PRIVATE OWNERSHIP OF FLATS AND OFFICE SUITES

The most novel adaption yet made of the machinery provided by the "Land Transfer" system in New Zealand is the introduction by the Companies Amendment Act 1964 of a system of registration of licences to flats and office suites. This legislation does not introduce new methods for the subdivision of buildings but makes provision for the recording and registration in the Land Registry Office of "licences to occupy" based on share certificates.

Briefly the statute provides that a "flat or office owning company" as defined in the Act may grant a licence to one of its members conferring rights to occupy a specified flat or office suite pursuant to appropriate powers in its articles. The licence, once registered under the Land Transfer Act 1952, is embodied as a folium of the register and attracts—with some necessary modification—the provisions of that Act applicable to leases. Thereafter the licence may be dealt with as though it were a lease—individual mortgaging being perhaps the most important feature. To avoid the possibility of a licensee-mortgagor mortgaging licence and shares separately share certificates must be produced to the District Land Registrar for noting transactions recorded against the corresponding licence.

The last ten years have witnessed an increasing demand for flat accommodation, particularly in the larger northern centres. This demand has by no means reached major proportions but it is true that dwellings of this type do have an appeal to certain classes of people. Older people who no longer have the need to maintain an orthodox home, the reasonably wealthy widow, and those who wish to be free of the burdens of private home ownership, have all shown a preference for close community living. While for a very long time, leases (registered and unregistered) and tenancy agreements have been used as a conveyancing method numbers of persons have indicated that they prefer to have a more substantial interest in what amounts to their home: they desire either to achieve or retain status as property owners. The advantages of ownership are many; service charges are much lower than customary rentals. tenure is secure, the flat forms part of a person's estate and, if held under registered lease or licence may be settled as a Joint Family Home. Overseas experience and such experience as we have had in this country indicates that flat accommodation of this kind is usually to be found in the inner suburbs of the larger cities. Services such as sewage, gas, electricity and among a great many other things, that metropolitan bug-bear transport, can be more economically provided.

Finance is of course a major problem and s.15 of the Companies Amendment Act 1963 and the Amending Act of 1964 are measures designed to overcome difficulties in this field. Flat ownership has hitherto largely been the prerogative of the comparatively wealthy. The Government although anxious in 1954 to promote private ownership of flats—a pilot scheme was promoted under the Housing Act 1919—eventually abandoned the idea and has taken little active participation in encouraging private subdivisions of this kind up until recently. The Companies Amendment Acts (supra) have been the only statutes

designed to give some (and very limited) momentum to this type of home ownership. Overseas countries with high density housing problems and some with post war reconstruction problems have encouraged multiple unit building in various ways. If flat ownership is to become widespread, it must be made to appeal as an investment to the "little man" and West Germany allows along with other inducements that up to half of the building costs may be deducted from income tax assessments over a period of 10 to 12 years while s.234 of the Housing Act 1961 (U.S.A.) permits the American Federal Housing Agency to insure loans on strata titles up to 97% of the first $13,500 of appraised value with a general allowance of $4250 per room. These liberal provisions may be contrasted with the coercive Hungarian requirements demanding that all banks insurance companies and factories maintain at least one-third of their assets in buildings and thus provide a pool of finance available for (inter alia) multi-storey dwellings.

Though these few examples are taken at random they help to illustrate the comparatively conservative approach taken by our Government. In enacting legislation which will not provide a real stimulus it may have been influenced by New South Wales experience where a well drawn strata titles Act resulted in overbuilding in the apartment sphere so that after a short period of operation it was reliably estimated that there were vacant buildings requiring an investment of £1,000,000 in Sydney alone.

METHODS AVAILABLE IN NEW ZEALAND

(a) STRATA TITLES.

The strata title concept is an interesting one—there seems nothing has quite the prestige for security purposes as a certificate of title in fee simple. In New Zealand there has never been any objection to the issue of a strata title whether for strata above or below the surface. This principle recently received judicial affirmation by Haslam J. in *Ruapekapeka Sawmill Co.* v. *Yeatts* [1958] N.Z.L.R.265 where at p.271 in criticising Counsel's submission that a certificate of title could not be issued for a horizontally severed portion of certain land his Honour had this to say:

"There appears to be no legal reason why the grantee could not in such circumstances obtain a certificate of title pursuant to s.91-95 of The Land Transfer Act, or why an adequate survey plan could not be deposited under s.167."

With respect, this is a representative statement of the law in New Zealand and while numbers of certificates of title to stratum have been issued in registries throughout the country they have been mainly, though not exclusively, issued for strata estates below the surface. Under the Land Transfer Act 1952 "land" includes "messuages, tenements and hereditaments corporeal and incorporeal, of every kind and description, and every estate or interest therein . . ." and a certificate of title issued for a flat would be to a portion of airspace usually fixed in relation to a datum level.

Common Law authorities which support the dicta of Haslam J. (supra) and existing Registry Office practice include *Sheppard's*

Touchstone 206 ("Feoffment may be made of an upper chamber over another man's house beneath for this chamber is a corporeal inheritance") and *Coke upon Littleton* 48 (b) ("A man may have an inheritance in an upper chamber though the lower buildings and soil be in another and seeing it is an inheritance corporeal it shall pass by livery"). The Court of Appeal in *Yorkshire Fire & Life Insurance Co.* v. *Clayton* (1881) 8 Q.B.D.421., recognised the sub-division of a building into separate flats or storeys. "For all legal and ordinary purposes they are separate houses" per Jessel, M.R. at p.424.

Realty (which at Common Law extends *ad coelum ad inferos*) may be the subject of separate certificates of title for different layers; *Taitapu Gold Estates Limited* v. *Prouse* [1916] N.Z.L.R.825. Modern practice throws some doubt on the maxim and it should be accepted with some reservations. However, as a general proposition it would still have application to anything above or below the earth's surface which is capable of private ownership—*The Board of Works for the Wandsworth District* v. *United Telephone Co.* (1884) 13 Q.B.D.915. As a storey of a building is a layer of realty it may be the subject of a certificate of title but it should be noted however that the certificate would be for the airspace and not for portion of the structure itself.

The major impediment to a practicable strata titles system in this country is that the doctrine of continuous and apparent easements has no application here. There are no easements implied under the Land Transfer Act 1952. One danger that arises from this is that a memorandum of transfer disposing of a stratum of air space, if properly drawn from the point of view of dimensional definition, would be capable of registration even though it is obvious that the appropriate easements have not been created. Doubtless a skilled conveyancer could provide for all contingencies but the task would generally be a formidable one—there is little precedent.

Every large multi-storey flat building has stairs, passages, lifts, drainage and water systems and access ways. There are problems of lateral and vertical support, the supply of electricity, telephone and allied services to name but a few. There is also the problem of group acceptance of propective purchasers (restrictions on alienation), of maintenance of the building, the nuisance problem of noise and vibration, the keeping of animals, disposal of garbage, collection of service charges, care of gardens and so on. Clearly some of these are not easements but would have to be framed as restrictive and positive covenants—although it is true that the principal easements of access, support and shelter include a wide variety of ancillary rights. If restrictive covenants are to be recorded against the register s.126 of the Property Law Act 1952 requires that the benefit be annexed to some other land—in this case the various strata titles. This could of course be done but the difficulties involved in providing for a large building of say 80 units seem almost insurmountable. Positive covenants may not be incorporated in a memorandum of transfer and may not be recorded against the register. Further a certificate of title would have to be issued on the basis of our land survey system and the three dimensional survey required would be costly and not necessarily satisfactory since an allotment so defined would be for a portion of space, and a building may at some time move on its foundations.

Only a few of the obstacles have been mentioned—but surely enough to point out the difficulties faced by any conveyancer who would chose this way to subdivide a building. It is practicable to effect a simple, say two unit, horizontal subdivision in this way but to venture into more complex schemes involving a number of units is to invite problems. Several such two unit subdivisions have been effected in Christchurch but the method does not find favour in New Zealand. The residual land—i.e. everything exclusive of the units—creates its own problem. Joint fractional ownership simpliciter would be unsatisfactory because of the need for common control and some form of corporate ownership seems essential. However, even with company ownership of the common parts and service agreements as to use thereof, the failure of our Land Transfer Act to imply easements creates too many problems to make such a solution readily workable. The Victorian (Aust.) Legislature was able to adapt the Torrens System with comparatively few amendments and this shall be dealt with later.

(b) THE BLOCK-SHAREHOLDING SYSTEM.

A widely used method practised in New Zealand for the subdivision of large buildings in the "block-shareholding" procedure whereby a company formed to own a building divides its shares in such a way that each shareholder is entitled to a unit. This system although it forms the kernel of the "licence" scheme initiated by the Companies Amendment Act 1964 has been in use for about ten years. The short-comings of stock-ownership as a basis of "title" with its inherent inflexibility particularly from the point of view of finance have been a matter for concern for some time for the Government, the building industry and persons dissatisfied with "share certificate-ownership" and the Act is an attempt to provide a solution to certain aspects of this problem.

The mechanics of the system are as follows:

The articles of such a company require that before allotment of a unit is made the prospective allotee must enter into an agreement or lease in a form specified in the articles providing for (inter alia) payment of taxes, water supply rates, garbage collection, lighting, cleaning, repairs and maintenance, insurance, rates, central heating, lifts service, salary of building superintendent and the accounting, audit and general administration expenses connected with the building, and surrounds. A well drawn agreement would further provide that each shareholder covenants with the company not to create any nuisance by way of noise, vibration, smell, trespassing on other tenants, obstructing halls, passages, yards or driveways, hanging anything out of windows and depositing rubbish.

Those aspects of management not required to be exercised by the company in general meeting are vested in the board of directors who have the important function of "screening" prospective purchasers. The right of rejection of unsuitable purchasers is probably of greater significance in this type of company as there is a duty incumbent upon the directors to ensure that all owners are of similar social standing and respectability. Obviously shareholders have a vital interest in the directorship and rights of control over the board can be established with little difficulty. The members of the company could be

divided (by the articles) into groups, each of which are entiled to nominate one director representing their particular group. Similarly the members in each group could have the right by giving notice to the secretary to terminate the appointment of a director so appointed and nominate another in his place. A portion of the capital should be left unpaid to provide a pool of finance for future maintenance and expansion. The share-holders should be required under the articles to take up shares in proportion to their existing holding should the company increase its capital. This may be necessary for the continued efficient functioning of the company.

There are two methods of financing this type of project. A mortgage may be given by the company over its land and a debenture taken by the mortgagee over the company assets. The company then finances individual purchases by making an advance to the shareholder of an appropriate amount of his unpaid purchase money—if necessary even aranging an increase of principal sum to cover the advance to its member. It should be pointed out that there is no restriction on a shareholder-vendor selling his flat for whatever price he thinks fit. Difficulties formerly posed by s.62 of the Companies Act 1955—a company cannot lend to its shareholders to provide the purchase moneys for shares—have now been overcome, in a restricted way as far as flat owning companies are concerned, by s.15 of the Companies Amendment Act 1963.

The principal lending agencies have shown a preference for this type of investment, but its shortcomings as far as the individual flat owner is concerned render it far from ideal. Each owner is made dependent on the solvency of his co-shareholders and should a number of them default in their repayments the financial stability of the company is endangered. A company could be forced into liquidation or the mortgagee might exercise his power of sale.

Excessive levies may be made by the company on its shareholders to make up the defaulting member's share in the mortgage repayments. The invidious position of a purchaser with sufficient money to acquire his shares free from encumbrance need hardly be mentioned. The reluctance of mortgagees to lend upon the security of share certificates, or in other words to finance individual purchases, is not confined to New Zealand but has been exhibited in almost every country including the United States of America where ordinary corporate (Company) methods of ownership have been adopted. In order to provide an alternative type of mortgage the Companies Amendment Act 1964 seeks to make share certificates better security by providing for the registration of licences based on them and for the registration of individual mortgages against these licences. A whole building could be financed in this way and the company need not encumber its assets at all.

The flexibility of this company method as well as being its strongest point is also its weakest for by New Zealand law seventy five per cent of the shareholders can impose their will upon the whole undertaking. For example part of the garden may be disposed of against the wishes of the minority. The block shareholding concept will later be discussed in the light of the Companies Amendment Acts of 1963 and 1964, and an attempt will be made to assess prospects for the future both in the field of finance and building itself.

(c) PERPETUAL OR LONG TERM LEASING.

Under this method a company is formed to own both land and buildings and a subdivision of the shares similar to that effected in the block-share method is made, the shares being apportioned to the respective units according to size, situation and rental vaule. An architect's plan is lodged in the Land Registry Office, and leases may be registered and leasehold certificates of title issued. Ownership of the shares confers on the holder the right to, say, a 99 or 999 year lease of the particular suite of rooms. The shares are purchased at a premium which is usually the market value of the unit and a nominal rent is charged. The lease provides for the use of conveniences, lifts, passages and maintenance while covenants govern the use and conduct, and insurance of the flats. Provision is also made for a variable service charge.

While the tenure established is that of landlord and tenant this method has certain advantages over a freehold strata titles sub-division effected under the present law in that positive covenants are securely anchored. Rights of re entry for breach of covenant are also firmly established. On the other hand this tenure suffers from defects common to all leases and is not as popular with purchasers or mortgagees as freehold interests in land. The leases must be drafted with great precision as it is difficult to secure agreement amongst all parties on a variation of terms. In this latter respect the more flexible block-shareholding method is superior.

(d) ALTERNATIVE FORM OF PERPETUAL LEASING.

This is a style of leasing well adapted to smaller buildings of up to six units and in Auckland, where it is very popular, has been used for structures of up to twenty flats. In many ways however, it seems clumsy and impracticable for larger buildings. Each purchaser is sold a proportionable share in the fee simple itself (e.g. 6 flats—$\frac{1}{6}$ share) and when all the shares in the fee simple are sold the other registered proprietors give a long term or perpetual lease to him or the flat itself. Each lessee covenants that should he dispose of his freehold interest without the corresponding lease, the lease shall be immediately determined and a majority of his co-lessees appointed his attorney to sell his share in the fee simple. A mortgage may be taken over both the share in the freehold and of the lease itself.

While covenants analagous to those incorporated in a lease or agreement entered into by flat purchaser and company may be included it is difficult to give co-owners any effective supervisory jurisdiction over incoming purchasers other than by entire group acceptance. In this respect, especially for a larger building, the company system has its advantages.

(e) COMPANY OWNERSHIP WHEN THE FLAT OWNERS ARE NOT SHAREHOLDERS.

This method envisages either a private campony with the promoters or their appointees retaining the shares and directorship or a public company formed solely for profit retaining absolute control. A company formed in this manner may either lease separate flats at a normal rental having first "sold" the unit to a lessee, or procure long term agreements for sale and purchase which guarantee a share in the fee simple in

proportion to the value of the flat when the balance of the purchase money has been cleared. Both methods suffer from the same defect in that owners have no control over the company which may amend its articles at will. While purchasers are no doubt aware of initial administrative problems which may require the promoter to take an active part in management for a time, few flat owners would be entirely content with this arrangement for the whole term of their lease or agreement. The principal attraction of flat ownership is that once it is paid for, the owner is only liable for the outgoings which are incidental to ownership of land together with a proportion of service charges over which he has some control. If the services are provided by the promoter he will no doubt make a profit from his endeavours and the owners will have little supervision over his operations. Covenants in the lease or agreement may not provide for every contingency and the purchasers themselves would have no right of rejection of unsuitable prospective incoming co-owners other than perhaps a covenant with the company to act in good faith in this regard.

Finance poses its own problems in that in the private company type which has granted both a mortgage and debenture over its assets owner-lessees are ultimately dependent on the solvency of the company which must in turn depend on the solvency of its lessees. Similarly a public speculative company which in all probability would have arranged finance over the whole of its undertaking may get into financial straits and purchasers may face possible eviction should the mortgagee exercise his power of sale. This very contingency occurred in Auckland just a few years ago. The dangers are real.

It is worth noting that in Victoria s.3 of the Transfer of Land (Stratum Estates) Act 1960 prohibits allotment of shares in a service company carrying voting rights or rights to profit to anyone other than the owner of a flat. Although this legislation was passed principally to reassure wavering mortgagees the section has wider significance.

Doubtless this list of schemes being used in New Zealand is not extensive but all have something in common—defects—both serious and less serious.

METHODS IN USE OVERSEAS

A consideration of a few overseas solutions to similar problems forms an interesting basis for an assessment of the scope and adequacy of the Companies Amendment Act 1964.

HUNGARY

Under a statute of 1924 each flat owner has unit ownership in fee simple and a fractional share in the land and communal property. This ownership is personal in that the common property is owned in partnership and not through a corporate body. Individual owners can mortgage, sell or lease their units and as a group can do the same with the residual part of the property.

In the Land Register individual owners are registered as proprietors of their unit and a statement is made of the fraction owned by each. Changes in ownership mortgages and so on are listed. Procedurally

individual owners must first form a legal unit declaring their fractional ownership of the land and subsequently enter into a covenant providing (inter alia) for the description of the building, its manner of construction, maintenance, insurance, those matters which would be easements under our law, replacement, miscellaneous matters such as neatness, appointment of a caretaker, restrictions on disposition, penalties and their manner of enforcement. Once the declaration and covenant are registered the latter may only be altered with the consent of all parties or by court order.

An annual general meeting of flat owners is provided for and among the obligatory duties incumbent upon the owners in general meeting is the appointment of a delegate, a manager, who has full powers of day-to-day management and control and who acts under power of attorney with third persons.

GERMANY.

The Federal West German Government inherited tremendous problems of post war re-construction and perhaps the greatest of these was housing. A statute passed in 1951 was designed to encourage the private ownership of flats in an effort to overcome the still acute housing shortage.

Under this statute a subdividing owner first makes "a declaration of intention to divide" before or after the completion of the building. The declaration is registered in the Titles Office and a separate certificate of title sheet is opened for each flat. Each purchaser obtains individual ownership of his flat with full rights of disposition (co-owners may only refuse to admit an incoming purchaser for serious reasons although by agreement rights of free alienation may be restricted). He also obtains fractional ownership in the common property which includes everything not vested in other flat owners, together with full rights of user. There are no easements and owners may by agreement or majority resolution regulate the use of the separate property. A flat cannot be severed from the share in the communal property. Certificates of Title to flats can carry mortgages if outside finance is required and a flat owner can never be placed in a position where he must foot any responsibility for the debts of a co-owner. Public credit institutions similar to the State Advances Corporation created a favourable precedent by granting loans to individual owners and building societies are providing a major source of finance. As indicated earlier, tax concessions also provide an incentive.

Administration of the common property is vested in all owners in common, acting in general meeting, but the work of management is carried out by a manager appointed either by the flat owners or their mortgagees should a mortgage (as is usual) confer power on the mortgagee to appoint in lieu of the owner. The manager has wide powers, and is often a professional estate agent; he collects service charges and attends to all outgoings and maintenance. In addition, on behalf of mortgagees he is sometimes authorised to collect mortgage principal and interest repayments. Acting under a type of power of attorney he represents the common interest of the owners with outside parties. Apparently this idea of a manager is common in many European countries.

Absent however, from both German and Hungarian schemes is the concept of corporate ownership—rather there is fractional ownership with a measure of group control. Day-to-day management is in practice the sole responsibility of the manager, for the owners have little direct say in these matters. Covenants regulating liabilities and obligations are registered initially and are not readily varied. Most New Zealanders would not tolerate the degree of regimentation imposed under these systems but one must bear in mind that these countries have customs and a law of property vastly different from our own and that under their own conditions as far as one can ascertain these schemes appear to be emiently practicable.

THE UNITED STATES OF AMERICA.

Up until five years ago the standard form of flat ownership thoughout the U.S.A. was company ownership of land and building with unit entitlement based on shareholding and a lease or other agreement giving rights of occupation.

By s.234 of the Housing Act 1961 Congress widened the base of finance available for apartments by permitting the Federal Housing Agency to insure loans of up to 97% on the security of "condominium" ownership. This is a form of co-operative enterprise in which each owner shares ownership of the land, walls, hallways and other common areas but is also the sole owner of one particular unit. Puerto Rica passed an Act in 1958 providing for "condominium" ownership and gave the lead to the U.S.A. Hawaii and Arkansas were next in the field with enactments similar to that passed by Puerto Rica, and many other states have since enacted similar statutes.

Each purchaser gets a title in fee simple "entirely irrespective of the building itself' 'and also has joint ownership with his co-owners of all common elements, which must remain undivided and cannot be separated from the "condominium". Ownership of a share in the common property determines unit share in management and in maintenance casts. Insurance is maintained on the building as a whole and the property is managed by an administrative board elected by at least 51% of the owners with votes based on each apartment's proportionate value.

Subject to minor state variations the general procedure is that a deed is given to each purchaser by the subdivider specifying the apartment he owns, the property owned jointly and the "condominium" bylaws. This is registered and evidences his title to his flat. Apparently the American method of evidencing title in fee simple is not a simple certificate as is isued in New Zealand but is more of a series of deeds rather like our Deeds System. Only seventeen states have a Torrens System and registration is not as formal an affair as it is here. The advantages over standard stock ownership includes the complete independence of each owner from the solvency of his co-owners, the ease with which individual finance may be arranged and the ready market a seller has for his unit.

The word "condominium" meaning "joint sovereignty" is used as a legal term in most Civil law countries in Europe and Latin America —and although in the United States it is merely used as a convenient term the similarity at least in principle between this scheme and the two European systems outlined is quite remarkable. There is no true

corporate ownership in either America or Europe though the administrative board is no doubt better attuned to American living than the German manager or Hungarian delegate would be.

ENGLAND.

The definition of "land" in the Land Registration Act 1925 of England differs somewhat from that in our own Land Transfer Act. Section 3(viii) of the English Act defines "land" as including "land of any tenure . . . . and buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments . . . ." It is therefore just as easy to subdivide land horizontally as verically. Portions of buildings have been sold separately in England for over 150 years and in Scotland for the last 600 years. The upsurge of this type of building since the last war has not apparently called for any special legislative assistance.

Under English law not more than four persons are premitted to be registered as proprietors of the legal estate. In blocks of up to four flats often the property is owned fractionally with cross leases from the various fractional proprietors ensuring access for each lessee to enter and repair and so on. In the two unit type there may be individual ownership of each flat with fractional ownership of garden and common parts and appropriate easements as to user.

The most typical way of subdividing a larger building is to transfer each flat together with its appropriate stairs and passages; the soil passes to the ground floor flat-owners and the roof to the top flat-owners. Easements are received and the appropriate covenants entered into. The residual property remains in the ownership of the subdivider and a rent charge is reserved in his favour. The subdivider may declare himself to be a trustee for all the flat owners and sell the common property and the rent charge if it appeals as an investment, or alternatively it may be transferred to a management company the shareholders of which are the flat owners. Apparently a company limited by guarantee and not having a share capital is considered the most convient type for management purposes. It is to be noted that English conveyancers do not always draft their easements in detail and a good deal is left to be implied by the common law.

This system has proved successful for a variety of reasons: their Land Registration Act 1925 is not as rigid as our Land Transfer Act; positive covenants may be incorporated in transfers, buildings may be subdivided by existing monuments (i.e. the flat itself and not a stratum of air space is sold) and easements are not defined with the precision apparently found so necessary in New Zealand.

AUSTRALIA.

(a) *New South Wales.*

The Conveyancing (Strata Titles) Act 1961 (N.S.W.) introduces what is in effect subdivision by monuments. A plan defining the boundaries of each lot (or unit) by reference to floors wall and ceilings is registered and thereafter each lot may be dealt with—transferred, leased, mortgaged etc.—as though it were land held under the Real Property Act 1900 (N.S.W.). This strata plan is not a plan of survey defining portions of air space but rather defines the actual

units, title and rights of occupation not being affected by movement of the building. Necessary easements are set out in the statute and are implied while the common property, which is that portion of the land not included in any unit, is held fractionally by the flat owners as tenants in common.

Strata plans may only be registered in respect of buildings already existing and upon registration of the plan the proprietors of the lots become a body corporate although not a company under the Companies Act. This body corporate is responsible for the management of the common property and for the enforcement of the bylaws as specfiied in the First Schedule to the Act. In addition the body corporate is obliged to provide for insurance, rates, repairs, and has power to impose a service charge.

The strata titles system as it relates to a building may be terminated if the owners by unanimous resolution so resolve or if the Equity Court makes an order. Under the Act this is termed "Destruction" and is permitted if the structure is undamaged and need not occur if the building is destroyed. Upon "Destruction" the body corporate is dissolved and the various proprietors become entitled to interests in the whole land as tenants in common.
Provision is therefore made for:—

(i) Physical destruction and

(ii) A situation where it is desirable to determine the form of co-ownership provided by the Act.

The Conveyancing (Strata Titles) Act 1961 is a very technical statute which attempts to provide for every contingency—the fore-going is a brief summary to indicate some of its provisions. Initially it stimulated overbuilding to excess and perhaps in this respect is an example of a statute ahead of its time; harmony with the needs of the population is vitally important. Mortgagees are asking the very high rate of interest of 1% per month on strata title investments. Obviously legislation along these lines is not of itself a formula for instant success. Many matters are outside the scope of legislation. Many Victorian lawyers would assert that the comparatively simple amendments made to their Transfer of Land Act 1958 are equally effective and far less complex.

(b) *Victoria.*

Victoria, the first Australian state to issue strata titles began to issue certificates of title for air space in 1953. Dissatisfaction with share certificate ownership especially from the point of view of finance led to the evolution of a strata title form of ownership designed to provide adequate and saleable security. Conveyancing problems inherent in a strata title system, e.g. rights of lateral and subjacent support, drainage, water and electricity supply, have been overcome by s.98 of the Transfer of Land Act 1958 (Vict.) which is worth quoting in full:

"A transfer of an allotment of land by reference to an approved plan of subdivision shall include and be deemed at all times to have included a grant therewith of

(a) All such easements on over or under the land appropriated or set apart for these purposes respectively on the plan of subdivision

as may be necessary for the reasonable enjoyment of the allotment transferred; and

(b) in the case of the subdivision of a building, also such easements of water, gas, electricity, sewerage, telephone and other services to the allotment transferred as may be necessary for the reasonable enjoyment of the relevant part of the building, notwithstanding that any such allotments are transferred to another person without expressly reserving any such easements for the benefit of any other allotment, but this section shall apply only so far as a contrary intention is not expressed in the transfer."

By our standards courageous, this section would if incorporated in the New Zealand Land Transfer Act provide the most simple of solutions. In effect the section embodies the common law doctrine of continuous and apparent easements so successfully used in Scotland for the past 600 years and, to a lesser degree, in England. The profession in New Zealand is reluctant to depart from the existing practice of precise definition of every easement (the register must be conclusive) but how often does one who works in the Land Registry Office hear the complaint that the "Land Transfer" system is "getting just as bad as the Deeds". We should be mindful that restricted statutory implication does not necessarily lead to uncertainty and rights of documentary variation can easily be maintained.

Under the Victorian method, initially a vendor in a scheme prepares and deposits a plan of subdivision just as if the land were being subdivided—there is a good deal of particularity of survey but internal measurements are not checked. Once local authority approval has been obtained he then proceeds to incorporate a service company to which the residual land i.e. the land surrounding and under the building, the fences, foundations, roofs, stairways, common passageways and outbuildings is transferred. The total value of the shares represents the value placed upon the residue by the vendor and the shares are divided into blocks which under the articles are related to individual units. On the purchase of a flat the purchaser also must take the corresponding shares and therefore becomes a member of the company. The company is responsible for maintenance generally insurance on the whole building, rebuilding of any part of the building destroyed by fire or other insurable risk and payment of rates and land taxes. A service charge is levied on each flat and an encumbrance expressed as an annuity is registered against each certificate of title. A service agreement may be registered in the office of The Registrar of Titles.

The service company is subject to the provisions of the Transfer of Land (Stratum Estates) Act 1960 dealing with voting rights and service agreements. An interesting provision (s.3(3)) is that that the rule against perpetuities shall not apply to service agreements. Section 3(2) provides that no amendment or alteration of the articles is to be made without the consent in writing of each registered proprietor of the stratum estates, of the persons for the time being empowered by law to deal with those estates. There is provision for an order of the court to be made summarily dispensing with the need for any consent unreasonably withheld.

The Co-operative Housing Societies (Residential Flats) Act 1958 (Vict.) permits Housing Societies to lend on Strata title security and s.2 of the Trustee (Mortgages) Act 1959 (Vict.) enables trustees

to lend upon the security of a strata estate notwithstanding that the certificate of title thereto is subject to a charge to secure payment of service charges to the service company.

THE COMPANIES AMENDMENT ACTS

The American, Hungarian and German methods illustrate what governments are prepared to do in the way of inducements whether by state finance, tax concessions, guarantee of private mortgages or by legislation to provide more satisfactory title. The inducements appear proportionate to the need and it should be borne in mind in criticising the New Zealand legislation that while a demand for this type of accommodation has become apparent in New Zealand the need is not as yet imperative.

Legal traditions must be taken into account and accordingly the New Zealand solution, however cautious, embraces and builds upon a method which has hitherto enjoyed some popularity despite its imperfections.

As indicated earlier the Companies Amendment Act 1964 permits the registration under the Land Transfer Act of a licence to occupy a specified flat or office suite corresponding to a group of shares held in the Company owning land and buildings. The licence, which is executed by the company under seal and by a member of that company must grant rights of exclusive occupation or use. Its form is not specified and the right of the company to insist upon the execution of a separate agreement is preserved.

Every licence is deemed to be a lease of a portion of a building for subdivisional purposes and so does not attract the provisions of either the Municipal Corporations Act 1954 or the Counties Amendment Act 1961 relating to subdivisions.

The licence, or if there is no duplicate a copy authenticated to the satisfaction of the District Land Registrar, once registered constitutes a folium of the register—just as for example does an agreement registered under The Housing Act 1955—and with some necessary modifications the provisions of the Land Transfer Act 1952 relating to leases apply. All dealings with the licence are registered against the licence and not against the certificate of title of the company. Section 4 gives the District Land Registrar power to require the applicant for registration of a licence either to deposit a plan or cause to be endorsed on or annexed to his licence a plan sufficient to identify the flat or office, together with any appurtenances such as a garage or outbuildings. It is envisaged that in most cases an authenticated architect's plan will suffice. While the section states that it is the applicant for registration of a licence who should lodge or procure the plan it is difficult to imagine a District Land Registrar refusing a plan of a complete building and appurtenances merely because it is lodged by a promoter or by the company itself.

The legislation is not designed to confer the State guarantee upon a licence and s.6 sets out the effect of registration. Although a licence is to be an interest in land within the meaning of s.62 of the Land Transfer Act 1952 registration will not give it any greater efficacy than it had in itself. It should be noted that the second part of the section corresponds to s.52 of the Land Transfer Act dealing with entries in the provisional register. The title of the original holder

of a provisional register—the familiar certificate issued by the Commissioner of Crown Lands—is not guaranteed by the Land Transfer Act as being free of defect and the Act does not undertake to remedy any defect (if there is one) by registration. A licence is placed in exactly the same position. In order that share certificates and licences may not be mortgaged independently, the former, when a mortgage of the latter is registered, must be presented for noting. The District Land Registrar is obliged to notify the company of the registration and discharge of any mortgage (s.7).

The balance of the Act deals principally with the cancellation of licences and regulates and extends the powers of mortgagees. Following s.109 of the Land Transfer Act s.8 of the Companies first Amendment Act 1964 entitles the mortgagee or first mortgagee to the custody of licence and share certificate and also confers upon him the right to attend meetings of the company as proxy of the licensee (and if present) to vote instead of the licensee. From the point of view of a flat owner whose share certificate is unemcumbered in some ways it would be unfortunate if a shareholders' meeting was composed almost entirely of mortgagees with one major lending institution in majority—this is not inconceivable. Undoubtedly this gives the mortgagee a certain measure of control, but the directorship would in the absence of suitable provisions in the articles remain in the hands of the shareholders.

The remainder of the Act deals mainly with matters of procedure and will not be summarised in detail but the more salient features will be mentioned. The Amendment Act leaves a very wide area of freedom of contract available to mortgagees. It gives them very full rights of control over dispositions of licences, requires the company to give notice of any impending cancellation or forfeiture of shares and provide a reasonable period for the mortgagee to remedy the default. The mortgagee is also appointed the attorney of the licensee should the power of sale be exercised, and is given the right to vote at meetings as the proxy of the licensee. It should be noted that the sections dealing with rights of mortgagees in respect of consents to dealings, to cancellations, relief against forfeiture and so on refer specifically to registered mortgages. An unregistered mortgage would not obtain any of these benefits.

When a licence is transferred and a new licence issued, should the applicant so request the District Land Registrar will record against the new licence mortgages noted against the prior licence in the order of their registered priority and the provisions of s.104 of the Property Law 1952 will then apply (s.12).

The Registrar is directed by s.13 to refuse to register any memorandum of transfer of a licence unless he is satisfied that a transfer of the corresponding shares has been registered by the company. When a new licence is issued in lieu of a licence previously registered the Registrar shall not register the former until the latter has been cancelled, revoked, rescinded or surrendered, and the appropriate notice has been registered.

S.15 ensures that in certain circumstances replacement mortgages over the land owned by a flat-owning company shall retain the same priority as the mortgage they replace in relation to registered licences affecting the same land. This provision enables a company which has borrowed money on the security of its land to re-finance

when the mortgage becomes due by giving the new mortgage the same priority in relation to licences registered subsequently as was enjoyed by the former mortgage. The above then are the main provisions of the Act.

A licensee is given an interest in land corresponding to that conferred under the provisional register; an interest which has been recognised as adequate for all types of dealings. It may be transferred, mortgaged and sub-leased, subject to the terms of articles and agreement, just as though it were a lease. In addition a licence may be settled as a Joint Family Home. Section 8(1) of the Joint Family Homes Act 1964 directs the District Land Registrar to give notice to the company of the settlement and s.8(2) requires the company on receipt of such advice to amend its register accordingly to show that husband and wife are joint holders. The company has no right to reject the settlement.

The legal status of a licence is nowhere defined. Section 6 of the Act makes it an interest in land; s.5 states that once a licence is registered, any instrument which could be registered under the Land Transfer Act against a lease may be registered against such a licence. Licences are deemed to be leases only for the purposes of s.350(3) of the Municipal Corporations Act 1954 and of s.21(5) of the Counties Ameendment Act 1961 which exempt leases of portions of buildings from subdivisional requirements under those statutes. Should the land itself be mortgaged by the company, what recognition must a mortgagee give a licence should he exercise his power of sale? Section 3(2) of the Companies Amendment Act 1964 states that ". . . . all the provisions of the Land Transfer Act 1952 relating to leases as far as they are applicable . . . . shall apply with respect to a licence registered under the section as if it were a lease." Under s.119 of the Land Transfer Act 1952 a lease of mortgaged lands is not binding upon a mortgagee unless he has consented thereto. While a licence is not a lease for thepurposes of the Land Transfer Act (it is only deemed to be a lease for specific purposes) once registered it must be dealt with as though it is a lease and the consent of the mortgagee of the company's land should be obtained to each new licence.

It appears that there is nothing to prevent a building being held partly by registered licence holders and partly by persons who are satisfied with a share certificate as their "title". If the effect of registration is to create a tenancy different from that conferred upon a shareholder by virtue of his share certificate and agreement the state of affairs would be hardly satisfactory to any mortgagee. The principal difficulties that could arise are in connection with the exercise of the power of sale by the mortgagee of a company's land and undertaking.

Mr E. C. Adams has determined that occupation agreements based on share certificates are leases for the term of the life of the shareholder since they confer, subject to compliance with articles and agreement, rights of exclusive occupation which are in fact the very essence of a lease: [1958] N.Z.L.J.268. At common law a rule which gives some assistance is the principle that a purchaser who has notice of a tenancy must take subject to the rights of the tenant. Share certificate ownership approximates very closely to a tenancy. Further a purchaser acquiring a building from a mortgagee who has exercised his power of sale must surely be aware of the purpose of the structure

and know of the existence of the various agreements to occupy. It would seem that a mortgagee or a purchaser through him would be bound by any occupation agreement which was in existence when the company gave the mortgage but would not be bound by agreements subsequently entered into by the company without the mortgagees consent irrespective of whether the building is held by its "owners" entirely or partly under registered licences.

Finance is the problem that the 1964 amendment is specifically designed to overcome. A mortgage may still be retained over the whole undertaking and where a flat purchaser is unable to find sufficient cash to make up the deficiency between the vendor's price and the vendor's share in the unpaid purchase money which is secured by the company's mortgage he may seek an individual mortgage over the licence. An alternative to the mode of finance provided by s.15 of the 1963 Amendment is therefore given to prospective licensees.

The latter allows a flat owning company (but not an office owning company) which has allotted at least three-quarters of its shares to persons who are or will be occupiers to assist purchasers by providing finance obtained from a mortgage against the whole of the company's assets. The disadvantages of a mortgage over the land and undertaking have been mentioned in connection with the block-shareholding system, and the practicability of this type of finance is further impaired by the procedural requirements of the section i.e. the directors must give notice to each members of the proposed assistance at least 28 days before the date of the transaction, certain statutory declarations must be filed with the Registrar of Companies and any members may requisition a general meeting of the company to consider the proposal.

Nevertheless there is still a good deal of mortgagee unrest. First there is the fear that 75% of the shareholders may alter the Articles of Association, and secondly there are the restrictions which are usually imposed on the right to transfer shares. Inherent in the "share" system is the difficulty of completely safeguarding the right to occupy a flat since breach of covenant may involve forfeiture of the shares. These factors detract from the value of shares as security. The Hungarian, German and Victorian solutions discussed earlier provide an answer to the problem of possible alteration to the articles (or the approximate equivalent under the two first named legal systems). In Victoria under s.3(2) of the Transfer of Land (Stratum Estates) Act 1960 the Articles of the service company may not be amended except by unanimous approval of the members or by an order of the Court or a judge thereof made summarily. A similar provision if enacted in New Zealand would no doubt reassure financiers as well as shareholders. Such an amendment would not however, be within the scope of the Companies Amendment Acts of 1963 and 1964; it would introduce a fundamental change in the structure of the body of company law applying to unit ownership in buildings. To date it has been the ordinary company law which has been used and special provisions for minority shareholders have not been found necessary.

In an orthodox mortgage, if default is made the mortgagee has all his ordinary remedies available to him and his administration costs would usually be confined to rates, insurance premiums and so on. Should, however, a mortgagor—licensee default, the liability of his mortgagee is much wider. In addition to ordinary outgoings he may be called upon to contribute to a wide variety of undertakings. There could

be contributions to be made for the garden, the roof and structural maintenance of the building itself. In the event of destruction of a building a mortgagee does not have the right to elect whether to apply the insurance moneys in reinstatement or repayment of the mortgage; any decision must be made as binding on all the unit owners.

The major lending institutions have in the past objected to lending on share certificates for on liquidation the claims of creditors would have priority, but were prepared to take security over the whole of a flat owning company's undertaking. It seems that the availability of a licence registered in the Land Registry Office has not as yet induced them to abandon their conservative stand. Although many of the insurance companies have approved the "licence system" in principle, their refusal to lend is based on the unsatisfied demand for orthodox mortgage investments. The largest State lending agency in New Zealand refuses to lend at all on licence security and will only make separate advances on buildings containing not more than two self contained units. Finance may be avaible on the basis of personal standing and other assets rather than on the value of the flat; while private finance methods may be able to operate in this way, if there is to be any real spread of this type of ownership some form of state guarantee or state finance will be required. In the final analysis however, one must consider that no promoter would build or probably be able to build a substantial building without first obtaining finance for the whole undertaking. However desirable, it is unlikely that a flat owning company will initially have its assets unencumbered.

THE ADEQUACY OF THE LEGISLATION.

Both s.15 of the 1963 Amendment and the 1964 Amendment are designed to assist would-be purchasers to find the balance of the purchase money which they are unable to provide from their own resources. The amending Acts are clearly not designed to widen the scope of subdivisional methods available but merely to provide a more satisfactory solution to the problem of finding finance. By and large block-shareholding has found most favour in the Wellington area where well over 100 companies have been registered; Auckland conveyancers prefer leasing methods with fractional ownership in fee simple and Christchurch has followed suit. Dunedin has made a very modest start with six companies. It is interesting to note that already varying practices have arisen and there is a certain amount of scepticism in each centre of methods used elsewhere.

Prior to the Companies Amendment Act 1964 the writer personally would have preferred company ownership of land and buildings, with a perpetual registered lease to each unit holder, or alternatively, fractional ownership in the fee simple with cross leases of each unit from the tenants in common to each co-owner. The main disadvantage of schemes involving registered leases is the difficulty found in varying covenants. The concurrence of all lessees may be difficult to obtain and each variation would have to be registered. These methods still, of course, retain their appeal for smaller buildings. The licence system retains many of the better features of leasing and in addition incorporates the flexibility of the company framework. It is well adapted to unit ownership in large structures. The agreements themselves are not drafted with the same precision as leases and are not registered.

While the agreement may not be varied without the consent of both company and shareholder the company may either in general meeting or by delegation to the directors, provide for many aspects of management which need not be specifically defined.

Other countries with much more experience than New Zealand in this field are swinging towards strata titles ownership. Many commentators consider that the psychological advantages of absolute ownership, as against entitlement based on share certificates, have contributed in some measure to the success of these schemes. Ownership of a freehold estate, however remote from the surface, seems more like conventional home ownership. Close at hand, New Zealand has the benefit of Australian experience. Victoria has adapted the Torrens System, New South Wales has enacted a codified strata titles Act and latterly Tasmania has passed a statute based on the New South Wales Act. Both the Victorian and New South Wales schemes achieve almost the same result. There are those who make the objection that a strata titles system makes a mockery of the Torrens System. They argue that the attendant service companies are fictional creations arising out of pure necessity and that while Land Transfer machinery is ostensibly adopted, the body of law which will apply will bear little if any relation to accepted Land Transfer principles. For example, mortgages which would otherwise be second in priority are ranked as first charges notwithstanding that service charges expressed as encumbrances are first recorded against the certificates of title. (vide s.2 of the Trustee (Mortgages) Act 1959 (Vict.).) No doubt many of these objections may be substantiated but it is a mistake to over emphasise the purity of the "Land Transfer" system. If its machinery is the best available, then there is little reason why it should not be adopted.

Separate ownership in fee simple with group or corporate control appear to be features common to the methods adopted by countries with a real need for high density housing. Each country has of course evolved a system which suits its own legal traditions. It is interesting to note that Germany, a civil law country, which must under that law provide for every innovation by statute, settled for individual ownership.

Altogether it does not appear as though there will be any sudden marked expansion of individual flat ownership although office ownership may have some appeal. Legislation which will give real impetus is probably not required in New Zealand at present. As yet flat ownership has restricted appeal and as large buildings are expensive a sudden increase in this type of building may divert capital from building more suited to the needs of most New Zealanders. There is the prejudice of the New Zealand community at large, ever present, to this mode of living—the problem is more of a sociological and town planning nature than a legal one. Its development is intimately bound up with Government and Municipal policy and while only the future will reveal the attitude of the local authorities it is interesting to note that s.19 of the Municipal Corporations Amendment Act 1964 gives Municipal Authorities power to promote flat owning companies.

Although the provisions of the Companies Amendment Acts are not altogether inadequate, they certainly have limited scope. If the need for flat building becomes imperative a strata titles Act providing for unit ownership in fee simple will be required. A satisfactory system, if different and superior to those at present used in New Zealand,

may obtain approval throughout the country; mortgagees and purchasers would be better aware of their rights and a standard body of law would develop. One of the disadvantages common to all existing methods is that any interested person is obliged to scrutinize every detail of what are generally very lengthy provisions in a lease or agreement and memorandum and articles. As far as possible this must be obviated.

Whether the Land Transfer Act should be brought into line with its Victorian counterpart or a strata titles Act enacted may largely be a matter of taste although it is submitted that the Victorian solution is preferable because of its simplicity. A combination of the better features of both may be desirable. For example the Land Transfer Act could be amended, incidental enabling statutes enacted as in Victoria, and the rights of proprietors and body corporate scheduled as in the New South Wales Conveyancing (Strata Titles) Act 1961. Strata titles legislation does not of itself provide the answer. Clearly some form of State finance or State guarantee of private mortgages will be required.

Finally, it must be remembered that it is not well drafted easements, restrictive and positive covenants, ready finance, or even strata titles legislation which ultimately determine the failure or success of a flat building scheme—the indispensible factor is goodwill of those who make their home in such a building.

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