LEGAL UPDATE

CASE UPDATE

13 March 2018

COURT OF APPEAL CLARIFIES MEANING OF "COMMON PROPERTY"

Sit Kwong Lam v Management Corporation Strata Title Plan No 2645
[2018] SGCA 14

SUMMARY

In its grounds of decision issued on 5 March 2018, the Court of Appeal ("**CA**") clarified the meaning of "common property" under the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) ("**BMSMA**") in the context of a strata title development.

BACKGROUND

The Appellant was a subsidiary proprietor ("**SP**") of a unit in Ardmore Park ("**Unit**"). Sometime in November 2011, the Appellant submitted an application to the management corporation ("**MCST**") for work to be carried out at the Unit. The application did not state that the work was to be carried out in areas *other* than within the Unit. The application was approved.

Subsequently, over the course of three inspections, the MCST discovered that:

(a) timber decking had been installed on two wide ledges *outside* the Unit. These two ledges ran along a segment of the Unit's external facade and were enclosed by a 0.75m tall parapet. It was accepted that the ledges were not balconies. In order to physically access these two wide ledges, the Appellant had removed the fixed glass panels which bordered parts of his Unit and replaced them with sliding glass panels ("**Work 1**");

(b) timber decking had been installed on a flat roof outside the Unit ("**Work 2**"). This timber decking covered the flat roof entirely, including the floor trap and drainage system. This flat roof was accessible by the Appellant via a backdoor in the Unit, and was also accessible by other SPs via a common staircase; and

(c) an air-conditioning ventilation unit had been installed on the outside wall of the building, which was also the external wall enclosing the Unit ("**Work 3**"). Work 3 required the Appellant to hack through a wall to connect the air-conditioning ventilation unit to the interior of the Unit.

At an Annual General Meeting, the Appellant tabled three motions seeking exclusive use and enjoyment and/or special privileges in respect of the property where Works 1, 2 and 3 (collectively, "**Works**") had been carried out. The motions were not passed.

The Appellant then made an application before the Strata Titles Board ("**STB**") for, amongst other things, a declaration that he was not in breach of any by-law by reason of the Works. A key issue was whether the areas under the Works (collectively, "**Areas**") were "common property". The STB dismissed his application and the Appellant appealed to the High Court ("**HC**").

THE HC'S DECISION

Before the HC, the Appellant argued, amongst other things, that the Areas were not common property as they did not fall within the definition of "common property" under the BMSMA. Essentially, section 2(1) of the BMSMA defines "common property" to mean such part of the land and building: (a) "not comprised in any lot or proposed lot in that strata title plan"; *and* (b) "used or capable of being used or enjoyed by occupiers of 2 or more lots or proposed lots" ("**2nd Limb**").

The Appellant argued that the Areas did not fall within the 2nd Limb because: (a) in relation to Work 1, the area could not be physically accessed or enjoyed by *any* SP; and (b) in relation to Works 2 and 3, the law supposedly imposes a requirement of "*central or common usage*" before classifying an area as common property, and the MCST had been unable to furnish evidence as to the common usage of the areas in question.

The HC disagreed with the Appellant's contentions. In particular, with regard to the 2nd Limb, the HC held that the correct inquiry was

whether the Areas were for the "*exclusive use*" of the occupier(s) of the Unit ("**Exclusive Use Test**"). On the facts, the HC found that the Areas were not, and they therefore constituted common property. The Appellant appealed to the CA.

THE CA'S DECISION

The CA dismissed the appeal. Among other things, the CA held:

(a) an area which has been expressly demarcated as "common property" on the strata title plan was "*at least on a presumptive basis, part of the common property of the development*". The burden would be on the party contending otherwise to prove that the strata title plan was in error because the area in question cannot fall within the statutory definition of "common property";

(b) the two limbs of the definition of "common property" in section 2(1) of the BMSMA were to be read conjunctively. However, and significantly, the CA disagreed that the 2nd Limb was to be construed by applying the Exclusive Use Test. In this regard, the CA observed that the Exclusive Use Test was contrary to the ordinary meaning of the language in the 2nd Limb;

(c) the words "used" and "enjoyed" in the 2nd Limb should be read broadly. "Use" means to "*take, hold or deploy (something) as a means of accomplishing or achieving something*", and "enjoy" means "*to get pleasure from something*". Any area or installation that could "*affect the appearance of a building*" or was "*part and parcel of the fabric of the building*", could, by its mere presence be "enjoyed" by the occupiers of two or more lots;

(d) there was no need for the area to be physically accessible by the occupiers in order to be enjoyed by them. In the same vein, an area need not, at any particular point of time, be used or enjoyed by occupiers of two or more lots to fall within the 2nd Limb to be considered common property. It was sufficient that the area was "*capable*" of being enjoyed; and

(e) any area in respect of which the MCST had assumed a duty to control, manage, administer or maintain would presumptively satisfy the 2nd Limb, unless it could be shown that the MCST ought not to have assumed such a duty.

Applying the above principles to the facts, the CA held that the Areas were common property.

In relation to Work 1, the ledges served as a shelter or sunshade to the units below it and were also part and parcel of the fabric of the building which contributed to its character and appearance. The ledges were therefore common property.

In relation to Works 2 and 3, the flat roof and external wall were part and parcel of the fabric of the building and contributed to its appearance. Its removal could even affect the structural integrity of the building. Further, the MCST had assumed responsibility for the maintenance of the flat roof and wall. Accordingly, they were common property.

COMMENT

By providing much needed clarity and guidance on the interpretation of "common property" under section 2(1) of the BMSMA, the CA's decision substantially reduces the scope for disagreement over what amounts to common property.

Going forward, in ascertaining whether a particular area or installation is common property, SPs and the MCST alike should, as a starting point, consider the demarcations of common property on the strata title plan, and whether the area in question is one which the MCST has assumed a duty to control, manage or maintain.

Further, with the broad interpretation given to the words "used" and "enjoyed" under the 2nd Limb, it may now be harder for parties to dispute that specific parts or areas of a strata title development constitute common property.

The CA's construction of "common property" effectively renders virtually every area not comprised in a subsidiary lot, common property. MCSTs should therefore take note of this decision, in light of its statutory duties in relation to the common property, in particular, the duties under section 29(1) of the BMSMA to control, manage and administer the common property for the

benefit of all SPs, and, to properly maintain and keep the common property (including any fixture and fitting comprised in the common property) in good and serviceable repair.

MCSTs which are uncertain about their obligations in light of the CA's decision should seek legal advice.

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