Management Corporation Strata Title Plan No 2504 v Hyundai Engineering & Construction Co Ltd and Another
[2007] SGHC 63

Case Number : OS 1643/2006

Decision Date : 11 May 2007

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Leo Cheng Suan (Infinitus Law Corporation) for the plaintiff; Vinodh S Coomaraswamy SC and Kenneth Choo (Shook Lin & Bok) for the first defendant; Alagappan s/o Arunasalam (A Alagappan & Co) for the second defendant

Parties : Management Corporation Strata Title Plan No 2504 — Hyundai Engineering & Construction Co Ltd; K.S.M. Engineering Pte Ltd

Land – Strata titles – Common property – Rectification of windows – Whether windows forming common property under pre-amendment Land Titles (Strata) Act – Windows not common property under post-amendment Land Titles (Strata) Act – Whether duty of management corporation to maintain windows – Sections 2(1), 2(9)(a), 29(1) Building Maintenance and Strata Management Act 2004 (No 47 of 2004), ss 3, 48(1)(b) Land Titles (Strata) Act (Cap 158, 1999 Rev Ed)

11 May 2007 Judgment reserved.

Kan Ting Chiu J

1 This matter came before the courts because the parties which have come to a settlement in an existing action, cannot agree on one issue. However, instead of proceeding with the action on the unresolved issue, the action was discontinued, and fresh proceedings were instituted to obtain the court's declaration on the outstanding issue.

2 The matter arose from a condominium development known as the "Thomson 800 Condominium" ("the development"). The original action was Suit No 1203 of 2003 ("the suit") which was filed on 10 December 2003. In the suit, the plaintiff was the management corporation (also referred to as "the MCST") of the condominium formed under the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LT(S)A"). The management corporation is also the plaintiff in the present proceedings. The present defendants are the second and third defendants in the suit where they were sued as the main contractors and the suppliers and installers of the windows of the development.

3 The original action was settled on 1 June 2006 with the execution of a settlement agreement. The unresolved issue related to some windows in the development specifically, and whether the defendants were liable to rectify defects in them. The settlement agreement provided in cll 12.6 and 12.7 that:

> 12.6 For the purpose of this Agreement, all windows of a lot at the external elevations in the Project being either louvers, casement windows, sliding windows or windows with any movable part will not be treated, unless the MCST in proceedings commenced in accordance with and pursuant to paragraphs 12.7 to 12.10 below obtains a Court declaration to establish that such windows, under the law applicable to the MCST's claim in the Suit, are part of the common property or that it is or was the duty of the MCST to maintain the affected windows under that

law ("the Windows Declaration").

12.7 Notwithstanding Clause 10.2 above, the MCST may, within 3 months from the date of this Agreement, commence separate legal proceedings ("the Windows Application") to apply to the High Court of the Republic of Singapore to seek the Windows Declaration, and the parties shall abide by that decision without further appeal to the Court of Appeal.

The reason for clause 12.6

4 The parties could not agree on the rectification of the windows referred to because the inclusion of windows as common property changed between the time the action was instituted and the time it was settled.

5 When the suit was filed (before the amendment of s 3 of the LT(S)A), common property was defined in the LT(S)A to include:

(c) unless otherwise described specifically as comprised in any lot in a strata title plan and shown as capable of being comprised in such lot, includes -

(i) foundations, columns, beams, supports, walls, roofs, lobbies, corridors, stairs, stairways, fire escapes, entrances and exits of the building and *windows installed in the external walls of the building;*

…

[emphasis added]

and s 48(1)(b) of the LT(S)A provides:

(1) A management corporation shall, for the purposes of the subdivided building concerned —

(b) properly maintain and keep it in a state of good and serviceable repair —

(i) the common property; and

(ii) any property vested in the management corporation;

6 Section 48 was repealed by the Building Maintenance and Strata Management Act (No 47 of 2004) ("the BMSMA") which came into force on 1 April 2005. Section 48 of the LT(S)A was replaced by s 29(1) of the BMSMA which spelt out the duties of the management corporation in respect to common property:

(1) Except as otherwise provided in subsection (3), it shall be the duty of a management corporation —

(a) to control, manage and administer the common property for the benefit of all the subsidiary proprietors constituting the management corporation;

(b) to properly maintain and keep in a state of good and serviceable repair (including, where reasonably necessary, renew or replace the whole or part thereof) —

(i) the common property;

(ii) any fixture or fitting (including any pipe, pole, wire, cable or duct) comprised in the common property or within any wall, floor or ceiling the centre of which forms a boundary of a lot, not being a fixture or fitting (including any pipe, pole, wire, cable or duct) that is used for the servicing or enjoyment of any lot exclusively;

(iii) any fixture or fitting (including any pipe, pole, wire, cable or duct) which is comprised within a lot and which is intended to be used for the servicing or enjoyment of the common property;

(iv) each door, window and other permanent cover over openings in walls where a side of the door, window or cover is part of the common property; and

(v) any movable property vested in the management corporation;

7 The BMSMA also amended some provisions in the LT(S)A. The most significant amendment affecting the suit was the deletion of the definition of common property, and its replacement by a new definition:

"common property", subject to subsection (2), means —

(a) in relation to any land and building comprised or to be comprised in a strata title plan, such part of the land and building —

(i) *not comprised in any lot* or proposed lot in that strata title plan; and

(ii) used or capable of being used or enjoyed by occupiers of 2 or more lots or proposed lots;

[emphasis added]

8 Section 2(1) of the BMSMA uses the same words in the definition of common property, and goes further to state in s 2(9)(a):

(a) all windows of a lot, proposed lot or non-strata lot that are located on any exterior wall of the lot, proposed lot or (as the case may be) non-strata lot, being either *louvres, casement windows, sliding windows or windows with any movable part*, shall be part of the lot, proposed lot or (as the case may be) non-strata lot and not common property;

[emphasis added]

9 It is to be noted that cl 12.6 of the settlement agreement repeats the words in italics. I will adopt counsel's description of these windows as "the affected windows".

10 The affected windows, being defined in cl 12.6 as "windows of a lot" do not come under the definition of common property under the LT(S)A after 1 April 2005 which excludes any part of a building comprised in any lot.

The relevant questions

11 The issue before me can be dealt with by examining the following questions:

(i) Are the affected windows common property under the pre-amendment LT(S)A?

(ii) What is "the law applicable to the MCST's claim in the Suit"?

(iii) Is it established that it "is or was the duty of the MCST to maintain the affected windows"?

(i) Are the affected windows common property under the pre-amendment LT(S)A?

12 The plaintiff submitted that the affected windows which are by definition "windows at the external elevations in the Project" must be "windows installed in the external walls of the building" under the definition of common property. In the absence of any factors to the contrary, that is a manifestly sound argument.

13 Counsel for the defendants took a different position, and contended that:

> There is authority to suggest that windows of the kind that do not open form part of the structure of the wall of a building. Such windows therefore clearly [do not] form part of the common property.[note: 1]

citing *Boswell v Crucible Steel Company* [1924] 1 KB 119 ("*Boswell*"), and *Holiday Fellowship Ltd v Hereford* [1959] 1 WLR 211("*Holiday Fellowship*").

14 In *Boswell*, the English Court of Appeal held that fixed plate-glass windows along the whole side of a shop on the ground floor was part of the "skin" of the building, which is to be considered as a part of the walls. In *Holiday Fellowship*, another decision of the English Court of Appeal, the court referred to *Boswell*, but ruled that bay windows are not to be regarded as parts of walls.

15 These cases are not relevant to the determination of the issue before us because they have nothing to do with common property. Insofar as *Boswell* held that a window can be taken to be a part of a wall, it is particularly unhelpful to the defendants. If the affected windows which are built into exterior walls are part of the walls, they are common property under the pre-amendment LT(S)A which included external walls in the definition of common property.

16 Counsel for the defendants also relied on by-law 12 of the First Schedule to the pre-amendment LT(S)A, which provides that:

> A subsidiary proprietor or occupier shall not make any alteration to the windows installed in the external walls of the subdivided building without having obtained the approval in writing of the management corporation.

and argued:

> If the Affected Windows were indeed common property, a subsidiary proprietor would not be entitled to make alterations to the windows even with the MCST's permission.[note: 2]

17 The counter-argument is that it is because the windows are common property that the approval of the management corporation is required. The effect of this by-law on the issue is thus at best equivocal and inconclusive.

18 Further to that, the defendants also referred to a judicial declaration made on 15 September 2003 in OS No 768 of 2003, *In the Matter of The Management Corporation of Strata Title Plan No 2054*,

where Lai Siu Chiu J declared that:

> [T]he external windows of each strata unit, as defined in section 3 of the Land Title (Strata) Act (Cap. 168, 1999 Ed), [*sic*] comprised in Strata Title Plan No. 2054 and located in the development known as Parc Oasis Condominium ("the External Windows") do not fall within the true construction of the statutory definition of "common property" set out in section 3 of the Land Titles (Strata) Act (Cap 168, 1999 Ed) [*sic*] and generally for the purposes of the said Act; …

19 It is unfortunate that the application of the declaration to the present proceedings is limited because the declaration was made in ex-parte proceedings without full arguments, and Lai J did not issue any grounds of decision, and therefore we do not know the basis for the decision.

20 The answer is that the affected windows are common property under the pre-amendment LT(S)A.

(ii) What is "the law applicable to the MCST's claim in the Suit"?

21 The applicable law would be the law which deals with common property and the duties of management corporations. These matters are dealt with by the LT(S)A (in the pre and post amendment forms) and the BMSMA.

22 The answer need not be in the singular; more than one set of law can apply to the suit. When the action was filed on 10 December 2003, the law applicable was the pre-amendment LT(S)A, but with effect from 1 April 2005, when the amended LT(S)A and the BMSMA came into operation, the plaintiff ceased to be responsible for the maintenance of the affected windows.

23 There is room for argument whether and how the amendments apply to ongoing actions, but this is not an issue in these proceedings because of the "is or was the duty of the MCST" terminology in cl 12.6. The plaintiff's claims against the defendants in the suit arose from the failure to properly construct and maintain the development and the failure to ensure that the windows and window frames supplied and installed are of proper quality ("the failures"). As the failures were alleged to have taken place before the suit was filed, the law applicable on the date of filing must apply and this will be the pre-amendment LT(S)A, but the suit cannot be decided without reference to the amendments of 1 April 2005.

24 The law applicable is the law in force between 10 December 2003 and 1 April 2005, as well as the law in force with effect from 1 April 2005.

(iii) Is it established that it "is or was the duty of the MCST to maintain" the affected windows?

25 The management corporation's duty to maintain the affected windows ceased on 1 April 2005. It may be argued that the management corporation may not have the power to sue for the failures after 1 April 2005, but its standing to sue for the failures for the period before 1 April 2005 cannot be doubted.

26 It may also be argued that from 1 April 2005, the management corporation lost its right to sue as the affected windows ceased to be common property, and the right to sue is transferred to the individual subsidiary proprietors of the affected windows, but this is by no means an irresistible conclusion. If the management corporation had incurred expenditure in remedying defects in the affected windows when these windows were common property, it must be entitled to recover those expenses from the defendants, even after the windows ceased to be common property. For the same

reason, if the management corporation had failed in its duty to maintain the affected windows before 1 April 2005, it would be answerable to the subsidiary proprietors. That duty cannot in any circumstances be said to have been transferred to the subsidiary proprietors.

27 It follows from the foregoing that it *was* the duty of the plaintiff to maintain those windows, though that duty ended on 1 April 2005.

Conclusion

28 My conclusion is that the plaintiff is entitled to the declaration referred to in cl 12.6.

29 For reasons that are undisclosed and not apparent, the plaintiff applied in the present proceedings for two declarations:

> (a) A declaration that under the then Land Titles (Strata) Act, applicable as at 10th December 2003, all windows of a lot at the external elevations in the condominium development known as Thomson 800, being either louves [*sic*], casement windows, sliding windows or windows with any movable part are part of the common property or are liable to be maintained by the Plaintiffs,
>
> (b) A declaration that pursuant to the Settlement Agreement dated 1st June 2006 between the Plaintiffs, the Defendants and others, the 1st and/or 2nd Defendants are to rectify the defects to the external windows as specified in the said Settlement Agreement.

30 There is no real purpose or advantage for departing from the clear words of cl 12.6, so I declare that:

> (i) the affected windows *are not* part of the common property,
>
> (ii) it *is not* the duty of the plaintiff to maintain the affected windows, but
>
> (iii) it *was* (until 1 April 2005) the duty of the plaintiff to maintain those windows.

For the avoidance of doubt, I confirm that the declaration is the Windows Declaration under cl 12.6.

31 Finally I order that the plaintiff is to have the costs of these proceedings.

[note: 1] 1st Defendant's Written Submissions para 5.3.2

[note: 2] 1st Defendant's Written Submissions para 5.3.10