Sharing Property: Multi-owned Property Workshop

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Summary by Professor Sarah Blandy, Dr Clare Mouat and Associate Professor Cathy Sherry

Multi-owned properties constitute an ever-growing proportion of the world's commercial and residential building stock. The multiplicity of owners and tenants produces social and legal complexity that many existing legal systems struggle to accommodate. On 29 September 2017, a diverse group of researchers, practitioners, policy and decision makers met to discuss the challenges of multi-owned properties. The themes of the workshop were drawn from the key ideas of 'Dynamics of Enduring Property Relations', a paper presented at the 2017 Australasian Property Law Teachers Conference, Curtin University, by Professors Sarah Blandy, Susan Bright and Sarah Nield. The following is a summary of the workshop's deliberations.

THE LAW

The law regulating multi-owned properties varies around the world.

In England and Wales leasehold law is used (mainly) for multi-owned properties, but this is ill-equipped to regulate modern buildings, such as the growing number of apartment blocks. A freeholder owns the whole site, and individual leaseholders own each unit on a long lease. Although there is a commonhold system (similar to strata title), it is rarely used. Currently there is no standard, or required, legal form, so lease content varies, even within buildings; leases are hard for residents and even lawyers to understand; there are often no provisions for property upgrades, costs or termination. Property rights and obligations are determined by tailor-made covenants in each lease.

Scotland uses the law of the tenement; fee simple ownership with an undivided share of the common elements. There is no body corporate (although residents may decide to form one). The doctrine of common interests creates a system of mutual obligations by residents, with default rules about repair and maintenance, which can be varied. 'Strategic' parts of the building are everyone's responsibility and a simple majority is needed to make everyone pay for repairs. Repair of 'non-strategic' parts or improvements are voluntary and, if common areas, unanimous agreement is needed. The risk of apathy in buildings is significant.

Large mixed-use residential and commercial buildings are not common in the United Kingdom.

Both jurisdictions in the United Kingdom suffer from a lack of data, which hinders research.

Australia has a standard legal form (strata title) for multi-owned buildings, which may be residential, commercial, tourist or mixed-use. Legal titles for multi-owned properties can only be created by registration under the Torrens system, and being created by legislation, it is easy to then regulate properties through legislation. All buildings have a body corporate with statutory responsibility for the management of finances, property and the community. All owners are legally obliged to pay for the maintenance and repair of the common property. However, disputes still arise about what constitutes maintenance and repair. Variation in buildings can occur through by-laws, the privately-written rules that regulate the building.

Hong Kong faces the challenge of party political factions within building committees; the Chairman and committee members in private estates regard themselves as more important than others. The best run estates, with least conflict, are the public housing estates, although they have many rules. There is always a new issue arising, e.g. 'big rigging' which relates to corruption in cladding tenders.

Governance and Decision-making

The major difference between jurisdictions is whether a body corporate formed of the owners is required by law (e.g. Australia and Hong Kong) or not (e.g. the UK jurisdictions). In England and Wales, the freeholder of a particular site could be an absentee ground landlord, or a company comprised of leaseholders. Regulation of the decision-making body also varies between jurisdictions: ranging from very specific requirements for e.g. types and frequency of meetings, quora, majorities for particular decisions, election of officers, winding up arrangements, to a complete lack of regulation.

Dispute resolution

Disputes occur in all properties, not just multi-owned; in some jurisdictions multi-owned properties have the advantage of mechanisms that require people to sit down and talk to resolve disputes. Where there is no such requirement, some sites develop their own internal dispute processes.

A requirement to refer disputes to external mediation / conciliation may assist, although this can be unfair when one party is clearly in the right.

Specialist tribunals are able to build up expertise in resolving disputes between residents who must continue to live as neighbours.

Property (strata) managers

Whether, and to what extent, property managers are regulated varies widely between jurisdictions; training for this complex and responsible position should be the minimum requirement. Many residents confuse the manager's role with the body corporate. However, property managers can play a positive role in forming communities. Increasingly sophisticated owners of high value properties, whose own business experience can influence their expectations, can put unfair pressure on untrained property managers.

Making internal rules (by-laws, CC&Rs, etc)

The mechanisms for making internal rules about use of common parts, conduct within the site, obligations to pay for maintenance and improvements, also vary. In England and Wales it is a complicated process to vary the lease, which contains the main rights and obligations in the form of covenants, whereas in most Australian states there is very little limit on the by-law making power, including the power to regulate privately owned apartments. However, new legislation in New South Wales requires bodies corporate to review their by-laws within 12 months; by-laws must not be 'harsh, unjust or unreasonable'. In other states, for example Queensland, by-laws cannot be 'unreasonable'.

Information

Multi-owned properties are legally and socially complex. One the of the core difficulties is that purchasers and residents are often not aware of their legal and social obligations at the point of purchase. They will be joining a community, and will be collectively responsible for the management

and upkeep of the whole site. Advice and education, not just information, should be provided to potential purchasers, and not only at the point when they feel under pressure to buy. The Scottish government is about to produce guidance on how to function well, as a community.

Disclosure: neoliberal myth that information disclosure will overcome the power imbalance and that information will lead to rational decisions by purchasers. We need information to be disclosed but we need to realistic about its role.

Diverse information: people need information about *different* things – financial, disputes within the scheme, how the committee works, maintenance and repair, the role of the property manager. There is a lot of information available in Australia, but how do people access it, how is it delivered, and how is it understood?

Flaws in information provision – contractual disclosure only required for purchasers, not potential purchasers; developers who sell apartments as if they're freehold; managers who believe information belongs to them, not the body corporate; conveyancers who regurgitate information and do not discuss it with purchasers; people buy before they consult a lawyer/conveyancer; large volumes of paper-based information will not be understood or remembered; information provision should be multi-sensory.

Sources of information - Research shows that most people rely on information from friends and family. Evidence from the United States, where many states require standard information to be highlighted in all sales documents, is that this kind of information makes little difference.

POWER

Power can rest

- with the developer setting up the legal and physical framework (thus binding future purchasers and residents);
- with purchasers, in a falling market;
- with ultimate owners, when they create new by-laws, which are becoming more intrusive;
- with the large anchor tenant, in mixed-use schemes.

Unpaid, lay owners: should we have paid, skilled, non-owner directors of complex schemes, rather than unpaid, lay owners who may not have the necessary skills?

Powerful stakeholders: influence legislation, producing less than optimal law. This is a problem in all jurisdictions.

COMMUNITY

Fundamental: Community is fundamental in multi-owned properties, but people often do not realise that is what they are entering.

Accidental not intentional: People buy what and where they can afford, and as a result, communities are accidental, not intentional.

Invoked vs real community – 'community' is consistently invoked in marketing, but how do we empower residents and owners to create real community? We need to focus on multi-lot *living*, not ownership.

Civil community: community does not have to be personal or intensely involved; many residents will have that kind of community elsewhere (family, friends), but it must be sufficient community to

effectively manage the finances, building and disputes, so that people can go on living together in some harmony.

Technology: has a role to play in aiding communication and community management; e.g. electronic voting; software that allows owners to check about meetings, levies, repairs etc; closed Facebook groups that allow people to talk through disputes.

Learning to live in community includes information and education about the law but also promoting an understanding and familiarity for living in a community, and what that entails.

ENDURING RELATIONSHIPS AND CHANGE

Static rules over time: property boundaries and legal obligations are set at the point of construction, but people often develop their own rules over time; e.g. children writing their own rules for use of the garden so younger children are not hurt.

Communities that work: research should focus on communities that function harmoniously, and pinpoint why they do so, rather than focussing on dysfunctional communities.

Changing demographics: lot owners are more affluent and educated now, not just living in apartments because that is all they can afford; but there are still large numbers of short-term tenants, in most jurisdictions. In New South Wales, tenants can now attend meetings, but have no voting power.

Termination: jurisdictions are introducing less than unanimous termination rules; necessary but open to abuse, e.g. termination of schemes purely for developer and/or own profit, such as the majority termination of a structurally sound 4-lot scheme so that a developer can build a single, luxury home.

Growing areas of dispute: can be caused by conflicting interests of long-term owner residents and short-term tenants; disagreement about cost of repairs and upgrades; property manager performance and contracts. Airbnb is a problem the world over, as well as issues arising from residents' mental health problems.

REFORM

Stakeholders sometimes have conflicting positions (e.g. owners and managers), and policy makers need to be sure that problems are real before adding new provisions.

Australian state legislation has grown inexorably, now running to hundreds of pages, making it difficult for owners to read and apply. However, it is hard to reduce its content without people feeling they are having rights taken away.

The new law for Western Australia runs to 700 pages; it will introduce the regulation of property managers and the right of bodies corporate to review/terminate their contracts (like NSW legislation in the 1980s); specialist tribunals to deal with disputes with the power to strike out by-laws. Policymakers have examined how other common law jurisdictions deal with multi-owned properties, and have sent out early drafts for consultation with practitioners.

There seems no appetite for reform in Scotland, but the government of England and Wales is currently consulting on reform of leasehold and commonhold, and on the regulation of property managers.

CONCLUSION

“The issues are almost endless because we are dealing with human beings, all their troubles and psychology,” Professor Malcom Merry, HKU.

Rich discussions are opened up through comparative analysis of the legal structures and cultures, modes of information delivery and its wealth/inadequacy, comprehension of that information, and policy/actor responses to different types of management style and governance experiences.

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