Yap Sing Lee *v* Management Corporation Strata Title Plan No 1267 [2011] SGHC 24

Case Number : Originating Summons No 672 of 2010

Decision Date : 28 January 2011

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : The applicant in person; Kenneth Tan SC (Kenneth Tan Partnership) for the respondent.

Parties : Yap Sing Lee — Management Corporation Strata Title Plan No 1267

Land

28 January 2011

Belinda Ang Saw Ean J:

Introduction

1 This was an appeal by the applicant, Mr Yap Sing Lee, under s 98 of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) ("BMSMA") against certain orders made by the Strata Titles Board ("STB") on 10 June 2010 in STB No 69 of 2009, which concerned Mr Yap's attempts to compel the respondent, the Management Corporation Strata Title Plan ("MSCT") No 1267 of the development known as "Yong An Park" ("the respondent"), to disclose certain information and documents to him under s 47 of the BMSMA.

2 On 19 October 2010, after hearing the parties, I dismissed Mr Yap's appeal. Mr Yap has now appealed against my judgment, and I therefore provide the grounds of my decision. I should add that, during the hearing, Mr Yap informed me that, although he was representing himself, he had in fact sought and received legal assistance in the preparation of the appeal before me.

Facts

3 Mr Yap was the subsidiary proprietor ("SP") of a penthouse unit in Yong An Park, and, as the STB noted in [4] of its grounds of decision ("GD"), has had "a number of differences" with the respondent, including the latter's refusal or omission to approve Mr Yap's proposal to carry out alterations and additions to the roof terrace of his penthouse, as well as over certain other alterations made by Mr Yap. In [37] of his written submissions, Mr Yap seemed to disagree with the STB's assessment of his relationship with the respondent, but as Mr Yap himself had, at [8] of his written submissions, chronicled a long list of conflicts between him and the respondent, it was not clear to me that the STB's assessment was objectionable in any significant way.

4 Two other SPs of Yong An Park, one Ponda and one Karim, had also carried out similar alterations and additions to their penthouse units, and the respondent had in fact commenced legal proceedings against Ponda on 10 August 2006, although these proceedings were subsequently discontinued.

5 Arising out of these differences, Mr Yap made a number of applications under s 47 of the

BMSMA to inspect a wide range of documents, including minutes of the meetings of the Council and Legal Sub-Committee of the respondent, and correspondence between the respondent and its lawyers. Section 47, so far as relevant, provides:

Supply of information, etc., by management corporations

47. –(1) A management corporation shall, upon application made to it in writing in respect of a lot which is the subject of the subdivided building concerned by a subsidiary management corporation, or by a subsidiary proprietor or mortgagee or prospective purchaser or mortgagee of that lot or by a person authorised in writing by such a subsidiary proprietor or mortgagee and on payment of the prescribed fee, do any one or more of the following things as are required of it in the application:

(a) inform the applicant of the name and address of the chairperson, secretary and treasurer of the management corporation and of any person who has been appointed under section 66 as managing agent;

(b) make available for inspection by the applicant or his agent —

(i) the strata roll;

(ii) the notices and orders referred to in section 29(1)(*g*);

(iii) the plans, specifications, certificates, drawings and other documents delivered under section 26(4);

(iv) the minutes of general meetings of the management corporation and of the council;

(v) the books of account of the management corporation;

(vi) a copy of the statement of accounts of the management corporation last prepared by the management corporation in accordance with section 38(10); and

(vii) any other record or document in the custody or under the control of the management corporation,

at such time and place as may be agreed upon by the applicant or his agent and the management corporation and, failing agreement, at the subdivided building at a time and on a date fixed by the management corporation under subsection (2);

…

(2) Where an applicant and a management corporation fail to reach an agreement referred to in subsection (1)(*b*) within 7 days after the receipt of the application by the management corporation, the management corporation shall immediately send by post to the applicant a notice fixing a time, specified in the notice, between 9 a.m. and 6 p.m. on a date so specified, being a date not later than 21 days after the receipt of the application by the management corporation for the making of the inspection referred to in that subsection.

…

6 As these documents were not forthcoming, Mr Yap eventually filed STB No 69 of 2009 before the STB, seeking, *inter alia*, an order that the respondent supply the information or documents sought by him, under s 113 read with s 101 of the BMSMA.

7 At the hearing before the STB, in the course of the cross-examination of Mr Yap on the first day of the hearing, it transpired that the respondent was willing to allow Mr Yap to inspect all the documents requested, save for a few documents in respect of which legal professional privilege ("LPP") was being claimed. Consequently, Mr Yap and the respondent were able to agree that the STB needed only to determine whether to order the inspection of the remaining four items for which LPP was being claimed, namely:

(a) The redacted portion of the Council minutes of the 4th Council Meeting held on 15 September 2009 ("item (a)");

(b) The redacted portion of the Council minutes of the 5th Council Meeting held on 27 October 2009 ("item (b)");

(c) The redacted portion of the recommendations of the Legal Sub-Committee referred to in the draft Council minutes of the 3rd Council Meeting held on 21 July 2009 ("item (c)"); and

(d) The legal advice given to the respondent by its lawyers on the respondent's claims or potential claims against Ponda, Karim and Mr Yap ("item (d)").

8 The hearing was then adjourned to enable Mr Yap and the respondent to submit their written arguments and address the STB on their submissions. According to [8] of the STB's GD, although Mr Yap, in his reply submissions, claimed that he never withdrew any of the original orders sought by him, he conceded during his oral submissions that he had agreed that the STB need only determine the four remaining items above, and the resumed hearing proceeded on that basis.

9 The arguments before the STB therefore centred on whether a MCST was entitled to assert LPP against a SP, and, after considering the parties' submissions, the STB gave an affirmative answer. Consequently, it determined that items (a) and (d) at [7] above were covered by LPP and could not be disclosed to Mr Yap. In respect of item (b), however, the STB held that the respondent was not entitled to claim LPP as item (b) merely reported information and recorded instructions to the managing agent of Yong An Park, and therefore had to be disclosed to Mr Yap. For the same reasons, the STB held that substantially the whole of item (c) was also not privileged from disclosure, save for the eight words after "not to further pursue the legal suit with Mr Ponda", which were subject to LPP. The STB also ordered that parties were to bear their own costs.

Issues

10 Mr Yap appealed the STB's decision (insofar as it related to items (a) and (d), as well as the eight redacted words in item (c)), contending that it should be set aside for various reasons (which also formed the issues for my determination), *viz*:

(a) The STB erred in law in holding that a MCST is entitled to assert LPP against a SP;

(b) The STB erred in law by breaching the rules of natural justice; and

(c) The STB erred in law in ordering parties to bear their own costs.

The nature of an appeal from the STB to the High Court

11 The right of appeal against an order of the STB to the High Court is provided for in s 98 of the BMSMA:

> **Appeal to High Court on question of law**
>
> **98**. –(1) No appeal shall lie to the High Court against an order made by a Board under this Part or the Land Titles (Strata) Act (Cap. 158) except on a point of law.
>
> …

The Court of Appeal in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener)* [2009] 3 SLR(R) 109 ("*Horizon Towers*") had occasion to construe the phrase "point of law", and concluded (at [101]) that it covered "*ex facie* errors of law", a shorthand phrase that included (as set out in *Halsbury's Laws of England* vol 1(1) (Butterworths, 4th Ed Reissue, 1989) ("*Halsbury's*") at para 70, a passage that was approved by the Court of Appeal in [90] of *Horizon Towers*):

> … misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof.

In addition to this, the Court of Appeal approved (at [100]) various High Court decisions that held that a "point of law" also included Lord Radcliffe's famous remark in *Edwards (Inspector of Taxes) v Bairstow and another* [1956] 1 AC 14 ("*Edwards v Bairstow*") that (at 36):

> … without any such misconception [of the relevant law] appearing ex facie [in the decision being appealed from], it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal.

In other words, an error on a point of law (giving rise to a right of appeal under s 98 of the BMSMA) might also occur where the facts as found could not possibly justify the legal conclusion reached, and where the only inference had to be that "there has been some misconception of the law and that, this has been responsible for the determination" (*Edwards v Bairstow* at 36).

Legal professional privilege

12 Mr Yap's first ground of appeal, that a MCST was not entitled to assert LPP against a SP, was undoubtedly an appeal "on a point of law" within the meaning of s 98 of the BMSMA, and was the key issue in this case.

13 Although the STB had held that a MCST could assert LPP against a SP's request for information under s 47 of the BMSMA, it became apparent during the hearing before me that the true dispute was on a narrower point, *viz*, whether a MCST could assert *legal advice privilege* against a SP under s 47. Consequently, I did not consider it necessary to decide whether *litigation privilege* could be asserted

by a MCST against a SP under s 47.

The applicability of legal advice privilege

14 LPP was exhaustively analysed by the Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 ("*Skandinaviska*"), where the Court of Appeal stated (at [27]) that LPP was a statutory right enacted in ss 128 and 131 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"), and that these two sections covered both species of LPP, *viz*, legal advice privilege and litigation privilege. However, the EA was not applicable in the present case, as s 2(1) of the EA provides that "Parts I, II and III shall apply to all judicial proceedings in or before any court…" (see also J Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010), para 14.115, at footnote 311). Although it was possible to interpret s 2(1) in a non-exclusive fashion, *ie*, that Part III of the EA (where ss 128 and 131 are located) could be applied in non-judicial proceedings as well as judicial proceedings (albeit that its application was mandatory in the latter), s 128 of the EA was nonetheless inapplicable since there was no question of *an advocate or solicitor* being compelled to disclose privileged information, and s 131 of the EA was also inapplicable since it contemplated a person being compelled to disclose confidential communication between him and his legal professional adviser *to the court*, which was not the case here, where Mr Yap's argument was that the MCST was compelled by s 47 of the BMSMA to produce privileged documents *to him*.

15 Consequently, the provisions of the EA were inapplicable, and recourse had to be had to the common law rules regarding legal advice privilege. At common law, legal advice privilege, as part of LPP, is not (or more accurately, no longer (see C Tapper, *Cross & Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) ("*Cross & Tapper*") at pp 436 to 437)) regarded as merely a rule of evidence, restricted to judicial or quasi-judicial proceedings, but is now considered a substantive legal right that may be claimed outside these areas (see *Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 17th Ed, 2010) ("*Phipson*") at paras 23-02 to 23-06). Given that some of the landmark cases espousing the latter view (*eg*, *Regina v Derby Magistrates' Court, ex parte B* [1996] 1 AC 487 and *Baker v Campbell* (1983) 153 CLR 52) received the express approval of the Court of Appeal in *Skandinaviska* (at [24] and [25]), it followed that legal advice privilege was applicable, notwithstanding that no judicial or quasi-judicial proceedings were in issue when Mr Yap sought production of the relevant documents under s 47 of the BMSMA.

Mr Yap's arguments

16 Mr Yap advanced a number of arguments in support of his submission on the issue of whether a MCST could assert legal advice privilege against a SP, *viz*:

(a) The decision of the Court of Appeal in *Horizon Towers* (at [199]), that a collective sale committee ("SC") constituted under s 84A(1A) of the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) ("LTSA") could not assert legal advice privilege against a SP, was directly applicable;

(b) The decision of the STB in *Re The Estoril (Strata Titles Plan No 843)* [1991] SGSTB 3 ("*The Estoril*") correctly established that a MCST could not resist a SP's application for the supply of information under s 47 of the BMSMA by claiming legal advice privilege; and

(c) It was a necessary implication from a purposive interpretation of the BMSMA that the right of a SP to obtain information from a MCST under s 47 of the BMSMA overrode legal advice

privilege.

17 Mr Yap also relied on the slightly different argument that the STB had erred in giving a decision in favour of the respondent despite the respondent's failure to reveal to the STB the legal advice in respect of which legal advice privilege was being claimed.

18 I did not accept these arguments.

Horizon Towers

19 The first question to be addressed was whether the respondent could avail itself of legal advice privilege at all. It was only if the respondent could, *prima facie* at least, claim legal advice privilege that one then had to consider the second question of whether s 47 of the BMSMA excluded legal advice privilege.

20 Mr Yap relied on *Horizon Towers* in submitting that a MCST could not, as against its SPs, claim legal advice privilege.

2 1 *Horizon Towers* concerned a bitter dispute between minority and majority SPs regarding the proposed collective sale of the development known as "Horizon Towers", which had been sanctioned by the STB ("the Horizon Board"), but was eventually set aside by the Court of Appeal as a result of the SC's breaches of fiduciary duty as well as the errors of law committed by the Horizon Board in the course of approving the collective sale.

22 In the proceedings before the Horizon Board, the minority objecting SPs of Horizon Towers had attempted to apply for the legal advice given by the SC's solicitors to be disclosed, but this was rejected by the Horizon Board on the basis that the SC was entitled to claim legal advice privilege in respect of the advice. The Court of Appeal criticised this decision, stating (at [199]):

> *As for the granting of legal privilege, although [the SC's solicitors] purported to act only for the SC as their principals, the SC had to represent the subsidiary proprietors collectively. The SC was, after all, an agent for all the subsidiary proprietors, and its solicitors were therefore sub-agents for all the subsidiary proprietors. The objecting subsidiary proprietors were entitled to know the contents of the legal advice and, indeed, the SC was in breach of its duty of even-handedness by claiming legal privilege in order to deny the objecting subsidiary proprietors information which they were entitled to receive. The SC was not, in the prevailing circumstances, entitled to rely on legal privilege to justify its decision and at the same time refuse to disclose the advice*. [emphasis in original]

23 The crux of this reasoning was that the SC was "an agent for all the subsidiary proprietors", which was a theme developed by the Court of Appeal in [104] and [105] of *Horizon Towers*:

> 104 In our view, the SC is the agent of the subsidiary proprietors collectively in relation to the collective sale of their strata units. At the point when an SC is appointed to carry out the collective sale (*inter alia*, obtaining consent to the collective sale agreement; advertising, negotiating and finalising the terms of the collective sale with potential purchasers; and completing the sale), there is no question of it being appointed to represent the consenting subsidiary proprietors only, since at that point the process of signing up to the collective sale agreement has not yet begun. The SC therefore carries out the collective sale process on behalf of all the subsidiary proprietors collectively and has the power to affect the legal relations of all the subsidiary proprietors with third parties. The common law requirement of express or implied

assent by the principal… is not relevant in the context of a statutory scheme, the very purpose of which is to allow the sale of the strata development against the wishes of the objecting subsidiary proprietors.

105 Section [84A(1A)] of the LTSA constitutes statutory confirmation of an SC's status as agent for all subsidiary proprietors collectively, although we are mindful that s 84A(1A) as well as the present incarnations of the Second and Third Schedules to the LTSA were introduced only in 2007 as part of the amendments to the LTSA ("the 2007 amendments"). This was after the appointment of the original SC in the present appeals, and thus these provisions do not apply directly to the original SC. Section 84A(1A) provides:

> For the purposes of a collective sale under this section and before the signing of the collective sale agreement by any subsidiary proprietor –
>
> (*a*) there shall be constituted a collective sale committee *to act jointly on behalf of the subsidiary proprietors* of the lots whose members shall be elected by the subsidiary proprietors of the lots at a general meeting of the management corporation convened in accordance with the Second Schedule;
>
> (*b*) the Third Schedule shall have effect as respects the collective sale committee, its composition, constitution, members and proceedings.

…

[emphasis in original]

24 As agent for the SPs, the SC in *Horizon Towers* was therefore not entitled to assert legal advice privilege against its principal(s) (see [22] above), since, in an agency relationship, the "privilege is the privilege of the principal" (*Phipson* at para 23-40).

25 Mr Yap contended that, on analogy with the agency relationship between a SC and all the SPs of a strata development articulated in *Horizon Towers*, a MCST was similarly the agent of all the SPs, and that this was reinforced by s 29(1)(*a*) of the BMSMA, which provides that it shall be the duty of a MCST "to control, manage and administer the common property *for the benefit of all the subsidiary proprietors* constituting the management corporation" [emphasis added], and by ss 34 and 35 of the BMSMA, which provide that a MCST may, subject to the relevant regulatory approvals and pursuant to special, 90% or unanimous resolutions, do certain things (such as execute transfers of common property, leases or accept transfers of land) "*on behalf of its subsidiary proprietors*" [emphasis added].

26 As a matter of principle, I considered that there was no reason why a MCST could not claim legal advice privilege. Section 24(1) of the BMSMA provides:

> **Constitution of management corporation**
>
> **24**. –(1) The management corporation constituted by virtue of the Land Titles (Strata) Act (Cap. 158) in respect of a strata title plan shall —
>
> (a) comprise the subsidiary proprietors from time to time of all lots comprised in that strata title plan;

(b) *be a body corporate capable of suing and being sued and having perpetual succession and a common seal*…

[emphasis added]

Section 24(1)(*b*) of the BMSMA therefore made it abundantly clear that a MCST, like an incorporated company, was to be regarded as a separate legal entity from the corporators (in this case, SPs rather than shareholders) who comprised it. In his oral submissions, Mr Yap contended that the analogy between a MCST and an incorporated company was misconceived, because, *inter alia*, unlike a limited liability company, the SPs were made personally liable for debts lawfully incurred by the MCST under s 44(1) of the BMSMA. This contention was met by the high authority of *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418, where the Court of Appeal described (at [9]) a MCST as an unlimited liability company (see also K S Teo, *Strata Title in Singapore & Malaysia* (LexisNexis, 3rd Ed, 2009) at p 199). Being an unlimited liability company, it followed that a MCST was entitled to the rights afforded by the law to a legal person, which rights included legal advice privilege.

27 Consequently, as a matter of authority, Mr Yap's reliance on *Horizon Towers* was inapt. Unlike a MCST, a SC had no independent legal existence under the LTSA: in a sense, the SC's only legal quality was to "act jointly on behalf of" the SPs as their agent, as required by s 84A(1A)(*a*) of the LTSA, and it was therefore no surprise that the Court of Appeal in *Horizon Towers* held that a SC could not assert legal advice privilege as against the SPs, since any such privilege could *only* belong to the SPs, for only they had the capacity as legal persons to claim it. An SC would not therefore have been able to claim legal advice privilege in its own right; any such privilege being claimed by it would be claimed as agent for and on behalf of the SPs.

28 That was not to say, however, that a MCST could never be considered the agent of the SPs: the MCST and the SPs could enter a consensual agency relationship, and the BMSMA clearly envisions that a MCST may sometimes act as agent for its SPs (*eg*, under s 86 of the BMSMA). However, simply because a MCST might for some purposes have been regarded as an agent for the SPs did not mean that it was an agent for them for all purposes. After all, it has been the law ever since *Aron Salomon (a pauper) v A Salomon and Company, Limited* [1897] 1 AC 22 that a company is not *ipso facto* an agent for its members, and I saw no reason why, in the absence of statutory language demanding a different conclusion, the same principle should not apply to the relationship between a MCST and its SPs, given that the MCST was to be considered an unlimited liability company.

29 I was not persuaded by Mr Yap's argument that ss 29, 34 and 35 of the BMSMA (see [25] above) indicated that a MCST was to be *generally* regarded as the agent of its SPs. Although there was some superficial similarity between these provisions and s 84A(1A)(*a*) of the LTSA (which the Court of Appeal relied upon in *Horizon Towers* as statutory confirmation of the agency relationship between a SC and the SPs of a strata development (see [23] above)) in terms of the language used (especially the use of the phrase "on behalf of" in ss 34 and 35 of the BMSMA), in my view, these provisions either did not establish an agency relationship at all, or only did so in *specific contexts*, and could not be extrapolated so as to deem a MCST the agent of its SPs for all purposes. For instance, s 32(3) of the BMSMA enabled a MCST to make by-laws for the purpose of controlling and managing the use or enjoyment of the common property, and s 32(10) enabled the MCST to apply to court to enforce those by-laws. It could not seriously be argued that, in enforcing by-laws against an errant SP, a MCST was acting as agent for all the SPs, *including* the errant SP, simply because s 29(1)(*a*) of the BMSMA provided that it was the duty of a MCST "to control, manage and administer the common property *for the benefit of all the subsidiary proprietors* constituting the management corporation"

[emphasis added]. In fact, even if it were argued that, in such circumstances, the MCST was acting as agent for all the SPs *excluding* the errant SP, that would lead to the unpalatable result that the non-errant SPs could, relying on *Horizon Towers*, gain access to the MCST's legal advice.

30 Consequently, the respondent, in my judgment, would ordinarily have been entitled as a separate legal person to claim legal advice privilege, even as against a SP.

The Estoril

31 Before the STB and in his written submissions on appeal, Mr Yap also relied on the authority of *The Estoril*. Although I was not bound by it, I did not agree with the reasoning employed in that case, and in my opinion it was inconsistent with other more persuasive authorities.

32 In *The Estoril*, the facts were similar to the present case. The applicant was a SP and a Council member of the development known as "The Estoril", and matters pertaining to his unit were discussed at a Council Meeting of the MCST of The Estoril. The applicant was present at this meeting but was excluded during the discussions of his unit. Subsequently, he requested for a copy of the minutes of the meeting, but received only a redacted copy. Dissatisfied, the applicant applied for inspection of the unredacted minutes pursuant to s 54 of the Land Titles (Strata) Act (Cap 158) (1988 Rev Ed) ("the 1988 Act") (which was largely *in pari materia* with s 47 of the BMSMA (see [5] above)), which he followed up with an application to the STB ("the Estoril Board") for an order under s 106 of the 1988 Act (which was *in pari materia* with *s* 113 of the BMSMA) that the MCST of The Estoril supply him the unredacted minutes.

33 The MCST of The Estoril resisted the application on the ground that the minutes were privileged from production as they contained "matters of strategy" and "matters of evidence" that pertained to the litigation between the parties pending in the Subordinate Courts. In other words, the MCST of The Estoril was asserting both legal advice privilege and litigation privilege against the applicant, although that did not appear to affect the reasoning of the Estoril Board, which decided against the MCST of The Estoril as follows:

> We are of the view that the Minutes are not privileged from production for two main reasons. In the first place the Applicant is a subsidiary proprietor who is entitled to the Minutes as of right under S. 54 of the [1988 Act]. Section 54 of the [1988 Act] is clear and unambiguous and does not lay down any exceptions or restrictions to that right. In the second place an examination of the copy of the Minutes (with certain items blanked out) produced before the Board… show that a wide range of topics [was] discussed at the meeting in question including matters relating to the [applicant's unit]. The failure of the Respondents [the MCST of The Estoril] to have not acted with more circumspect [*sic*] in taking legal advice as claimed at a Council Meeting and then recording what the Respondents claim to be such advice in the Minutes should not be a ground for shutting out the Applicant or denying him a complete copy of the [Minutes]. The Respondents have themselves to blame for the predicament in which they find themselves when they knew or ought to have known full well that the Minutes will have to be produced to the Applicant both in his capacity as a Council member and as subsidiary proprietor. [Had] the Council sought legal advice on the proper recording of the minutes in the light of S. 54 of the [1988 Act] the impasse that had arisen in this case could have been avoided. Finally even if we are wrong in the interpretation of Section 54 of the [1988 Act] we are of the view that the Respondents have clearly waived the privilege by disclosing the Minutes (with certain portions blanked out) to the Applicant.
>
> This is clear from the principles enunciated in [*Great Atlantic Insurance Co v Home Insurance Co*

and others [1981] 1 WLR 529.] In that case [Templeman LJ] summarised the law as follows:-

> "In my judgment the simplest, safest and most straightforward rule is that if a document is privileged then privilege must be asserted, if at all, to the whole document unless that document deals with separate subject matters so that the document can in effect be divided into two separate and distinct documents each of which is complete ….. the rule that privilege relating to a document which deals with one subject matter cannot be waived as to part and asserted as to the remainder is based on the possibility that any use of part of a document may be unfair or misleading, that the party who possesses the document is clearly not the person who can decide whether a partial disclosure is misleading or not, nor can the judge ; [*sic*] decide without hearing argument nor can he hear argument unless the document is disclosed as a whole to the other side. Once disclosure has taken place by introducing part of the document into evidence or using it in Court it cannot be erased."

We are of the view that to furnish only part of the Minutes to the Applicant would be unfair or misleading. We are not here dealing with a document that is capable of severance into two separate and distinct documents each of which is complete and can exist on its own. We are here dealing with Minutes of a council meeting which is not capable of severance into two documents least of all exist as two separate and distinct documents.

3 4 *The Estoril*, therefore, appeared to be authority for the proposition that a MCST could not assert legal advice privilege against a SP under s 54 of the 1988 Act (or s 47 of the BMSMA).

35 However, insofar as the Estoril Board's reasoning based on a construction of s 54 of the 1988 Act (or s 47 of the BMSMA) was concerned, I did not agree with it for the reasons explained at [39] – [50] below.

36 For the same reasons, neither did I agree with the Estoril Board's view that the MCST of The Estoril should have acted with more circumspection, presumably by not recording legal advice in the minutes of the Council meeting, when it ought to have known that the minutes would have to be produced to the applicant under s 54 of the 1988 Act. This already assumed that s 54 of the 1988 Act did indeed override legal advice privilege; if it did not, then it would have been entirely reasonable for the MCST of The Estoril to record legal advice in the minutes, safe in the knowledge that such advice could not thereafter be disclosed under s 54 of the 1988 Act.

37 As for the Estoril Board's reliance on *Great Atlantic Insurance Co v Home Insurance Co and others* [1981] 1 WLR 529 ("*Great Atlantic*"), the Estoril Board appeared to have overlooked the fact that in *Great Atlantic*, the entire document was privileged, and it was in that context that the English Court of Appeal held that, unless the document could be severed into two distinct and separate documents, a party could not be permitted to "cherrypick" by disclosing the parts of the document that were favourable, yet retain privilege for those which were unfavourable (see generally *Phipson* at paras 26-09 to 26-10). However, where only *part* of a document was privileged, *eg*, mere references to legal advice in otherwise unprivileged documents, it was perfectly permissible to disclose only the unprivileged portion by redacting the privileged portion (*Skandinaviska* at [99] and [100], citing C Hollander, *Documentary Evidence* (Sweet & Maxwell, 9th Ed, 2006) at paras 12-07 and 12-09, and *Consolidated Contractors International Company SAL and another v Munib Masri* [2011] EWCA Civ 21 at [51]).

38 It followed, therefore, that the respondent did not lose the protection of legal advice privilege simply because it had furnished Mr Yap with redacted versions of the documents he had sought.

The BMSMA

39 In *B and others v Auckland District Law Society and another* [2003] 2 AC 736 ("*Auckland District Law Society*"), Lord Millett described (at [67]) LPP as "a right to resist the compulsory disclosure of information", a description which I considered was equally applicable to legal advice privilege. Section 47 of the BMSMA was clearly a provision directed at the compulsory disclosure of information, for it provided that:

> **Supply of information, etc., by management corporations**
>
> **47**. –(1) A management corporation *shall*, upon application made to it in writing in respect of a lot which is the subject of the subdivided building concerned by a subsidiary management corporation, or by a subsidiary proprietor or mortgagee or prospective purchaser or mortgagee of that lot or by a person authorised in writing by such a subsidiary proprietor or mortgagee and on payment of the prescribed fee, *do any one or more of the following things as are required of it* in the application:
>
> …
>
> [emphasis added]

40 Given my views that the respondent would ordinarily have been entitled to claim legal advice privilege, and that it had not lost its entitlement to such privilege simply by disclosing the non-privileged portions of the relevant documents, the remaining question, therefore, was whether s 47 of the BMSMA, on its true construction, excluded or abrogated legal advice privilege.

41 Commonwealth authorities have generally concluded that it must be extremely clear from the statutory language and intent before legal advice privilege is to be regarded as having been excluded or overridden. In the UK, a statute will not be read as excluding or overriding legal advice privilege unless such an intention was expressly stated or appeared by necessary implication (*Regina (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax and another* [2003] 1 AC 563 ("*Morgan Grenfell*") at [8] (*per* Lord Hoffmann) and [44] (*per* Lord Hobhouse); *McE v Prison Service of Northern Ireland and another (Northern Ireland Human Rights Commission and others intervening)* [2009] 1 AC 908 at [39] and [40] (*per* Lord Phillips) and [97] (*per* Lord Carswell)). The same approach is adopted in Australia (*The Daniels Corporation International Pty Ltd & Anor v Australian Competition and Consumer Commission* (2002) 213 CLR 543 ("*Daniels*") at [11] (*per* Gleeson CJ, Gaudron, Gummow and Hayne JJ), [88] (*per* Kirby J) and [132] (*per* Callinan J)) and New Zealand (*Auckland District Law Society* at [57] to [59]). In Canada, the test appears to be even stricter, in that legal advice privilege cannot be abrogated by inference, and the statutory intention to abrogate legal advice privilege must be "clearly or unequivocally" expressed (*Colleen Pritchard v Ontario Human Rights Commission (Attorney General of Canada, Attorney General of Ontario, Canadian Human Rights Commission and Manitoba Human Rights Commission (Interveners))* [2004] 1 SCR 809 at [33] and [35]).

42 The strictness of these tests stems from the view that legal advice privilege, as part of LPP, is a "fundamental human right" (*Morgan Grenfell* at [7] (*per* Lord Hoffmann) and *Daniels* at [86] (*per* Kirby J)), or, in less exalted terms, a "basic tenet of the common law" (*Morgan Grenfell* at [44] (*per* Lord Hobhouse)), and therefore required a clear expression of Parliamentary intention to be overridden. Indeed, so stringent are these tests that commentators have noted that, given the rarity of statutes which expressly abrogate legal advice privilege, implied abrogation will be difficult to

establish (see *Phipson* at para 23-35, *Cross & Tapper* at p 462 and S McNicol, *Law of Privilege* (The Law Book Company Limited, 1992) at pp 113 to 135).

43 In Singapore, both the rationale for and strictness of the English approach have been decisively endorsed by the Court of Appeal. In *Skandinaviska*, the Court of Appeal cited [7] of *Morgan Grenfell* with approval (at [24]), and commented (at [23]) that legal advice privilege "has been firmly entrenched as part of the common law system of justice for centuries". In *Leong Wai Kay v Carrefour Singapore Pte Ltd* [2007] 3 SLR(R) 78, the Court of Appeal affirmed (at [13]) the established principle of statutory interpretation that legislation is not presumed to take away existing rights except expressly or by necessary implication, citing with approval Bowen LJ's reminder in *In re Cuno* (1889) 43 Ch D 12 (at 17) that:

> [I]n the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature.

44 It was accepted by the parties, and obvious on the face of the provision, that s 47 of the BMSMA did not expressly abrogate legal advice privilege. Consequently, legal advice privilege would only have been excluded or overridden by the BMSMA if it was a necessary implication from the BMSMA generally, or s 47 specifically, to abrogate the legal advice privilege a MCST would otherwise have been capable of asserting against a SP.

45 The meaning of the expression "necessary implication" was explained by Lord Hobhouse in *Morgan Grenfell*, and was endorsed by the Privy Council in *Auckland District Law Society* (at [58]). As Lord Hobhouse stated (at 616):

> A necessary implication is not the same as a reasonable implication. A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation. [emphasis in original]

46 I was satisfied that there was nothing in the express language, context and logic of the BMSMA to show that legal advice privilege had been impliedly overridden by s 47.

47 Further, such a construction of s 47 of the BMSMA did not result in an interpretation which failed to promote the purpose of the BMSMA. Section 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("IA") provides:

> **Purposive interpretation of written law and use of extrinsic materials**
>
> **9A**. –(1) In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

48 The preamble to the BMSMA states that it is an Act "to provide for the proper maintenance and management of buildings", and undoubtedly the BMSMA was intended to facilitate the orderly regulation of strata developments. In my view, that purpose would be promoted by allowing and

encouraging a MCST to take legal advice as to its rights and duties, and it followed that it was necessary to extend the protection of legal advice privilege to a MCST, for the reasons articulated by the Court of Appeal in *Skandinaviska* at [23] to [26]. As a MCST may from time to time find it necessary, in the course of its duties, to take legal action against errant SPs (see [29] above) or fend off legal action by its SPs, it was not, in my judgment, in accordance with the statutory purpose of the BMSMA to allow the SPs (including the very SPs with whom the MCST was in dispute) to freely disregard legal advice privilege and obtain access to the MCST's privileged legal advice. To do so would create a chilling effect on the willingness of a MCST to take legal advice or vindicate its rights, and ultimately hamper the MCST in the fulfilment of its statutory duties under the BMSMA.

49 Hence, the BMSMA did not necessarily imply that legal advice privilege had been abrogated in s 47: a purposive interpretation of s 47 of the BMSMA demanded that it be read subject to legal advice privilege, and hence the respondent could assert legal advice privilege against Mr Yap's request for privileged documents under s 47 of the BMSMA.

50 For these reasons, I did not accept the reasoning in *The Estoril* (see [33] and [35] above) that legal advice privilege was overridden because "[s 47 of the BMSMA] is clear and unambiguous and does not lay down any exceptions or restrictions".

STB's alleged failure to inspect the respondent's documents

51 Mr Yap's complaint in this regard was that the respondent had a habit of making extravagant and unjustified claims of legal advice privilege, and that, in failing to inspect the legal advice in respect of which legal advice privilege was being claimed by the respondent, the STB had erred in law by depriving itself of relevant and admissible evidence. This argument, therefore, assumed that legal advice privilege could be claimed by the respondent, but asserted that the STB may have wrongly allowed it to be claimed in respect of item (d) (see [7] above).

52 I had grave doubts whether this could aptly be characterised as a "point of law" in respect of which an appeal lay to the High Court. The respondent had addressed the STB as to dispensing with providing it copies of the legal advice given by the respondent's lawyers in respect of the respondent's claims or potential claims against Karim, Ponda and Mr Yap (item (d)), and it seemed to me that the STB had made a factual decision agreeing with the respondent that it did not need to examine the legal advice before determining the real point of law in issue, *ie*, whether an application for disclosure of that advice under s 47 of the BMSMA could be resisted by the respondent on the basis of legal advice privilege.

53 If so, then this aspect of the STB's decision was non-appealable. Further, even if this were to be regarded as a "point of law", there had been no error of law by the STB, since the legal advice given to the MCST by its lawyers was obviously covered by legal advice privilege. As counsel for the respondent put it, the issue was not whether legal advice was covered by legal advice privilege (since it clearly was), but whether legal advice privilege was a good answer to an application under s 47 of the BMSMA.

Natural justice

54 Mr Yap contended that the STB had breached the rules of natural justice by:

(a) Not admitting his reply marked "AB4";

(b) Discontinuing the hearing without giving him the opportunity to adduce evidence of the

factual background; and

(c) Discontinuing the hearing before the respondent had completed its cross-examination of him, and therefore depriving him of the opportunity to re-examine himself and cross-examine the respondent's witnesses.

55 Oddly, a breach of the rules of natural justice did not feature in the examples of "*ex facie* errors of law" listed by *Halsbury's* and approved in *Horizon Towers* (see [11] above).

56 Nonetheless, it seemed to me that, in principle and on authority, a breach of the rules of natural justice could give rise to an appeal "on a point of law".

57 In principle, the errors of law listed by *Halsbury's*, if committed by an administrative body subject to judicial review, would all result in the impugned decision being *ultra vires* and hence void. It is well-established that "a decision given without regard to the principles of natural justice is void" (*Ridge v Baldwin and others* [1964] 1 AC 40 at 80 (*per* Lord Reid)), with the possible qualification that "not every breach of natural justice is equally serious" (*Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2010] SGCA 39 at [56], albeit this case was not concerned with judicial review of administrative action). If so, then a breach of the rules of natural justice ought also to be considered an *ex facie* error of law giving rise to an appeal under s 98 of the BMSMA.

58 As a matter of authority, this view was adopted by the English Court of Appeal in *Nina Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306, where Auld LJ held (at 313) that the words "point of law" in s 204 of the Housing Act 1996 (c 52) (UK), which provided for an appeal to the county court on any "point of law" arising from the borough council's decision, included:

> *… the full range of issues which would otherwise be the subject of an application to the High Court for judicial review, such as procedural error…* [emphasis added]

It was notable that, in that support of his view, Auld LJ cited the same passage of H W R Wade & C F Forsyth, *Administrative Law* (Oxford University Press, 7th ed, 1994) (at pp 951 to 952) which was relied upon by the Court of Appeal in *Horizon Towers* (at [101]), *viz*:

> The courts ought… to guard against any artificial narrowing of the right of appeal on a point of law, which is clearly intended to be a wide and beneficial remedy. […] The extension in recent years of the right of appeal on questions of law has… done much to assist the integration of the tribunal system with the general machinery of justice. Judicial policy ought to reinforce this beneficial trend.

STB procedure

59 Regulation 18(1) of the Building Maintenance and Strata Management (Strata Titles Boards) Regulations 2005 (S 195/2005) ("the 2005 Regulations") provides that:

> A Board shall not be bound to apply the rules of evidence applicable to civil proceedings in any court but may inform itself on any matter in such manner as it thinks fit.

60 This formed the basis of the Court of Appeal's view in *Horizon Towers* (at [173]) that the STB had a "significant inquisitorial role". In *Horizon Towers*, however, the point was not taken that reg 18(1) might not have its intended effect, by reason of s 2 of the EA ([14] above), which states that Parts I, II and III shall apply to all judicial proceedings in or before any court, but not to proceedings

before an arbitrator, and s 92(8) of the BMSMA, which states that the arbitration proceedings of the STB shall be deemed to be judicial proceedings. "Court" is defined in s 3 of the EA as including all Judges and Magistrates and, *except arbitrators*, all persons legally authorised to take evidence, while s 92 of the BMSMA provides that the STB has powers to take evidence (s 92(4)) and that the Arbitration Act (Cap 10, 2002 Rev Ed) shall not apply to mediation-arbitration proceedings before the STB. There was a distinct possibility, therefore, that Parts I to III of the EA applied to proceedings before the STB, notwithstanding reg 18(1) of the 2005 Regulations, as a result of s 19(c) of the IA, which provides:

> **General provisions with respect to power given to any authority to make subsidiary legislation**
>
> **19**. When any Act confers powers on any authority to make subsidiary legislation, the following provisions shall, unless the contrary intention appears, have effect with reference to the making and operation of the subsidiary legislation:
>
> …
>
> (c) no subsidiary legislation made under an Act shall be inconsistent with the provisions of any Act.

Decision

61 Nonetheless, even if the provisions of the EA did apply, I was of the view that Mr Yap's complaints were without foundation.

62 Mr Yap's reply in AB4 was not admitted by the STB because it was late, and the respondent had objected to its admission on the grounds that it contained scandalous and irrelevant material, and had not complied with the STB's directions as to the filing of replies. The STB had heard submissions from both the respondent and Mr Yap before it decided to exclude AB4, and there was therefore no question of a breach of natural justice.

63 As for Mr Yap's complaints that the hearing had been prematurely discontinued, this was because the STB had been able to narrow the point of contention between the parties to the issue of whether the respondent was entitled to claim legal advice privilege in respect of items (a) to (d) ([7] above), which was a question of law that did not require the examination of witnesses before it could be answered. That was why the STB dispensed with any further examination and adjourned the hearing for parties to submit their written arguments ([8] above). Indeed, Mr Yap had even conceded that the STB need only concern itself with the issue of whether to order disclosure of the four items for which legal advice privilege was being claimed by the respondent ([7] above). Again, therefore, there was no breach of any rules of natural justice.

Costs

64 Mr Yap argued that the STB erred in ordering parties to bear their own costs, and that this was an "error of law", from which an appeal lay to the High Court under s 98 of the BMSMA, because the STB failed to take into account relevant considerations in making the costs order.

65 The relevant considerations that the STB purportedly failed to take into account were alleged instances of "bad faith" on the part of the respondent both prior to, and during, the proceedings before the STB.

66 However, these were not facts found by the STB and were therefore not matters I could take cognisance of, even if they were true (which I very much doubted). In the absence of any *ex facie* errors of law, the STB's costs order was wholly within its discretion, and any appeal against it was predicated on questions of fact which were non-appealable under s 98 of the BMSMA. Nor was this an instance of an error of law of the sort described in *Edwards v Bairstow*; the facts as found (and clearly there could not have been many, since the STB's determination was primarily concerned with a question of law) fully justified the STB in ordering parties to bear their own costs.

Conclusion

67 In the result, I dismissed Mr Yap's appeal, and fixed costs at $20,000, inclusive of disbursements.