner of a land would own anything built upon it. Thus we have a 'vertical ownership' over land from the deepest bowels of the earth to the heavens above.

The vertical ownership related to land was amended by statute, initially by the Condominium Property Act No. 12 of 1970 which was repealed and replaced by Apartment Ownership Law No. 11 of 1973. The said statute created a new concept of ownership of Real Property, that is, ownership of horizontal layers of a building. The important requirement for such ownership to come into existence is the registration of the subdivided building under the provisions of the statute.

The legislation which created this new concept of Real Property can be listed as follows –

- Condominium Property Act No. 12 of 1970 *(repealed)*
- The Apartment Ownership Law No. 11 of 1973 (Principle enactment) This Act was subsequently amended by the following statutes:
  - Apartment Ownership (Amendment) Act No. 45 of 1982
  - Apartment Ownership (Special Provisions) Act No. 4 of 1999 & Apartment Ownership (Special Provisions) Act No. 27 of 2002
  - Apartment Ownership (Amendment) Act No. 39 of 2003

Dual ownership

Registration of a subdivided building as shown on a plan of subdivision (i.e. provisional condominium plan, semi-condominium plan or a condominium plan) according to the Apartment Ownership Act leads to the creation of several apartments or units depicted in the plan as separate 'freehold property'. Each such unit referred to as a "condominium" is located within a building of more than one storey, enabling individual ownership of the unit designed for independent use (which can be divided into one of more rooms) with direct exit to a road or to a common area leading to a road.

A condominium unit owner would also have joint ownership of the Common Elements (i.e. all areas which **do not form part of any condominium unit** in a Condominium Property and which are described as Common Elements in a **Plan of subdivision**). The joint ownership is based on the 'Share Values' assigned to each unit. Currently, the Act does not indicate how share values are to be assigned to units, except providing in Sec. 13(3) of Act No. 39 of 2003 that share values are assigned according to the 'use of the said condominium, whether residential or commercial, as the case may be'. This definition is not clear and does not indicate whether there should be a higher share value for commercial condominium units or vice versa. Though this appears to be an area where comparably less attention had been given by the drafters of the law, it is however, a feature which can make a significant impact for condominium

dwellers as share values determine the amount of service charges that should be paid by individual unit owners, their respective voting rights at meetings of the Management Corporation and also the allocation of residual property in the event of a destruction of the subdivided building.

Another interesting feature is the creation of a Management Corporation with all unit owners as 'Members' of the said corporation upon the registration of the subdivided building as a condominium property. It has a Constitution and By-laws and can sue and be sued like any other corporate body. This concept, with the individual ownership of the condominium unit, joint ownership of common elements and membership of Management Corporation has sometimes been referred to as a 'three fold unity' of condominium properties. One entitlement cannot exist or be considered separately from another, as a unit owner will automatically be entitled to all three elements. Having thus briefly considered the concept of 'condominium properties' we can now explore the issues that concern buyers and sellers of this type of Real Properties.

1. **Title to the condominium unit and registration of the condominium property -**

A major issue that confronts condominium buyers is the 'title' to the condominium unit. This is linked to the existence of the 'subject matter' in a Real Property transaction.

The 'subject matter of sale' is an important element in the sale of a property. In the absence of a subject matter there cannot be a legally binding transfer, even if there is unanimity between parties to the transaction. Thus in a sale of immovable property, the subject matter of the transaction should be in existence for title to pass to a buyer upon payment of valuable consideration. If one enters into a sales agreement for the sale of land X without knowing that there is no such block of land in existence or indicated in a survey plan, then the sales agreement will be void due to the absence of the 'subject matter'.

A condominium property comes into existence with the registration of the Deed

of Declaration along with the Condominium Plan describing the individual condominium units and the common elements of the building, duly executed under the hand of the owner/s of the land, attested by a Notary. The Deed of Declaration embodies a vast amount of information as contained in a number of documents attached to the Declaration, the principle one of the said documents is the plan of subdivision. This is referred to as a 'Condominium Plan' in respect of a completed building, a 'Semi Condominium Plan' in respect of a partially constructed building and a 'Provisional Condominium Plan', in the case of a building which is yet to be constructed.

Only upon the registration of the Deed of Declaration and the corresponding plan of subdivision dividing the building into separate units, will such condominium units be considered separate from the land to which the building is attached to and constitute immovable property that can be the subject matter in a condominium property transaction. Therefore, title cannot pass to a buyer of a condominium unit unless and until the subdivided building has been registered in terms of the Apartment Ownership Act giving recognition to condominium units reflected in the plan of subdivision as individual immovable property.

Deeds can be executed relating to segments of a building which have not been registered as a subdivided unit. But in the absence of registration of the same as subdivided freehold units, title that vests with the transferee will only be a *co-ownership* of the building. In **Mallika Fernando vs Nagesh Fernando** (C.A. 979/79 DC Colombo 16894/L : March 26, 2001) it was held that non registration of a condominium property will not invalidate a legally binding Deed of conveyance under which sections of a building had been gifted to different parties. In this case, the plaintiff and defendant had both signed and accepted a Deed of Gift of the Donor whereby sections of a building, which were not properly subdivided under a registered condominium plan, had been gifted to the donees. They were thus considered to be **co-owners of the building** and not as owners of individual units.

Consequences of acquiring unregistered 'condominium units': Let us consider a situation where a conditional sale of a 'condominium unit' takes place with a mere reference to the unit in the Sales Agreement, which incidentally, is not a title deed. This is the general practice of Property Developers in Sri Lanka if there are impediments or delays to the registration of the Deed of Declaration and Plan of subdivision. In order to comply with Sec. 2 of the Prevention of Frauds Ordinance, which requires a sale of immovable property to be in writing and signed in the presence of a licensed Notary and two or more witnesses, the Sales Agreement attested by a Notary is thus registered under the main land upon which the building is constructed. The consequences of this registration can be given as follows:

i. It does not result in a transfer of title but remains a conditional sale as it is merely an 'agreement' between parties. Therefore, the prospective purchaser will not acquire ownership of his / her condominium unit even if he/she has paid the sale price in full.

ii. In the event the project fails, recovery of payments made by the prospective purchaser will be difficult as the land upon which the sale transaction is registered would be mortgaged to financiers as collateral.

iii. In the event the building is destroyed or damaged, the insurance proceeds will be released to the owner of the land or to the financiers to whom the property is mortgaged and the prospective purchaser/s of the building under Sales Agreements will have no right or title to claim compensation.

iv. In the absence of registration, the prospective purchasers occupying units within the building will not constitute a body corporate referred to as a **Management Corporation that normally comes into existence upon the registration of the condominium property**. The prospective purchasers hold no right or authority over the common elements of the building and accordingly, are not entitled to an undivided portion of the common elements due to the absence of valid title to a

condominium unit within the building. On the other hand, this is also disadvantages to the Developer or the Owner of the building as he has no statutory right or authority to charge fees for the use of the maintenance of common areas without the sanction and approval of the occupants of the building in the absence of a legally constituted body corporate, similar to a Management Corporation.

It needs to be mentioned here that the Apartment Ownership Act No. 39 of 2003 has addressed this type of issues and has made it mandatory for the Developer/ Vendor to register a sub divided building as stipulated in Sec. 3(2) of the said Act. It compels the Developer or the owner of a land upon which **there is a completed building capable of being subdivided,** to register the property as a subdivided property if he has entered into a transaction to sell any part of the said building as a subdivided unit. **The application for registration** should be submitted within **18 months from the date of the first sales agreement or within 3 months of completion of the building,** whichever occurs first. In the event, the sale occurs after the completion of the building, the application for registration should be submitted within 6 months from the date of completion of the building. Any person who contravenes the provisions of the Act is guilty of an offence under Sec. 3(2) and 3(3) of the Act and is liable on conviction after summary trial before a Magistrate to a fine not exceeding Rs.50,000/- and a further fine of Rs.1000/- per day for each day the offence continues to be committed. Considering that no attempts have been made by many occupiers in condominium properties who are yet to receive their title deeds to take action in terms of Sec.3(2), it is apparent that there is still a lack of awareness among condominium dwellers as to their rights both prior to and after the purchase of a condominium.

The Apartment Ownership Law has not however stipulated criteria to be fulfilled by Developers **who engage in pre-selling when construction has not commenced or when there is no visible building to be subdivided.** It can be said that the lacuna in the law as well as the ignorance of prospective purchasers have paved the way for unscrupulous Developers to exploit this situation to their advantage. It is common to see pre-selling of

condominiums even without obtaining vital regulatory clearances. By an amendment to the Act or by way of Regulations under the Act, the Authorities should impose conditions to be observed by Developers prior to pre-selling of units, such as **Disclosures** about the proposed building, proposed maintenance fees, type, area, price and method of payments, and other important conditions that are covered in Sales Agreements, mandatory deposit of advance payments in **Escrow Accounts** till the building is completed up to a certain minimum level, **rights of termination of a Sales Agreement** and refund of funds, proposed **project completion date, facilities provided** to unit owners, proposed **by-laws** of the condominium property, etc., Without such transparency in multi-storey property development projects, there will be many innocent purchasers who would repent after parting with their hard earned money.

2. Administration, maintenance and management of the condominium property

Many of the problems that are currently faced by condominium dwellers arise over the management of the condominium property, in other words, "management of common elements". This is an area which has not been adequately addressed in the Apartment Ownership Act leaving room for Developers to continue to operate the building as if the ownership of common elements are vested in them.

Some of the common problems faced by unit owners due to Developers continuing to control and manage the common elements –

i. Use of common areas by Developers for their private purposes, (i.e. as office space, storage space or in certain instances, to construct apartments carved out of common areas in the basement)

ii. Use of parking space for their own private commercial operations.

iii. Collecting service charge/maintenance fees from owners of other units but not in respect of the units which are unsold and remains the property of the Developer.

iv. Failure to release to unit owners a budget depicting the proposed income and expenditure relating to the management of the common elements and the Service charge per share value based on such budget. It is not uncommon for Developers to decide on the Service Charge according to their preferences and to credit such sums collected to their own bank accounts, whereas the Act specifically refers to the need to create a Management Fund for day to day operations and a Sinking Fund for capital expenses.

There are currently several registered condominium properties which do not have an operational or fully functioning Management Corporation, **though it comes in to existence with the registration of the subdivided building.** Sec. 27(3) of Act No. 39 of 2003, provides that the Condominium Management Authority (CMA) shall convene the 1st AGM. But unless the Developer invites the CMA, the convening of the 1st AGM will not take place as there is no mechanism to keep the CMA informed of the registration of the Deed of Declaration and the consequent establishment of a Management Corporation. In my view, the holding of the 1st AGM and the appointment of the Council is an internal matter to be handled by the members of the Management Corporation. The Act needs to be amended to make it mandatory for the Management Corporation (and/or the Developer who holds all the units immediately upon the creation of the MC) to convene the 1st AGM within 3 months of its establishment. A failure of this important requirement should be a punishable offence.

In developed countries, there are stringent laws to safeguard the rights of apartment owners which evolve over time addressing new issues as they come up. This is lacking in our country as Act No. 39 of 2003, being the last amendment, is woefully inadequate to address problems of modern times.