

# THE VARIOUS POLICY OPTIONS FOR THE SETTLEMENT OF DISPUTES IN RESIDENTIAL COMMUNITY SCHEMES

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I consider it a great privilege to have been asked to write this article in honour of my friend and colleague, David Butler. We have known each other since 1973 and became thoroughly acquainted when we cooperated on the publication of *Sectional Titles, Share Blocks and Time-sharing* which was published in 1985. What I admire most of David is his splendid intellect; his superb knowledge and use of the English language; his patience in explaining difficult concepts of company law and arbitration to me; and his somewhat dry sense of humour. It was a real pleasure to have known and worked with him for so many years.

## 1 Introduction

The aim of this article is to identify and critically assess the various policy options for the resolution of disputes in community schemes such as sectional titles schemes, strata title schemes, real estate cooperatives and planned unit schemes controlled by home owners' associations. The policy options will be divided into internal mechanisms, co-regulation, government regulation, a simplified procedure in ordinary courts, the establishment of specialised strata title tribunals and the establishment of a specialised strata title ombud service. In this contribution the basic characteristics of the various policy options will be explained before the efficacy of each option will be subjected to critical analysis. In conclusion it will be indicated how a simplified version of the Singapore and Queensland option has been adapted in South Africa to provide a swift and inexpensive system to settle disputes and complaints in community schemes.

Sectional title bodies corporate and sectional owners will invariably come across situations involving bylaw (rules) violations, non-payment of common expenses, problems with other strata lot owners, damages to common property or disagreements over strata council decisions. Some of these situations resolve themselves, but many do not. The owners found that court resolution of disputes proved very costly, time-consuming and extremely adversarial. Many owners realise that nothing will destroy a neighbour relationship more than a law suit and that if they sue the body corporate (strata corporation), they are in effect suing themselves as the expenses flowing from the proceedings are to be paid from the administrative fund of the strata title scheme to which they must contribute. Consequently other options must be sought to solve the problem.

## 2 Self-regulation or internal mechanisms

Under a system of *self-regulation* residential community schemes settle their mainly social disputes by internal mechanisms within the provisions of their applicable statutes without any government help or interference. Examples are the South American state of Colombia which, in terms of its Law on Horizontal Property 675 of 2001, elects neighbourhood committees (*Comité de Convivencia*) from amongst the owners' ranks at a general meeting.<sup>1</sup> These committees serve for a year and can consist of three or more members.<sup>2</sup> They attempt to settle mainly social disputes amongst owners or tenants themselves or amongst themselves and the association, the professional manager, the management committee or any other management organ, with regard to the interpretation of the Law and the bylaws of the condominium scheme.<sup>3</sup> Their efforts are aimed at solving the dispute by negotiation<sup>4</sup> and fortifying the harmonious co-existence in the condominium community.<sup>5</sup> They are not allowed to impose any sanctions on any of their members.<sup>6</sup> Resort to court is only allowed after the committee has failed to solve the dispute.

The standard bylaws of the Canadian British Columbia Strata Property Act SBC 1998<sup>7</sup> ("Standard Bylaws") make provision for so-called voluntary dispute resolution. Any party to a dispute among owners, tenants, the strata corporation or any combination of them which involves the Act, the regulations, the bylaws or the rules may refer the dispute to a dispute resolution committee with the consent of all the parties.<sup>8</sup> The dispute resolution committee consists of one owner or tenant of the strata corporation nominated by each of the disputing parties and one owner or tenant chosen to chair the committee by the persons nominated by the disputing parties, or any number of persons consented to, or chosen by a method that is consented to, by all the disputing parties.<sup>9</sup> The dispute resolution committee must attempt to help the disputing parties to voluntarily end the dispute.<sup>10</sup>

By virtue of the provisions of the Catalan Civil Code on condominium, the President of the condominium scheme in Catalonia is in a position to attempt resolution of disputes arising between unit owners themselves and between unit owners and the management body.<sup>11</sup> This flows from his function to ensure that owners must comply with their condominium obligations. Meetings (*junta de propietaris*) can also be arranged to discuss all issues regarding the condominium, and the bylaws can provide for special meetings to be convened to deal with matters that relate only to certain members.<sup>12</sup>

<sup>1</sup> Law on Horizontal Property 675 of 2001 (*Ley de Propiedad Horizontal*) art 58

<sup>2</sup> Art 58 para 1

<sup>3</sup> Art 58

<sup>4</sup> Art 58 para 3

<sup>5</sup> Art 58 1

<sup>6</sup> Art 58 para 2

<sup>7</sup> Ch 43

<sup>8</sup> Standard Bylaws s 29(1)

<sup>9</sup> S 29(2)

<sup>10</sup> S 29(3)

<sup>11</sup> Catalan Civil Code art 553-16

<sup>12</sup> Art 553-20

In Denmark, disputes can be brought before the general meeting, the board, the chairperson of the board or the professional manager. If brought before the general meeting, the person appointed as chairperson conducts the proceedings.

Another example outside the sphere of common interest communities is the Real Estate Developers' Association of Singapore ("REDAS") which set up a conciliation panel in 1991 specifically to hear complaints against developers in response to the Government's call for self-regulation within the building industry. The panel, an independent body comprising members of government agencies, engineers, architects, surveyors and valuers, provides a speedy and amicable manner of redress for owners with grievances pertaining to building defects.<sup>13</sup>

The main objection against a system of self-regulation for multi-ownership communities is that any committee set up to resolve disputes would be too closely involved with the parties to the dispute and thus lack objectivity. They would also, except in the case of the conciliation panel of REDAS, lack the expertise to apply the alternative dispute resolution principles effectively. There is also the problem that the wrong choice of committee members could result in a kangaroo court which discriminates against certain owners or certain groups of owners on the ground of personal rather than objective considerations.

### 3 Co-regulation

In the second type of system, namely *co-regulation*, the condominium statutes prescribe certain steps intended to force owners to resort to other methods to settle disputes before approaching the courts. The methods concerned are mostly alternative dispute resolution mechanisms.

#### 3.1 Ontario Condominium Act

The Canadian Ontario Condominium Act of 1998<sup>14</sup> obliges the association and owners to submit a dispute to mediation and if that fails to arbitration.<sup>15</sup> The Act provides that every declaration (constitutive deed) of a condominium shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, bylaws or rules to mediation by a person selected by the parties,<sup>16</sup> and if that fails to arbitration under the Arbitration Act of 1991.<sup>17</sup> In the event that the parties have not selected a mediator, the submission must occur 60

<sup>13</sup> See in general T Keang Sood *Strata Title in Singapore and Malaysia* 3 ed (2009) 830-831

<sup>14</sup> SO 1998 Ch 19

<sup>15</sup> Condominium Act s 132. The disputes that are commonly being arbitrated include noise bylaw violations, pet issues, parking issues, fencing issues, rental restriction issues, insurance deductible payments by an individual owner, application of fines and generally disputes that bylaws are not being enforced on an even handed basis. Approximately half the arbitrations include legal counsel representation. There are a few condo consultants, who are not lawyers, representing parties at arbitrations. This practice is not frowned upon, and indeed, is encouraged.

<sup>16</sup> Condominium Act s 132(1)(a)

<sup>17</sup> SO 1991 Ch 17 s 132(4) referring to s 34(1)(a) and (b)

days after the parties have submitted the agreement to mediation or 30 days after the mediator selected delivered a notice stating that the mediation has failed.<sup>18</sup> The mediator must confer with the parties and endeavour to obtain a settlement with respect to the disagreement.<sup>19</sup> Each party must pay the share of the mediator's fees and expenses that the settlement specifies or the mediator specifies in the notice stating that the mediation has failed.<sup>20</sup> In the event of a settlement the mediator must record the settlement which shall form part of the matter that was the subject of the mediation.<sup>21</sup>

The Ontario process has been criticised as inefficient in solving minor issues of non-compliance with bylaws or rules (such as an owner painting his or her hallway door in an unapproved colour). Concern has also been raised that some owners have used mediation or arbitration to unduly prolong their non-compliance (which can be costly for all parties). It is also not clear when issues can be directly raised in court proceedings. Due to the fact that mediation is non-binding, it is ineffective unless both parties are willing to come to an agreement. Furthermore, arbitration is costly and time-consuming as lawyers are usually engaged.<sup>22</sup>

The main concern with the Ontario process of mediation-arbitration is, however, that the complainant is not part of the resolution process. Unit holder A complains to the management corporation that unit holder B is practising her flute every night between 10 pm and 11 pm. The Act provides that every Corporation has an obligation to take reasonable steps to compel unit owners to comply with any provisions of the Act, declaration or rules dealing with noise and nuisance. Consequently, if the management corporation or the board receives complaints of noise or nuisance from a unit owner, the Corporation has a duty to, at minimum, investigate the complaint and determine whether to take enforcement steps against any alleged offenders. Unit holder B denies that the noise is loud or disturbs the comfort and quiet enjoyment of the other owners and residents. Due to consistent complaints by unit holder A, the management corporation in good faith decides that it is prudent to take enforcement steps against B. In general, the management corporation will commence relief proceedings and B will be the defending or responding party. Normally, as complainant, A will be the main and perhaps the only witness for the management corporation without being a party to the dispute.<sup>23</sup> Some stakeholders have requested a third party dispute resolution mechanism in Ontario, similar to the Landlord and Tenant Board.

<sup>18</sup> S 132(1)(b)

<sup>19</sup> S 132(5)

<sup>20</sup> S 132(6)

<sup>21</sup> S 132(7)

<sup>22</sup> Some Ontario stakeholders have requested a third party dispute resolution mechanism in Ontario, similar to the Landlord and Tenant Board

<sup>23</sup> See M Djurdjevac "Dispute Resolution: Are all the Parties at the Table?" (2012) *Ontario's Condominium Law Experts* 315

### 3 2 British Columbia Strata Property Act

In British Columbia, the favoured alternative dispute resolution mechanism is a slightly different form of arbitration. The British Columbia Strata Property Act provides that an owner or a strata corporation may refer any dispute between the strata corporation and an owner, or between two or more owners about any matter to an arbitrator.<sup>24</sup> An owner or the strata corporation must give written notice of the arbitration referral to the party affected. Within two weeks after the notice is received, the parties to the arbitration are required to agree on and appoint a single arbitrator. If the parties cannot agree on a single arbitrator, then each disputant appoints an arbitrator and the two arbitrators so appointed appoint a third arbitrator who acts as the chairperson. Any person nineteen years or older may act as an arbitrator, but owners, tenants, occupants of the strata scheme or the manager or other employee of the strata corporation may not act as an arbitrator.<sup>25</sup> They usually appoint a lawyer, a certified arbitrator or someone with expertise in condominium management.

Before holding a hearing, the arbitrator must advise the parties of the possibility of a mediated settlement.<sup>26</sup> For example, a noise bylaw dispute cries out for mediation, not arbitration. The arbitrators must hear the arbitration as soon as possible at a location close to the strata scheme. In many cases the arbitration can take place within three weeks from the date on which an arbitrator is appointed. The arbitration hearing is open to all owners or tenants, unless all the parties to the arbitration agree that the hearing should be held in private.<sup>27</sup> A party may be represented at any stage of the arbitration by another person, including a lawyer. If all parties agree, the arbitration hearing may consist of an exchange of written statements or any other procedure.<sup>28</sup>

The arbitration process is much less formal than a court proceeding. The arbitrators must conduct the hearing as they believe proper,<sup>29</sup> allowing each party adequate opportunity to present or rebut evidence. They may accept evidence on oath, affidavit or otherwise, as they believe proper, whether or not admissible in court.<sup>30</sup> The arbitrator can make whatever award is just and equitable, including orders prohibiting certain actions or conduct and orders requiring monies to be paid by one party to the other party.<sup>31</sup> The arbitrator's decision must be in writing, including reasons and signed by him or her.<sup>32</sup> The arbitrator may also make an award regarding his or her costs and the costs of the arbitration.<sup>33</sup> Very often the award is provided within two to three weeks of the hearing date.<sup>34</sup>

<sup>24</sup> British Columbia Strata Property Act s 177. The list of matters enumerated in s 177(2) is inclusive, but not exhaustive.

<sup>25</sup> S 179

<sup>26</sup> S 181

<sup>27</sup> S 181(5)

<sup>28</sup> S 183

<sup>29</sup> S 183(1)

<sup>30</sup> S 184

<sup>31</sup> S 185(1)

<sup>32</sup> S 185(2)

<sup>33</sup> S 186

<sup>34</sup> S 185

The decision of the arbitrator is final and binding on the parties, subject to review under the Judicial Review Procedure Act<sup>35</sup> and an appeal if all of the parties to the arbitration consent, or the court grants leave to appeal.<sup>36</sup> An arbitrator's decision and order for costs may be filed in the Supreme Court or a Provincial Court and, on being filed, have the same effect as if they were orders of the Supreme Court or the Provincial Court.<sup>37</sup>

The advantages of arbitration over court proceedings are the ability to inspect the strata scheme concerned; expediency; it is less adversarial than court proceedings between neighbours, the option of not hiring a lawyer; and the ability to sit long hours. The disadvantages are that the law is not necessarily applied; the problems with a variety of methods of obtaining evidence; the loss of mysticism that some owners feel is provided by a judge; and the cost involved in arbitration proceedings.<sup>38</sup> Overall, arbitration is reported to be working well in British Columbia to resolve condo disputes.

### 3 3 Florida Civil Rights statute

The Legislature of the American state of Florida has found that alternative dispute resolution has made good headway in reducing court dockets and trials and in offering a more efficient, cost-effective option to court litigation. It acknowledged that the high cost and significant delay of circuit court litigation faced by unit owners in Florida can be alleviated by requiring non-binding arbitration and mediation in appropriate cases. In such a manner delays and attorneys' fees can be reduced while preserving the right of either party to have its case heard by a jury, if applicable, in a court of law.<sup>39</sup> The Legislature therefore compels a party to a dispute to petition, with supporting evidence given to respondents, the Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation for non-binding arbitration.<sup>40</sup> The arbitration is conducted by full time attorneys who are members in good standing of the Florida Bar. The Department adopted rules of procedure to govern the arbitration hearings including mediation incidental thereto.<sup>41</sup>

Before or after the filing of the respondents' answer to the petition, any party may request the arbitrator to refer the case to mediation under any rules adopted by the Division. Upon receipt of a request for mediation, the Division

<sup>35</sup> RSBC 1996 Ch 241 s 187

<sup>36</sup> S 188

<sup>37</sup> S 189 See s 189(2) for decisions that must be filed with the Provincial Court

<sup>38</sup> Most arbitrators are compensated on an hourly basis and require a deposit to be paid before they will proceed with the arbitration. Each party to the arbitration is typically required to pay half of the deposit, which in British Columbia may be in the range of Canadian \$500 00 to \$1,000 00. If a lawyer is retained because the dispute deals with complex issues or the parties are not comfortable representing themselves, this will be an added cost of the arbitration. At the conclusion of the arbitration, and in most cases prior to releasing his or her award, the arbitrator will submit an invoice for the number of hours spent hearing the arbitration and preparing the award. In most cases, the parties to the arbitration are each asked to pay half of the arbitrator's costs on the understanding that the award will deal with which party is required to pay what portion of the arbitrator's costs.

<sup>39</sup> Florida Civil Rights 2013 FlaStat XL Ch 718 Condominiums art 718 1255(3)(b) and (d)

<sup>40</sup> Art 718 1255(4)(a) and (b)

<sup>41</sup> Art 718 1255(4)

must promptly contact the parties with regard to the appropriateness of mediation. If all parties agree, or if the arbitrator deems referral appropriate, the dispute must be referred to mediation.<sup>42</sup> The purpose of the mediation is to give the parties the opportunity to resolve the underlying dispute in good faith, and with a minimum expenditure of time and resources.<sup>43</sup> An impasse after a mediation conference results in the termination of the arbitration proceedings, unless all parties agree in writing to continue the proceedings. In such a case the parties must agree whether the decision of the arbitrator shall be binding or non-binding on the parties.<sup>44</sup> The arbitration must be conducted according to the rules adopted by the division and within a prescribed time-limit.<sup>45</sup> The arbitration award must be presented in writing, and will be final if the parties have agreed to be bound, or if a complaint for a trial *de novo* is not filed in a court of competent jurisdiction in which the condominium is located within 30 days. The prevailing party in an arbitration proceeding shall be awarded the costs of the arbitration and reasonable attorneys' fees in an amount determined by the arbitrator. Such an award shall include the costs and reasonable attorneys' fees incurred in the arbitration proceeding as well as the costs and reasonable attorneys' fees incurred in preparing for and attending any scheduled mediation.<sup>46</sup> Any party to arbitration proceedings may enforce an arbitration award by filing a petition in a court of competent jurisdiction in the area where the condominium is located.<sup>47</sup>

The Florida Legislature has warned that the alternative dispute resolution system introduced by it should not be used as a mechanism to encourage the filing of frivolous or nuisance suits.<sup>48</sup>

### 3 4 English Commonhold and Leasehold Reform Act

Another good example of co-regulation is the new English Commonhold and Leasehold Reform Act of 2002 ("CLRA 2002") which requires directors of the commonhold association to consider a complicated multi-layered internal dispute resolution process, set out in the Model Commonhold Community Statement<sup>49</sup> ("Model CCS"), before embarking on court proceedings to settle disputes in commonhold developments. The process is based on the assumption that a judicial approach to disputes is not appropriate in residential commonholds, due to the fact that the parties will have to live alongside each other after the dispute has been resolved.<sup>50</sup>

In disputes between unit holders or their tenants and commonhold associations,<sup>51</sup> the complaining unit holder must first try to resolve the matter by negotiation with the association, and only if this fails may resolution

<sup>42</sup> Art 718 1255(4)(e)

<sup>43</sup> Art 718 1255(4)(g)

<sup>44</sup> Art 718 1255(4)(h)

<sup>45</sup> Art 718 1255(4)(i)

<sup>46</sup> Art 718 1255(4)(k)

<sup>47</sup> Art 718 1255(4)(m)

<sup>48</sup> Art 718 1255(3)(b)

<sup>49</sup> Model CCS paras 4 11 1-4 11 30

<sup>50</sup> DN Clarke *On Commonhold* (2002) para 19[6]

<sup>51</sup> Model CCS paras 4 11 2-4 11 9

be attempted by means of arbitration, mediation, conciliation or any other method. If this is unsuccessful, the unit holder must serve a “complaint notice” on the association in response to which a “reply notice”<sup>52</sup> must be served by the association. The unit holder must reconsider informal methods of resolving the dispute either on receipt of a reply notice or 21 days from the service of the first notice, whichever date is earlier. Recourse to the courts is permitted only if these fail to resolve the dispute.

Similar rules exist for disputes in which the association is the complainant, albeit with the roles reversed.<sup>53</sup> In the case of an obligation to pay money<sup>54</sup> or the enforcement of a right or duty in an emergency, the association may institute court proceedings directly, without going through any internal procedures.<sup>55</sup> Otherwise, the association must proceed as noted above with the same time-limits for notices, both against the unit holder or against any tenant in possession of the unit.<sup>56</sup> However, the association directors, who are under a general statutory duty to ensure compliance with their obligations to all unit holders,<sup>57</sup> may refrain from any action if they reasonably believe that inaction is in the best interests of “establishing or maintaining harmonious relationships between all the unit holders”. This is subject to the qualification that such inaction must not cause any unit holder other than the alleged defaulter any “significant loss or damage”.<sup>58</sup> Thus if a unit holder’s dog fouls the common areas on a regular basis, the association may prefer to take no action other than a warning letter to the defaulter.

Disputes among residents are also catered for by an internal dispute resolution system.<sup>59</sup> The basic operation of these rules is similar to those already discussed, with certain modifications. Again, the rules demand primary reliance on the informal dispute resolution procedures, although if either a duty to pay money or an emergency is involved, the complainant can go directly to court, notwithstanding that he or she must still first consider the use of informal dispute resolution methods.<sup>60</sup> If direct negotiations or informal methods fail, the unit holder must notify the commonhold association. If the association chooses to act, it may do so either by negotiations or informal dispute resolution procedures.<sup>61</sup> It is not bound to act, and can either allow the complainant direct enforcement or block this route if it believes that the complaint is vexatious or trivial.<sup>62</sup> A possible example might be where a unit holder is alleged to be using a vacuum cleaner late at night. However, the unit holder or tenant may challenge the association’s decision, and if the

<sup>52</sup> Both these notices and those served where the association is the complainant must be in the form laid down (Model CCS paras 4 11 6 and 4 11 13)

<sup>53</sup> Model CCS paras 4 11 10-4 11 16

<sup>54</sup> As where the unit holder of a tenanted unit fails to pay assessments and the association make a direct claim against the tenant

<sup>55</sup> This applies regardless of the sum of money in question

<sup>56</sup> Consequently a notice procedure applies, this time called a “default notice” (para 4 11 13)

<sup>57</sup> CLRA 2002 s 35(1)

<sup>58</sup> Model CCS para 4 11 13 This is a mirror provision to CLRA 2002 s 35(3)

<sup>59</sup> Model CCS paras 4 11 17-4 11 30

<sup>60</sup> Para 4 11 18

<sup>61</sup> Para 4 11 20-4 1 21

<sup>62</sup> Para 4 11 23

association fails to respond within seven days then the complainant may take direct enforcement action.<sup>63</sup> Even then, a further round of internal dispute resolution procedures is required,<sup>64</sup> before matters end up in court.

The laudable aim of these rules is to keep all but the more serious financial disputes out of court. However, the technicalities and intricacy of the commonhold disputes resolution system may deter even a particularly determined person or association from following them. The suspicion that this aspect is deliberate is re-enforced by the power of the commonhold directors to dismiss a complaint by one unit holder against another on the ground that it is trivial or vexatious.

If matters do reach court, the powers of the court are limited.<sup>65</sup> The court may award damages if loss is proved and may also enforce the payment of assessments. In the case of serious contravention of local rules in the CCS (for example, by the keeping of too many cats in a unit), the court may even award an injunction. There is no remedy of forfeiture of a unit, unlike the case with a lease, and the association cannot exercise a lien of any unit to secure the payment of unpaid assessments.<sup>66</sup>

The advantage of this method over methods of internal self-regulation is that the dispute is referred to an independent and therefore more objective agency, especially in the case where the Legislature has prescribed a list from which mediators and arbitrators can be chosen. The difficulty with this system is that mediated settlements cannot be enforced and that arbitration proceedings are cumbersome, costly and as we have experienced in South Africa, not altogether appropriate to settle housing disputes.

### 3.5 Western European jurisdictions

Two autonomous Spanish regions, namely Catalonia and the Basque Region, have enacted legislation on mediation as a swifter and more effective mechanism for settling disputes in condominiums than ordinary court proceedings.<sup>67</sup> If mediation is unsuccessful, recourse to the ordinary court system is still available. At a national level in Spain there is a Draft Bill on Mediation in Civil and Commercial Matters, implementing Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. This covers mediation in condominium schemes. The aim of the Directive is to facilitate the use of mediation as a method of settling disputes in civil and commercial matters. Similar Italian legislation, which came into force on 20 March 2012,<sup>68</sup>

<sup>63</sup> Such action must in turn be notified to the other party to the original dispute

<sup>64</sup> Model CCS para 4 11 29 seems to suggest that the unit holder can base his reconsideration of use of internal methods on his own say so but para 4 11 30 suggests that an attempt must be made by both parties to resolve the dispute at this last stage prior to direct enforcement action by the complainant

<sup>65</sup> Clarke *On Commonhold* para 9[16]

<sup>66</sup> CLRA 2002 s 31(8)

<sup>67</sup> For the Basque Region the Counsellor on Housing and Social Matters issued an Order on 24 October 2007: BOPV no 222 of 19-11-2007 Pt 1 For Catalonia see the Catalan Law on Mediation in Private Law of 2009 art 2

<sup>68</sup> Decreto Legislativo 4 Marzo 2010 n 28 art 23 See L Barbero "Mediation in Italy" (2012) 67 *IntaBulletin* No 2

compels parties to attempt to settle disputes by mediation before a Justice of the Peace or a mediation tribunal (depending on the value of the dispute) before resorting to court proceedings.<sup>69</sup>

Article 62 of the Dutch Model Bylaws<sup>70</sup> provides that disputes between owners, or between one or more owners and the association of owners, may be subjected to dispute resolution by arbitration, mediation or binding conciliation (*bindend advies*). In the case of conciliation, a conciliator gives a ruling which parties to the dispute contractually agree to observe. In 2012, a dispute resolution committee on real estate management (*gescillencommissie vastgoedbeheer*) was established to deal specifically with certain disputes, including disputes in apartment ownership schemes between owners and the owners' association, and between the management board and the general meeting. The task of the committee is to provide an inexpensive procedure to settle disputes by means of binding conciliation (*bindend advies*), within a fairly limited time-frame.

### 3.6 General arguments against arbitration

A judge of the Supreme Court of Appeal of South Africa has contended that the whole purpose of South African arbitration proceedings<sup>71</sup> is to provide an expeditious and inexpensive method of determining disputes.<sup>72</sup>

The following arguments can be raised against the appointment of an arbitrator to solve condominium disputes. In general, disputants have to go through various stages to appoint one and in some cases more than one arbitrator. Arbitration is in most cases just as expensive, if not more costly, than ordinary court proceedings. Again, most arbitration hearings are not conducted in public which eliminates public scrutiny of the process. Even if reasons are given for awards or decisions made by arbitrators, these awards and decisions as well as the reasons for the decisions are not recorded. This means that the awards or decisions cannot serve as precedents for similar disputes that arise later.<sup>73</sup>

Prominent French academics do not favour arbitration as a dispute resolution mechanism on the grounds that access to ordinary courts is a fundamental right which guarantees claimants access to public justice. Moreover, it is felt that arbitration is too costly and denies claimants access to legal aid.<sup>74</sup>

<sup>69</sup> See for example Cassazione Civile, Sezione II, Sentenza 22 gennaio 2010 n 1201

<sup>70</sup> Modelreglement bij de splitsing in appartementsrechten, Koninklijke Notariële Beroepsorganisatie 17-01-2006

<sup>71</sup> Under prescribed management rule 71 in Annexure 8 to the Regulations under the Sectional Titles Act 95 of 1986 published in GN R664 GG 11245 of 08-04-1988 as amended, certain disputes in sectional titles schemes may be referred to statutory arbitration as set out in the bylaw

<sup>72</sup> *Body Corporate Greenacres v Greenacres Unit 17 CC 2008 3 SA 176 (SCA)* para 7

<sup>73</sup> GJ Pienaar *Sectional Titles and other Fragmented Property Schemes* (2010) 225; T Maree "How to Achieve the Impossible - A Plea for the Appointment of a Sectional Title Ombudsman" (2001) *De Rebus* 14

<sup>74</sup> See *Givord, Giverdon, Capoulade, La copropriété* (2009) no 1108 The first French Law on Apartment Ownership of 1938 provided for an arbitration clause to be inserted in the bylaws (*règlement de copropriété*) of condominium schemes Before this provision was repealed by the Law of 1965, the inclusion of such clauses was quite common in the bylaws of particular condominiums

Furthermore, many condominium disputes do not require the relative formality of arbitration proceedings. Although most arbitration proceedings are held informally or according to the procedure set by the arbitrator, the process remains fairly daunting to an uninformed person and, by necessity, certain restrictive procedural rules are usually implemented by the arbitrator in order to control the proceedings. Minor disputes such as disputes about noise and other types of annoying behaviour, are best settled by mediation or conciliation by the people involved in the scheme.

While the French Law on Apartment Ownership of 1938 prescribes certain compulsory time limits for the conclusion of the process, the practice proved that the process of appointing an arbitrator can be time-consuming. There are, furthermore, numerous requests for postponements in practice and matters sometimes take months to finally reach arbitration. In many cases, matters are only referred to arbitration following a stay of proceedings in a court of law when it has been established that a dispute in fact does exist which usually happens when the defendant enters an appearance to defend.

In most cases where bodies corporate are involved, they are represented by legal counsel. These legal representatives are comfortable with court rules and often require that the procedural rules of the High Court apply to the arbitration and the exchange of pleadings. This inevitably leads to delays and places the unrepresented party at a disadvantage.

Given that the arbitration is very seldom held on the first day (there is normally at least one pre-arbitration meeting), that the parties are usually represented, and that the cost of the arbitrator is often substantial, arbitration is not inexpensive.

#### 4 Government regulation

At this stage it is convenient to refer to the additional regulation of strata title schemes by the Singaporean and Sri Lankan governments.

The main function of the Commissioner of Buildings appointed by the government is to oversee the management of the strata title building,<sup>75</sup> to approve the schedule of quotas before units in scheme may be sold,<sup>76</sup> to approve additional levies in case of a change of use of a unit,<sup>77</sup> to exercise control during the initial period; and to convene the first annual general meeting where the management corporations have failed to do so.<sup>78</sup> The Commissioner is also empowered to enter at any reasonable time any premises occupied by the developer to inspect any book, register, document or other records relating to the management of the development, and to make copies of records in order to monitor compliance with essentially financial requirements imposed by the BMSMA.<sup>79</sup> To monitor proper maintenance of the scheme, the

<sup>75</sup> Building Maintenance and Strata Management Act 47 of 2004 s 3(1) ("BMSMA"); Keang Sood *Strata Title in Singapore and Malaysia* 826

<sup>76</sup> BMSMA s 11(1) and (3); Keang Sood *Strata Title in Singapore and Malaysia* 29-31

<sup>77</sup> BMSMA s 41(3)-(5)

<sup>78</sup> S 26(7); Keang Sood *Strata Title in Singapore and Malaysia* 826

<sup>79</sup> BMSMA s 126; Keang Sood *Strata Title in Singapore and Malaysia* 93-95 and 130

Commissioner has the power to give written notice to owners of buildings, common properties and limited common properties which are not kept in a state of good and serviceable repair or in a proper or clean condition to carry out the necessary works and repairs as he deems fit. The same applies with regard to the exterior features of buildings which are not maintained in such a manner as to be securely fixed to the building.<sup>80</sup> If the notice is not complied with the Commissioner may carry out the necessary works and repairs to the building or exterior fixture and recover all the expenses reasonably incurred from the person in default.<sup>81</sup> Failure to comply with the notice is also an offence punishable by a fine.<sup>82</sup>

In Sri Lanka the Condominium Management Authority has a similar function.<sup>83</sup> This Authority is empowered to oversee the proper management and maintenance of condominium buildings in order to create a healthy atmosphere and habitable apartments; to educate owners as to upkeep of buildings and common property; to remove unauthorised structures; to co-ordinate the upkeep of common facilities like children's parks; to create confidence for purchasers to buy into condominiums by playing a major role in condominium property management; to facilitate loans from lending institutions; and to streamline the process of forming efficient management corporations.<sup>84</sup>

Consequently, the functions attributed to the Singapore and Sri Lanka government officials are more in the nature of monitoring the maintenance of community buildings and the financial management of schemes to avoid future disputes than to resolve later disputes in the community.

## 5 Simplified procedure in ordinary courts

Some jurisdictions introduced a special procedure in ordinary courts to adjudicate housing disputes in an inquisitorial manner. The best illustration is the German Apartment Ownership Act<sup>85</sup> where a special procedure has existed since the promulgation of the Act in 1951 to settle disputes in apartment ownership schemes by judges of first instance (magistrates). Besides housing disputes, this informal procedure was also used to adjudicate a *potpourri* of matters relating to wills, guardianship, public registers and the authentication of signatures. In this informal procedure the judge asked questions to place all the relevant facts on the table and negotiated orally with the parties in order to reach an amicable decision. If no settlement was reached, the judge was given a wide discretion to arrive at a reasonable decision. Reasons were required for the decision, and it had to be framed in such a way that it could

<sup>80</sup> BMSMA s 6(1)(a) and (b); Keang Sood *Strata Title in Singapore and Malaysia* 96

<sup>81</sup> BMSMA s 6(4)(a) and (b); Keang Sood *Strata Title in Singapore and Malaysia* 97

<sup>82</sup> BMSMA s 6(5)

<sup>83</sup> Condominium Management Authority Act 10 of 1973 as amended by the Common Amenities Board (Amendment) Act 24 of 2003

<sup>84</sup> S 5

<sup>85</sup> *Wohnungseigentumsgesetz* 15-03-1951 (BGBl 1 175)

be enforced.<sup>86</sup> The German non-contentious proceedings for condominium disputes were abolished by the amendment to the German Law on Apartment Ownership in 2007.

In 2001 the Portuguese Law on Justices of the Peace<sup>87</sup> established a new mechanism for resolving disputes. The Law provides that claims totalling less than 5,000 Euros should be adjudicated on by a Justice of the Peace.<sup>88</sup> Such court hearings are centred around simplicity, adequacy, informality, and absolute procedural economy.<sup>89</sup> The proceedings initially attempt to resolve the dispute by mediation. However, the court will intervene and rule on the substance of the matter, and will also make an award regarding expenses where mediation has not been successful.<sup>90</sup> The decisions of a Justice of the Peace have the same force as a decision of a court of first instance.<sup>91</sup> Thus far, nineteen centres have been created under the supervision of a special Commission in Aid of Justices of the Peace (*Conselho de Acompanhamento dos Julgados de Paz*). The new process has proved invaluable in resolving simple disputes, although there are still doubts over the quality of decision making. Furthermore, the efficiency of the process is undermined by the fact that the success of mediation depends on the agreement of all the parties to the dispute. In practice, it is often the case that at least one of the parties is not focused on achieving a quick resolution, and is willing to go down the route of protracted litigation.<sup>92</sup> In this regard there are rumours that the government has plans to grant exclusive jurisdiction to Justices of the Peace for certain disputes.<sup>93</sup>

Arguments against introducing informal procedure in the magistrates' court to hear housing disputes are that the inquisitorial nature of the proceedings militate against adversarial proceedings existing in many jurisdictions, that it would increase the workload of magistrates' courts considerably, that magistrates would not necessarily have the necessary expertise to settle the specialised disputes that may be referred to them, and that it would not be less costly than other proceedings in the magistrates' court.

## 6 Specialised tribunals

Closely related to the aforementioned system is the establishment of specialised courts (tribunals) to settle common interest community disputes.

<sup>86</sup> Similar proceedings in terms of the Slovenian Property Code (*Stvarnopravni zakonik*) Official Gazette (*Uradni list*) no 87 of 2002 arts 109 and 123 and Law on Housing (*Stanovanjski zakon*) Official Gazette (*Uradni list*) no 69 of 2003 art 28 are reported to provide an inexpensive and efficient dispute resolution system

<sup>87</sup> Lei 78/2001 de 13 de Julho Julgados de paz (*Diário da República* no 161 4267)

<sup>88</sup> Portuguese Law on Justices of the Peace art 9(6) read with art 8

<sup>89</sup> Art 2 para 2

<sup>90</sup> Art 60 read with art 5

<sup>91</sup> Art 61

<sup>92</sup> The Portuguese Supreme Court decided that the jurisdiction of the Justices of the Peace and ordinary courts is concurrent: Decision No 11/2007 of 24-05-2007

<sup>93</sup> JM Pimentel "Portugal" in R Clarke (ed) *The Dispute Resolution Review* 3 ed (2011) 680 690

## 6 1 Singapore Strata Titles Board

The best example of such a system is the Singapore Strata Titles Board created in terms of Part VI of the Building Maintenance and Strata Management Act of 2004 to settle strata title disputes. The new Act would be under the purview and administration of the Ministry of National Development (“MND”) and provides a clearer delineation of the role of the MND in administering the maintenance and management of buildings. It also enhances responsiveness to the needs of the industry since only the MND will be involved in initiating and the following through of any amendments.

This specialised judicial Board is organised on the model of a Small Claims Court and consists of academics and other strata title experts on a non-permanent basis. The only permanent members are the Registrar,<sup>94</sup> the President and Deputy President<sup>95</sup> assisted by a panel consisting of such number of persons as may be considered necessary and appointed by the Minister of National Development<sup>96</sup> for a term not exceeding three years and who are eligible for reappointment.<sup>97</sup> The members of the panel have a wide range of experience and include accountants, architects, engineers, grassroots leaders, lawyers, property consultants and surveyors.

A strata titles Board is empanelled for every application. Each Board consists of the President or Deputy-President and two or four members selected by the President from the panel,<sup>98</sup> for the purpose of hearing the dispute or matter. The Board is required to endeavour to mediate and bring about an agreement without delay. If no agreement is reached within three days of being constituted, the Board must hear the parties and arbitrate the matter and render a decision and make an order<sup>99</sup> in a fair and impartial manner.<sup>100</sup> Although the BMSMA refers to arbitration, it expressly excludes the application of the Arbitration Act.<sup>101</sup> Hearings are open to the public and minutes of the proceedings, including any oral evidence given, are kept by the President of the Board.<sup>102</sup> The arbitration proceedings are deemed to be judicial proceedings and the members of the Board are deemed to be public servants.<sup>103</sup> The Board is required to carry out its work expeditiously and to make a final order or determination within six months from the date it is constituted.<sup>104</sup>

Further regulations make the procedure more flexible and informal. Parties may be represented by counsel<sup>105</sup> and witnesses may be called.<sup>106</sup> There is an appeal to the High Court on questions of law.<sup>107</sup>

<sup>94</sup> BMSMA s 99

<sup>95</sup> S 89(1)

<sup>96</sup> S 90(4)

<sup>97</sup> S 90(5)

<sup>98</sup> S 89(3)(b)

<sup>99</sup> S 92(1)(b)

<sup>100</sup> S 92(3)

<sup>101</sup> Ch 10 (revised edition 2002) s 92(6)

<sup>102</sup> S 92(7)

<sup>103</sup> S 92(8)

<sup>104</sup> S 92(9)

<sup>105</sup> S 94

<sup>106</sup> S 95

<sup>107</sup> S 98

Not all disputes can be referred to the Board; only disputes listed in sections 101 to 115 of the BMSMA can be heard by the Board.<sup>108</sup> These are, *inter alia*: settling disputes on costs or repairs or rectifying a complaint in respect of a defect in a lot, a subdivided building and the common property;<sup>109</sup> convening a meeting where the management corporation has defaulted; annulling a resolution if voting rights are denied or due notice of the business is not given; revoking an amendment to a bylaw that affects all the lot owners; invalidating a purported bylaw that the management corporation has no power to make; varying the rate of interest fixed by the management corporation for late payment of a contribution; varying the amount of insurance to be provided; requiring the management corporation to make or pursue an insurance claim in respect of damage to the scheme building; giving consent to owners to alter the common property; appointing a managing agent; compelling a management corporation to supply information or documents to an applicant who is entitled to have access to them; compelling an owner to grant access to the management corporation to carry out works; and resolving disputes between a management corporation and a subsidiary management corporation.

The Board may dismiss an application if it believes that it is frivolous, vexatious, misconceived or lacking in substance; that a decision in favour of the applicant is not within the jurisdiction of the Board; that the applicant has unreasonably delayed to provide information; that the applicant is a lot holder who is in arrears with the payment of his contributions and that the case is suitable for mediation.<sup>110</sup>

For compliance with an order, the Board may order a body corporate, the trustees, the managing agent or owner or other person having an interest in a unit or occupier to do or refrain from doing a specified act in respect of a unit or the common property.<sup>111</sup> Any order may, by leave of a District Court, be enforced against the person in the same manner as a judgment of that Court, and where leave is so granted judgment may be entered in terms of that order.<sup>112</sup> Contravention of an order to do or refrain from doing a specified act constitutes an offence and on conviction a maximum fine of S\$10,000 or imprisonment for a term not exceeding five years or both may be imposed.<sup>113</sup> An appeal is allowed to the High Court but only on matters of law.<sup>114</sup> This gives finality to decisions of the Board and ensures that there is no miscarriage of justice due to errors of law.

The advantages of such a system is that it is swifter, less cumbersome and cheaper than ordinary court procedures; that disputing parties have a fairly attractive permanent forum in which to solve their disputes; that disputes are adjudicated upon by experts in the field of multi ownership community

<sup>108</sup> Ss 101-115

<sup>109</sup> In proceedings with regard to any alleged defect in a lot, there is a statutory presumption of liability on the owner of the upper floor lot (s 101(8)) See Keang Sood *Strata Title in Singapore and Malaysia* 799

<sup>110</sup> BMSMA s 116

<sup>111</sup> S 117(2)

<sup>112</sup> S 120(1)

<sup>113</sup> S 120(2)

<sup>114</sup> S 98

matters; and that the courts are relieved from a workload which could have become very heavy in future. The disadvantages of such a system are that these courts proved only practicable for certain type of disputes, mostly damage by rainwater ciphering through to apartments below, and that the adjudicators who work for a pittance<sup>115</sup> do not always give the necessary care and attention to the cases at hand.

In cases of leakage affecting units on two floors, there will be a statutory presumption of liability against the unit on the upper floor.<sup>116</sup> The presumption is rebuttable and the objective is to make the owners of upper floor units more responsive to such problems and to facilitate a quick resolution.<sup>117</sup>

## 6 2 New South Wales specialised tribunal

Another example of a specialised court or tribunal created to settle disputes in sectional title schemes is the forum created in terms of chapter V of the New South Wales Strata Schemes Management Act 138 of 1996.<sup>118</sup> This Act gives power to adjudicators appointed by the Minister of Fair Trading and the Consumer, Trader and the Tenancy Tribunal to make orders to settle disputes about certain matters relating to the operation and management of a strata scheme. Initially, an application for an order is processed by the Registrar. The Registrar must refuse to deal with a matter if satisfied that mediation was appropriate and was not attempted. A person may either apply to the Director-General of the Department of Fair Trading for mediation of a matter or make other arrangements for mediation.<sup>119</sup> If mediation of a matter is unsuccessful or a matter is not appropriate for mediation, the Registrar may accept the application for the order. Depending on the nature of the order requested, the application will be dealt with by either a Strata Schemes Adjudicator or the Tribunal constituted in terms of the Consumer, Trader and Tenancy Tribunal Act 82 of 2001 (“CTTT Act”).

Strata Schemes Adjudicators are appointed by the Minister of Fair Trading.<sup>120</sup> The orders they are empowered to make are itemised in Part 4 of chapter V of the New South Wales Strata Schemes Management Act and divided into ten divisions starting with a general order to settle disputes or rectify complaints concerning the exercise or failure to exercise a function in terms of the Act<sup>121</sup> or the operation, administration and management of the scheme. Other orders relate to property (alterations and repairs to common property and entry into a section); insurance (to pursue an insurance claim); levies (varying rates of interest, contributions levied or manner of payment); keeping of animals; parking on the common property; noisy residents or air conditioning; insufficient floor covering in an owner’s lot; unauthorised alterations to the common property; meetings and decisions of the body

<sup>115</sup> S 100: allowances

<sup>116</sup> S 101(8)

<sup>117</sup> Keang Sood *Strata Title in Singapore and Malaysia* 799

<sup>118</sup> Ch 5 of the Act deals with “Disputes and Orders of Adjudicators and Tribunal”

<sup>119</sup> See further A Ilkin *NSW Strata and Community Schemes Management and the Law* 4 ed (2007) 1403

<sup>120</sup> New South Wales Strata Schemes Management Act s 217

<sup>121</sup> For example, failure to repair common property defects

corporate (invalidating decisions), records of the body corporate, rules and house rules and appointing administrators to take over the functions of the body corporate.<sup>122</sup>

The Adjudicator may dismiss applications on certain grounds and refer others (for example, an application involving complex issues) to the Tribunal. The Adjudicator makes decisions based on written submissions. He or she is allowed to make certain investigations and must act judicially when making the order in writing. An order has force and effect for a period of two years. A copy of the order must be served by the Registrar on the body corporate, the applicant, parties who made submissions and the person against whom the order was sought. An appeal may be made to the Consumer, Trader and Tenancy Tribunal against an order of an Adjudicator within 21 days of the Adjudicator's order coming into effect.<sup>123</sup>

The Tribunal consists of various divisions, amongst others a Motor Vehicle Repairs and Sales Division, a Retirement Village Division and the Strata and Community Schemes Division.<sup>124</sup> The Chairperson, Deputy Chairperson and members are appointed by the Minister of Fair Trading.<sup>125</sup> Members must have expertise in one or more of the areas of jurisdiction of the Tribunal. A specific tribunal may consist of one, two, or three members as determined by the Chairperson.<sup>126</sup> Matters for which orders may be made by the tribunal are itemised in Part V. They relate to the authorisation of certain acts during the initial period, the reallocation of participation quotas, caretaker agreements, the appointment of an administrator and matters referred to the tribunal by an Adjudicator.<sup>127</sup> In the same way as an Adjudicator, the Tribunal may dismiss applications on certain grounds, and conduct investigations. Applicants may be represented by counsel, an attorney or any agent at the hearing. Proceedings before the Tribunal must be conducted in public and in accordance with the provisions of the CTTT Act.<sup>128</sup> Copies of an order must be served on interested parties. Strict requirements are set for an appeal to the District Court against an order of the Tribunal.<sup>129</sup> The CTTT Act allows for an appeal to the Supreme Court with respect to matters of law.<sup>130</sup> The Strata Schemes Management Act provides for civil penalties for non-compliance with orders of adjudicators or the Tribunal.<sup>131</sup>

The difficulty with the New South Wales legislation on dispute resolution is that it is too complicated. The matter is dealt with in two Acts, namely the Strata Schemes Management Act and the CTTT Act. Chapter V of the former Act dealing with Disputes and Orders of Adjudicators and the Tribunal

<sup>122</sup> New South Wales Strata Schemes Management Act ss 17, 19, 84, 86, 138-162 and 170; Ilkin *NSW Strata and Community Schemes Management and the Law* 1409-1440

<sup>123</sup> Ilkin *NSW Strata and Community Schemes Management and the Law* 1409

<sup>124</sup> Other divisions are residential tenancies, social housing, residential building work, purchase and supply of goods and services, residential parks and commercial disputes

<sup>125</sup> Consumer, Trader and Tenancy Tribunal Act s 7

<sup>126</sup> S 11

<sup>127</sup> Strata Schemes Management Act ss 182-184

<sup>128</sup> CTTT Act s 222

<sup>129</sup> S 200

<sup>130</sup> S 67

<sup>131</sup> Ss 202-206

consists of 87 sections, covering 27 pages. Furthermore, the relationship between the two Acts is not clear, and in my opinion the classification of disputes in housing matters as consumer related and placement thereof in the Department of Fair Trading is not entirely satisfactory.

## 7 Establishment of special ombudsman service

The final option considered was the establishment of a special ombudsman service to hear complaints and to settle common interest community disputes. The best examples of this system are found in Nevada and Florida in the United States.

Nevada was the first to introduce an ombudsman service. The Nevada ombudsman provides a wide range of services including assistance in processing claims submitted to mediation or arbitration; advice to owners as to their rights and responsibilities; assistance to management boards in the performance of their duties; the investigation of disputes involving the interpretation of the Act,<sup>132</sup> the regulations and other documents of the scheme; the compilation and maintenance of a register of all management corporations in the State, indicating among others the number of foreclosures which were completed on units within the scheme based on non-payment of levies or fines, and whether the required reserve fund study has been conducted.<sup>133</sup>

The functions of the Florida Condominium Ombudsman (an attorney assisted by fourteen staff members) are, among others, to prepare and issue reports and make recommendations on the state of multi ownership (common interest) communities in the State; to liaise between disputing parties; to monitor condominium elections; recommend enforcement action and investigate condo financial dealings; to assist unit owners and board members; and to encourage alternative dispute resolution proceeding before filing a matter as a formal complaint. The ombudsman will only act after six unit owners, or 15% of the association members, sign a complaint against their board.<sup>134</sup>

The main arguments against such a wide Ombudsman service is that it purports to provide not only dispute resolution services, but also monitoring, informational and training functions. If a ready source of financing is not available, such services may ultimately be too costly.

### 7.1 The South African Ombud Service

Until 2011 the only dispute resolution mechanism available in South Africa was a kind of statutory arbitration regulated by prescribed management rule 71 in Annexure 8 of the Regulations<sup>135</sup> under the South African Sectional Titles Act 95 of 1986 promulgated in 1997. Since its introduction, arbitration was criticised as equally expensive and time-consuming as court proceedings

<sup>132</sup> Common Interest Ownership (Uniform Act) Nevada Revised Statutes (“NRS”) ch 116 Alternative Dispute Resolution is governed by the NRS ch 38

<sup>133</sup> See NRS 116 625 and 116 630

<sup>134</sup> See 2013 Florida Statutes Title XL ch 718 5011-5012

<sup>135</sup> GN R664 in GG 11245 of 08-04-1988 as amended

and an unsuitable method of resolving sectional title disputes. The Department of Lands (now the Department of Rural Development and Land Reform), which administered the Sectional Titles Act, was inundated with complaints arising from sectional title disputes and appointed consultants to investigate the establishment of a more suitable dispute resolution system.

The result was the promulgation of two statutes in 2011, namely the Sectional Titles Schemes Management Act 8 of 2011 (“STSMA”) which separated and re-enacted the management provisions of the Sectional Titles Act 95 of 1986 (“STA”) and placed the new Management Act under the control and administration of the Department of Housing (now the Department of Human Settlements). On the same date the Department of Human Settlements published the Community Schemes Ombud Service Act 9 of 2011 (“CSOSA”) which established, among others, a dispute resolution service in respect of “community schemes” which are defined to include, among others, sectional title schemes, share block developments, retirement schemes and housing schemes controlled by home owners’ associations.

The Community Schemes Ombud Service Act makes provision for the establishment of a national head office and several regional offices. The head office will be under the control of the Chief Ombud and the Chief Financial Officer appointed by the Board of the Service,<sup>136</sup> while the regional offices will be staffed with an ombud, a deputy ombud (appointed by the Chief Ombud and the Advisory Board), and competent adjudicators and conciliators.<sup>137</sup>

The functions of the Community Scheme Ombud Service are expressly made wider to include some of the aspects found in the American Condominium Ombudsman statutes and even the Singapore and Sri Lanka statutes. The functions are the following:

- to develop and provide a dispute resolution service;
- to train conciliators, adjudicators and employees;
- to monitor and take custody of scheme governance documentation; and
- to provide education, information, documentation and other services to the public.<sup>138</sup>

Whereas the office of the Chief Ombud will develop and monitor the dispute resolution service, and train conciliators and adjudicators, the Service itself will be provided by the regional ombuds, adjudicators and conciliators. An important function of the Chief Ombud will be the inspection and approval of bylaws of community schemes which were only lodged with the Land Registry and never examined for their appropriateness. Furthermore, the scheme rules in the various land registry offices were missing, incomplete and mostly in a complete state of disarray. These bylaws will now be kept safely by electronic means and made available to the public on request.

The first stage of the Ombud Service, namely the establishment and equipment of the national head office and the most important regional offices,

<sup>136</sup> CSOSA s 14(1)

<sup>137</sup> S 21(2)

<sup>138</sup> S 4

will be funded by the South African parliament. Thereafter the operation of the national and regional offices are funded mainly by levies collected from unit owners of community schemes as well as cost recovery fees charged for the various services offered by the Service.<sup>139</sup> A reasonable income could be expected from the furnishing of scheme documentation and especially from the fact that ordinary and special contributions can be claimed *via* the regional Ombud Service offices rather than by debt collection proceedings in the magistrates' courts.

Any party with a complaint or who is a party to a dispute or any person who is materially affected by a complaint or a dispute may apply to a regional office for relief. The application for relief is limited to one or more of the 28 orders listed in section 39 of the Act.<sup>140</sup>

The orders are divided into seven categories, namely in respect of financial, behavioural, scheme governance issues, meetings, management services, works pertaining to private and common areas and general issues.<sup>141</sup> The list is not exhaustive as the Chief Ombud is entitled to propose any other order.<sup>142</sup> An example of an order addressing financial issues is an order requiring the association to increase the amount of insurance on the building or an order requiring the association to have its accounts audited by a designated auditor. An order addressing a behavioural issue could be an order that particular behaviour constitutes a nuisance and that the person concerned must refrain from causing a nuisance; in the case of an animal causing a nuisance an order to take specific action to remedy the nuisance or to remove the animal. An order with regard to scheme governance issues could be an order to record a new bylaw or an order declaring that a specific bylaw is invalid. With regard to meetings, an order could require the association to call a meeting to deal with a specific issue or to declare that a resolution passed at a general meeting was void or invalid. On the issue of management services, an order could require the management agent to comply with the terms of his contract of employment or the applicable code of conduct. In respect of works pertaining to private and common areas, the adjudicator may order the association to carry out repairs and maintenance or an order declaring that the association's decision to reject a proposal to make improvements or alterations to common areas is unreasonable and requiring the association to agree to the proposal or to ratify the proposal on specified terms. In respect of general issues, the adjudicator could order that the applicant be allowed access to information or documents wrongfully denied.

The ombud must reject the application if the relief sought is not within the jurisdiction of the Service; the applicant does not confirm that he or she wants to proceed with the application or if the ombud is satisfied that the dispute should be dealt with in a court of law.<sup>143</sup>

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<sup>139</sup> S 22

<sup>140</sup> S 38

<sup>141</sup> S 39

<sup>142</sup> S 39(7)(b)

<sup>143</sup> S 42

On acceptance of an application, and after receipt of submissions from affected persons or responses from the applicant, the ombud must consider whether there is a reasonable prospect of a negotiated settlement and if there is such a prospect, he must refer the matter to conciliation.<sup>144</sup> If conciliation fails, the ombud must refer the application together with any submissions and responses to an adjudicator, chosen by the ombud if the applicant qualifies for a waiver or discount of fees and if the application does not so qualify, to the adjudicator chosen from the ombud's list.<sup>145</sup>

Once an application is referred to an adjudicator an ombud plays no role in relation to the substance and outcome of the dispute. The adjudicator must act independently and impartially in resolving the dispute.<sup>146</sup> The adjudicator must abide by the due process of law, act swiftly and with little formality and with avoidance of technical points. He is not obliged to apply the exclusionary rules of evidence and is free to request further information, documentation and inspection of the community scheme concerned.<sup>147</sup> The parties are not entitled to legal representation, unless they all agree or the adjudicator concludes that it is unreasonable to expect from the parties to conduct their own case.<sup>148</sup>

After consideration, the adjudicator must grant or reject each part of the relief sought; apportion the liability for costs; complete a statement setting out the reasons for his or her order and inform the parties of their right of appeal on a question of law<sup>149</sup> within 30 days of delivery of the order.<sup>150</sup> The order is enforceable in a magistrate's court or the High Court depending on the amount of money and the relief ordered. The clerk of the magistrate's court and the registrar of the High Court, on lodgement of a copy of the order, must register it as an order of their respective courts.<sup>151</sup> The Ombud Service is obliged to publish and make available for inspection by the public a copy of any order made and the reasons for such order.<sup>152</sup>

## 7.2 Advantages of the Ombud Service

The Ombud Service provides a swift and inexpensive service for the resolution of disputes and complaints compared to costly and time-consuming court and arbitration proceedings. The workload of magistrates' courts is also reduced.

The national office of the Ombud Service must provide education, information, documentation and such services as may be required to raise awareness to owners, management boards and other affected persons about their rights and obligations in community schemes.<sup>153</sup> In line with the functions of the Singapore Commissioner of buildings and the Sri Lanka

<sup>144</sup> S 47

<sup>145</sup> S 48

<sup>146</sup> S 35

<sup>147</sup> Ss 50 and 51

<sup>148</sup> S 52

<sup>149</sup> Ss 53 and 54

<sup>150</sup> S 57

<sup>151</sup> S 56

<sup>152</sup> S 58(2)

<sup>153</sup> S 4(2)

Condominium Management Authority the Ombud Service is compelled to monitor and promote good governance of community schemes.<sup>154</sup>

The service provided by the Ombud Service is professional. The adjudicators and conciliators must have suitable qualifications and experience in adjudication and conciliation and community scheme governance.<sup>155</sup> Moreover, the national office is obliged to provide training for conciliators and adjudicators,<sup>156</sup> and contrary to their Singapore counterparts who work for a pittance, they are generally appointed on good salaries and on a full time basis.<sup>157</sup>

Besides dispute resolution, the national office is also obliged to “regulate, monitor and control the quality of all sectional titles scheme governance documentation”.<sup>158</sup> It must take safe custody and provide public access electronically to such documentation.<sup>159</sup>

The maintenance and repair of community scheme buildings are promoted by the provision that in the event of insufficient provision for maintenance in the budget, any owner may now approach the Ombud Service for an order declaring that incorrectly determined contributions be adjusted to a “correct or reasonable amount”.<sup>160</sup> This is further fortified by the provision in the Sectional Titles Schemes Management Act that the body corporate may recover all contributions (including special contributions)<sup>161</sup> from the owners of the units at the time of the passing of the resolution by a swifter application to an ombud instead of a time-consuming action in a magistrate’s court.<sup>162</sup>

## SUMMARY

This contribution in honour of David Butler surveys the various policy options for the resolution of disputes in community schemes. The options are internal mechanisms, co-regulation, government regulation, a simplified procedure in ordinary courts, the establishment of specialised strata title tribunals and the establishment of a specialised sectional title ombud service. The basic characteristics of each policy option are explained and each option is subjected to critical assessment. Illustrations of self-regulation are the neighbourhood committees of Colombia in South America and the meetings convened by the President (chairperson) of Catalan condominium schemes to attempt dispute resolution. Instances of co-regulation are provided by the Ontario Condominium Act of 1998, the British Columbia Strata Property Act SBC 1998, the Florida Civil Rights statute on Condominiums (Florida Civil Rights 2013 FlaStat XL Ch 718 Condominiums) and the English Commonhold and Leasehold Reform Act of 2002. These statutes oblige strata owners to resort to mediation and arbitration before approaching the courts. Similar dispute resolution mechanisms are encountered in Catalonia and the Basque Region of Spain and in the Dutch Model Bylaws for apartment ownership schemes. Under the heading government regulation the functions of the Singaporean Commissioner of Buildings and the Sri Lankan Condominium Management Authority are explained. After a brief discussion of the simplified court proceedings practised in Germany and the streamlined dispute resolution proceedings before a Justice of the Peace in Portugal, the role of specialised tribunals in dispute resolution in Singapore and New South Wales is attended to. The article is concluded with a

<sup>154</sup> S 4(2)(a) and (c)

<sup>155</sup> S 21(2)(b) and (c)

<sup>156</sup> S 4(1)

<sup>157</sup> See in general s 21(3)-(5)

<sup>158</sup> S 4(1)(c)

<sup>159</sup> See CSOSA s 4(1)(c) and (d) and STSMA s 10(2) and (5)

<sup>160</sup> CSOS s 39(1)(c)

<sup>161</sup> STSMA s 3(3)

<sup>162</sup> S 3(2) read with STA 37(2)

survey of the special ombudsman service in Nevada and Florida in the United States and the South African ombud service in terms of the newly promulgated Community Schemes Ombud Service Act 9 of 2011. The latter mechanism is hailed as one of the most advanced dispute resolution systems in the world.