

Condominium Properties in Sri Lanka – Legal Issues

This article addresses the important issue of ascertaining whether there exists a 'subject matter' in a sales agreement relating to a subdivided building.

The existence of the subject matter of a sale:

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.

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 in the presence of 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 which 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. Thus, 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 No. 39 of 2003 giving recognition to condominium units reflected in the plan of subdivision as individual immovable property.

However, 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 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.

A buyer of a properly registered condominium unit whilst acquiring total ownership, possession and control of the respective unit, also acquires joint ownership of the Common Elements of the subdivided building with the other condominium owners based on the "share value" assigned to their respective units.

Another statutory requirement for the proper transfer of title is the need to register all condominium units under the Registration of Title Act No. 21 of 1998, if the building is constructed in a Province or Administrative District where the said Registration of Title Act is enforced.

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 Sale and Purchase Agreement (Sales Agreement) in the absence of a properly registered Deed of Declaration subdividing the building into condominium units. 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 or future 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:

1. It does not result in a transfer of title but remains a conditional sale. Therefore, the prospective purchaser will not acquire ownership of his / her condominium unit even if he/she has paid the sale price in full.
2. 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.

3. 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.

4. 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 lack of a 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 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 has come to light that many occupants of condominium units of completed projects have only a Sales Agreement even after one year of occupation preventing them from claiming ownership over the condominium unit for which millions of Rupees have been paid as full settlement of the sale price. In most cases, the prospective buyers have been compelled to pay the full price, under the threat of losing their condominium unit if the installments are not paid on the due dates. The full amount has thus been paid benefiting the Developer/ Vendor, whilst the prospective purchaser has got only a possessory right over his/ her unit. It needs to be mentioned here that the Apartment Ownership Act No. 39 of 2003 has addressed this issue and has made it mandatory for the Developer/ Vendor to transfer title to the property as stipulated in Sec. 3(2) of the said Act.

This statutory provision 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 sale or the agreement to sell 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 appears 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.

- **Ajithaa Edirimane LLB (Colombo) MLB (Hamburg),**
Attorney-at-Law & N.P.