Management Corporation Strata Title Plan No 2827 *v* GBI Realty Pte Ltd and another [2014] SGHC 86

Case Number	: Suit No 920 of 2009 (Registrar's Appeal No 406 of 2013)
Decision Date	: 23 April 2014
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: Haridas Vasantha Devi (Sim Law Practice LLC) for the plaintiff/appellant; Tan Yee Siong and Priscilla Wee (Rodyk & Davidson LLP) for D2/respondent; Henry Heng and Gina Tan (Legal Solutions LLC) (on watching brief) for D1.
Parties	: Management Corporation Strata Title Plan No 2827 — GBI Realty Pte Ltd and another

Civil Procedure – Limitation

Civil Procedure – Parties – Joinder

23 April 2014

Woo Bih Li J:

Introduction

1 This is an appeal from the decision of an Assistant Registrar ("the AR"). The AR allowed an application for the appellant's statement of claim and action against the respondent to be struck out and dismissed respectively. After hearing arguments, I dismissed the appeal. I was in agreement with the AR that the appellant's claim against the respondent was time-barred. I now state the reasons for my decision.

Background

2 The striking-out application arose out of Suit No 920 of 2009 ("the Suit"). The appellant, Management Corporation Strata Title Plan No 2827 ("the MCST"), is the plaintiff in the Suit. The MCST is the management corporation of an industrial development at 59 Ubi Avenue 1, Bizlink Centre, Singapore 408938 ("the Development"). The respondent, Boustead Projects Pte Ltd ("Boustead"), is the second defendant in the Suit. Boustead is the main contractor which was engaged to design and construct the Development. GBI Realty Pte Ltd ("GBI Realty") is the first defendant in the Suit. GBI Realty was the developer of the Development. Boustead was engaged by GBI Realty to design and construct the Development.

3 The Development consists of a single 7-storey building with access driveways and other amenities that surround the main building. The access driveways and other amenities were defined as "the Peripheral Regions" by Boustead for easy reference. I will adopt that definition as well. In the Suit, the MCST sought damages for negligent construction of the Development. The MCST claimed that GBI Realty and Boustead negligently failed to take appropriate preventive measures to deal with the soft marine clay subsoil which the Development was purportedly built on. The MCST alleged that the negligence led to a continuous sinking of the ground at the Peripheral Regions. This caused damage to the access driveways and other amenities.

4 The MCST commenced the Suit by issuing a writ of summons against GBI Realty on 27 October 2009. The writ did not include Boustead as a defendant. The writ was only amended to include Boustead as a defendant close to four years later, on 17 July 2013. The amended writ was served on Boustead on 30 July 2013.

5 Boustead applied to strike out the MCST's claim and to dismiss its action against Boustead under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") on the basis that the MCST's claim against it was time-barred. The AR allowed the application. The MCST appealed. The sole question before me was whether the MCST's claim against Boustead was time-barred.

The issues

6 The limitation periods for claims are stipulated by the Limitation Act (Cap 163, 1996 Rev Ed) ("the Act"). There are two dates relevant to the application of these limitation periods. The first is the date the limitation period commences. The second is the date the action is brought. A claim will be time-barred if the time between the date of commencement of the limitation period and the date the action is brought exceeds the limitation period stipulated by the Act.

7 I will first deal with the date the action was brought against Boustead. It was not disputed that the action was brought against Boustead when it was joined to the proceedings as a party. According to *Ketteman and others v Hansel Properties Ltd and others* [1987] 1 AC 189 ("*Ketteman*") (at 200G and 218F), the date a person is joined to the proceedings as a party is the date the writ, which has been amended to include that person as a defendant, is served on that person. The amended writ was served on Boustead on 30 July 2013. Accordingly, Boustead became a party to the proceedings on that date.

8 I pause to make an observation on *Ketteman*. In *Ketteman*, the House of Lords overruled a previous decision of the English Court of Appeal in *Seabridge and others v H Cox & Sons (Plant Hire) Ltd and another* [1968] 2 QB 46 ("*Seabridge*"). The English Court of Appeal in *Seabridge* held that the date a person is joined to the proceedings is the *filing date* (and not the date of service) of the writ which has been amended to include that person as a defendant. The House of Lords in *Ketteman* overruled *Seabridge* because the decision in *Seabridge* was inconsistent with the plain wording of the then Rules of the Supreme Court (Revision) 1965 (SI 1965 No 1776) (UK) ("the UK Rules"). In particular, O 15 r 6 of the UK Rules stated that where "a person is to be added as a party ... that person shall not become a party until ... the writ has been amended in relation to him ... and ... has been served on him".

9 Under the ROC, Order 15 r 6 is substantially similar to O 15 r 6 of the UK Rules. I agree that the terms are clear and that a person only becomes a party to the proceedings when the writ, which has been amended to include that person as a defendant, is served on him.

10 In my view, however, there are good reasons why the person to be joined should be deemed to have become a party to the proceedings at the date the amended writ is filed (this was the holding in *Seabridge*). In cases involving only a single defendant, the limitation period stops running when the writ is issued. The date of service is irrelevant. When a person is subsequently added as a party to the writ, it would be logical to think that the date of service should similarly be irrelevant as to when the limitation period stops running against that person. Also, it is not clear to me why a plaintiff who joins a person as a second defendant to existing proceedings should be in a worse position than a plaintiff who opts to issue a second writ against that person and applies to consolidate proceedings later. In the first scenario, the limitation period stops running only when the amended writ is served on the second defendant under the ROC whereas in the second scenario, the limitation period stops

running when the second writ is issued. Unless there are good reasons to the contrary, the ROC should be amended to reflect the decision in *Seabridge*.

11 Now that I have dealt with the date the action was brought against Boustead, I turn to the date of commencement of the limitation period. This was the substance of the dispute between the parties at the appeal. There were three issues I had to address:

(a) the first was whether the action against Boustead was brought within six years of the accrual of the MCST's cause of action against Boustead under s 6(1)(*a*) of the Act;

(b) the second was whether the action against Boustead was brought within three years from the date when the MCST had knowledge of its right of action against Boustead in respect of the damage in question under s 24A(3)(*b*) of the Act; and

(c) the third was whether the commencement of either limitation period above was postponed under s 29(1)(*b*) of the Act due to Boustead's alleged fraudulent concealment of the MCST's right of action.

12 I will give the reasons for my decision in respect of each of these issues after providing a brief sequence of events.

Sequence of events

13 On 1 March 2000, GBI Realty engaged Boustead to design and construct the Development. [note: 1] On 31 March 2003, a Temporary Occupation Permit ("TOP") was issued in respect of the Development. [note: 2] The subsidiary proprietors likely took possession of the Development soon after the TOP was issued. [note: 3] On 10 November 2003, the MCST was constituted. On 8 January 2004, a Certificate of Statutory Completion was issued in respect of the Development. [note: 4]

14 The MCST made a number of complaints about defects in the Development to Boustead between January 2004 and January 2005. On 30 March 2004, the MCST issued a letter of demand to Boustead in respect of defects at the Development. This letter of demand mentioned damage to the Peripheral Regions. It referred to a "[d]riveway sunkened-required [*sic*] resurfacing". [note: 5] On 20 May 2004, the MCST complained about leakage from underground pipes in the Peripheral Regions.

15 Boustead carried out rectification works on the Development between April and August 2004 in response to the MCST's various complaints. Nonetheless, the complaints from the MCST persisted. On 6 September 2004, Boustead sent a letter to the MCST stating that "the Defects Liability Period ... has already expired", and that "[Boustead] cannot be held responsible for the defects". [note: 6] Boustead nonetheless offered to conduct a subsequent site inspection out of goodwill.

16 In 2007, the MCST engaged CC Building Surveyor Pte Ltd ("CC") to produce a report on the problem of soil settlement and related damage to the Development. The report titled "Inspection Report on Building Damage at Bizlink Centre" was dated 20 July 2007 ("the CC Report"). It was produced by Paul Crispin Casimir-Mrowzynski ("Mr Casimir"), a chartered building surveyor with CC, pursuant to a site inspection on 29 May 2007. The CC Report concluded that there was "severe settlement around the building". Further, the settlement resulted from the soil not being "compacted adequately at the construction stage" and due to "insufficient support to the driveway and related structures". [note: 7]

17 On 21 July 2008, the MCST wrote to Boustead complaining of the "perennial sinking driveway problem". [note: 8] The CC Report was appended to the letter. Boustead responded on 25 September 2008 stating that the sinking of the driveway was not due to inadequate compaction of the marine clay. Boustead's response further stated that they were "no longer liable for any report of defects ... presented ... after such a long time". [note: 9]

18 On 8 September 2009, the MCST, through its solicitors, Sim Law Practice LLC ("Sim Law Practice"), wrote to GBI Realty (and not Boustead) requesting that the sinking driveway be rectified and threatening legal proceedings.

19 Legal proceedings were subsequently commenced with the issuance of a writ against one defendant only, *ie*, GBI Realty on 27 October 2009. Boustead was served with an amended writ and became a party to the proceedings on 30 July 2013.

Whether the action against Boustead was brought within six years of the accrual of the MCST's cause of action against Boustead under s 6(1)(*a*) of the Act

20 Both Boustead and the MCST proceeded on the assumption that one of the relevant sections to this issue was s 6(1)(*a*) of the Act.

21 Section 6(1)(*a*) of the Act states that an action founded in tort "shall not be brought after the expiration of 6 years from the date on which the cause of action accrued". Section 6(1)(*a*) appears to overlap with s 24A(3)(*a*) of the Act. Section 24A applies specifically to an action for negligence. Section 24A(3)(*a*) of the Act states that "[a]n action to which [s 24A] applies ... shall not be brought after the expiration of the period of ... 6 years from the date on which the cause of action accrued".

22 It has come to my attention that in *Lian Kok Hong v Ow Wah Foong and another* [2008] 4 SLR(R) 165 ("*Lian Kok Hong*"), the Court of Appeal held (at [14]) that "s 24A carves out certain exceptions to s 6(1)(*a*) and, as such, the two cannot apply concurrently".

23 The MCST's claim against Boustead was in negligence. The applicable provision is s 24A(3)(*a*) of the Act. I will refer to s 24A(3)(*a*) of the Act, rather than s 6(1)(*a*). This does not make a difference to the MCST's argument, as both provisions stipulate the same commencement date and the same limitation period.

24 The MCST argued that its cause of action against Boustead accrued when the CC Report was first brought to its notice. This was purportedly on 22 August 2007, which was the date of an MCST council meeting. If this was the commencement date under s 24A(3)(*a*) of the Act, then the action would have been brought against Boustead within the six years stipulated in s 24(A)(3)(*a*) as Boustead was joined as a party on 30 July 2013.

25 It is settled law that the plaintiff's cause of action accrues "when the damage occurs" (see *Lian Kok Hong* at [24]). The question was when the damage to the Development occurred. The MCST's argument on this point was incorrect because it conflated two distinct dates: the date when the damage occurred and the date when the damage was discovered. The date the CC Report was brought to the MCST's notice would only have been relevant (if at all) to the date the damage was *discovered*. But s 24A(3)(*a*) of the Act is concerned with the date the damage *occurred*.

26 The English decision in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 2 AC 1 ("*Pirelli*") is instructive. There, the plaintiffs engaged the defendants to advise on and design an addition to their factory premises. The material used for the additions were unsuitable for the

purpose. Cracks developed after the construction was completed. The plaintiffs only discovered the cracks sometime after they developed. The question before the House of Lords was whether the cause of action accrued on the date when cracks developed, or the date when the cracks were discovered. The House of Lords held that the cause of action accrued when the damage occurred. Lord Fraser of Tullybelton (with whom the rest of the House of Lords agreed) stated (at p 16G):

> [t]he plaintiff's cause of action will not accrue until damage occurs, which will commonly consist of cracks coming into existence as a result of the defect even though the cracks or the defect may be undiscovered and undiscoverable." [emphasis added; emphasis in the original omitted]

Pirelli was approved by the Court of Appeal in *Lian Kok Hong* (at [24]).

27 On the strength of *Pirelli*, it is likely that the cause of action accrued as early as 30 March 2004. That was the date the MCST first complained of the sunken driveway. The sinking of the driveway was akin to the "cracks coming into existence as a result of the defect". But taking the MCST's case at its highest, the damage must have come into existence, at the latest, by the date Mr Casimir conducted the site inspection on 29 May 2007. The damage would have come into existence by then as it was observed by Mr Casimir during his inspection. His observations formed the basis of the CC Report.

28 On the MCST's best case, the cause of action accrued on 29 May 2007 and not on 22 August 2007, which was the date of the MCST council meeting. A six-year period commencing on 29 May 2007 would end on 28 May 2013. Boustead was joined as a party on 30 July 2013. The action was accordingly brought more than six years after 29 May 2007. The claim was time-barred under s 24A(3)(*a*) of the Act.

Whether the action against Boustead was brought within three years from the date when the MCST had knowledge of its right of action against Boustead in respect of the damage in question under s 24A(3)(*b*) of the Act

29 Section 24A(3)(*b*) of the Act provides that a claim may be brought "3 years from the earliest date on which the plaintiff ... had ... the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action". Section 24A(3)(*b*) also states that the three-year period will apply if it "expires later than the [six-year period from the date on which the cause of action accrued] ... mentioned in [s 24A(3)(*a*) of the Act]".

30 It was not in dispute that the MCST had the right to bring an action against Boustead when the MCST was constituted. The application of this part of s 24A(3)(*b*) was not in issue. The question was the date when the MCST had the knowledge for bringing an action against Boustead in respect of the damage in question.

31 Section 24A(4) of the Act elaborates on "knowledge" mentioned in s 24A(3)(*b*). The relevant portions of s 24A(4) refer to knowledge that the damage is attributable to the act alleged to constitute negligence, and knowledge of the identity of the defendant.

32 The MCST's arguments on this point were convoluted. The MCST argued that it had no reason to assume that Boustead's acts were not in accordance with the instructions or contract it had with GBI Realty. GBI Realty's defence in the Suit "shielded" [note: 10] Boustead by failing to divulge that Boustead was an independent contractor. The MCST claimed that "a party [Boustead] who legitimately executes the instructions of another [GBI Realty] would be perceived to have a valid defence against liability". [note: 11] The MCST argued that it only came to know that Boustead was an

independent contractor when GBI Realty amended its defence on 10 August 2012 to state that it had entered "into a contract with an independent and competent main contractor". The MCST accordingly claimed that it only had sufficient knowledge to bring a claim against Boustead on 10 August 2012. If this was the commencement date under s 24A(3)(*b*) of the Act, then the action would have been brought against Boustead within the three years stipulated in s 24(A)(3)(*b*) of the Act, as Boustead was joined as a party on 30 July 2013.

33 In *Lian Kok Hong*, the Court of Appeal elaborated on the requirement of knowledge under s 24A(3)(*b*) of the Act. It stated (at [36]) that:

> … the claimant need not know the details of what went wrong, and it is wholly irrelevant whether he appreciated that what went wrong amounted in law to negligence, *as long he knew or might reasonably have known the factual essence of his complaint*. [emphasis in the original]

34 I was of the view that this threshold level of knowledge must have been satisfied, at the latest, when the MCST had notice of the CC Report. The CC Report stated that the damage to the Development was caused by insufficient compacting of the marine clay subsoil, insufficient support structures at the peripheral areas of the Development, or both. Even if I were to accept the MCST's contention that the CC Report was only brought to its attention on 22 August 2007, the claim would still have been time-barred. The limitation period under s 24A(3)(*b*) is three years, and not six years, from the date of commencement of the limitation period. In the course of arguments, it appeared that the MCST had overlooked this point. The action against Boustead was only brought on 30 July 2013, which is more than three years after 22 August 2007.

35 The MCST's argument that it did not know the claim could be brought against Boustead until GBI Realty's defence was amended to refer to Boustead as an independent contractor was disingenuous.

36 The MCST had directed all its complaints about the defects to Boustead up till 25 September 2008. This was the date of Boustead's letter to the MCST stating that "the building was completed in 2003 ... [w]e are therefore no longer liable for any report of defects now presented to us after such a long time". [note: 12] Boustead's 25 September 2008 letter was discussed at the MCST council meeting on 30 September 2008. The minutes of that meeting stated the MCST would "seek [Sim Law Practice's] opinion on M/s Boustead Project's reply that they were no longer liable for any defects". [note: 13] The minutes of the next MCST council meeting on 4 November 2008 stated that the MCST would "liaise with [Sim Law Practice] to issue out the legal letter by 10 December 2008". [note: 14]

37 On 8 September 2009 Sim Law Practice, representing the MCST, wrote to *GBI Realty* (and not Boustead), threatening legal proceedings. The writ was subsequently issued against *GBI Realty* (and not Boustead). This was not a situation where the MCST had insufficient knowledge of the facts to bring a claim against Boustead. The MCST had been making complaints to Boustead as early as 2004, all the way through to 2008. Rather, the decision to proceed against GBI Realty instead of Boustead appears to have been a deliberate one made in reliance on legal advice. As the Court of Appeal in *Lian Kok Hong* stated (at [63]): "where the [plaintiff] chose to have implicit trust in his solicitors' ... advice, then he has to take the *legal* consequences of an unhappy sequel" [emphasis in the original].

38 The MCST's other argument was that it was under the impression that Boustead was legitimately executing GBI Realty's instructions, and therefore Boustead had a "valid defence". This was a bare assertion. There was no elaboration on the legal or factual basis of the argument. I did not accept the argument.

Whether the commencement of either limitation period above was postponed under s 29(1)(*b*) of the Act due to Boustead's alleged fraudulent concealment of the MCST's right of action

39 I turn to the MCST's final argument based on s 29(1)(*b*) of the Act, which provides for postponement of the commencement of limitation periods in cases of fraud. Section 29(1)(*b*) of the Act states that where a plaintiff's right of action is concealed by fraud, "the period of limitation shall not begin to run until the plaintiff has discovered the fraud ... or could with reasonable diligence have discovered it."

40 The MCST argued that it was the victim of "equitable fraud". [note: 15] This was because GBI Realty and Boustead's "attendances at Development (*sic*)" [note: 16] led the MCST "to believe that the problem could be resolved by measures such as those that they undertook". [note: 17] The MCST asserted that Boustead "could easily have informed the Plaintiff of the actual state of affairs", [note: 18] which Boustead "knew was waiting to happen". [note: 19] The MCST relied on the English Court of Appeal decision in *Archer v Moss* [1971] 2 WLR 541 ("*Archer v Moss*") in support of their argument.

41 The MCST argued that the limitation period only commenced upon discovery of the fraud by the MCST. The discovery of the fraud was "no earlier than the date ... [the MCST received] the letter dated 28 [*sic*] September 2008 from [Boustead] ... to [GBI Realty]." [note: 20]

42 The MCST's argument based on fraud was unsatisfactory. It did not plead fraud in response to Boustead's allegation of limitation. Fraud was not raised in any of the affidavits for the MCST to resist the striking-out application. It seemed to me that the fraud allegation was raised as an afterthought to support the appeal.

43 At the hearing of arguments on 18 March 2014, counsel for the MCST, Ms Haridas Devi ("Ms Devi"), stated that the MCST's pleadings could be amended to include the point on fraud after the outcome of the hearing. This was a peculiar position to take. Ms Devi was assuming that the MCST would succeed in its appeal on its present pleadings. But as its pleadings did not allege fraud, it could not rely on fraud to support its appeal. If its appeal was unsuccessful, it would be too late to make any amendment as its statement of claim would have been struck out.

44 Furthermore, the argument on fraud was also characterised by broad allegations unsupported by any documentation. In particular, the letter dated 28 September 2008 was not even mentioned in the affidavits for the MCST.

45 The MCST's argument on fraud was clearly unmeritorious. Section 29(1)(*b*) of the Act requires "conceal[ment] by the fraud of [the defendant]". Case authority has interpreted fraudulent concealment under s 29(1)(*b*) of the Act to include "unconscionability in the form of a *deliberate act of concealment* of a right of action by the wrongdoer" [emphasis added] (*Chua Teck Chew Robert v Goh Eng Wah* [2009] 4 SLR(R) 716 at [27]). This is wider than fraud or deceit at common law.

46 However, Boustead did not conceal the MCST's right of action. The MCST's position was that GBI Realty and Boustead, through their inspections and attempts at rectifying the defects, led the MCST to believe the problem could be easily resolved. That position was untenable.

47 There was no evidence that Boustead deliberately engaged in repairs to the Development to conceal the magnitude of the damage. There was no evidence that Boustead knew that it had constructed the premises negligently and that it was making piecemeal attempts at rectification to

mask its own negligence. Boustead made the repairs as the damage appeared, *at the request of the MCST*. If the MCST's argument was accepted, any contractor that attempts to rectify damage when it surfaces will, without more, be guilty of fraudulent concealment if the defects are caused by an unknown root cause.

48 I now address the case of *Archer v Moss*. I did not find that case to be of assistance to the MCST.

49 There, the plaintiff contracted with the defendant developer to erect a house in accordance with the plans annexed to the contract. The plans required the house to be built on reinforced raft foundations. At the time the contract was entered into, the foundations of the house were already laid and covered. The foundations were inferior concrete footings instead of reinforced concrete rafts. Further, the mix used for these concrete footings was defective. It was found as a fact that the defendant was aware that the inferior foundations had been used at the time he entered into the contract with the plaintiff. The defendant also knew that the plaintiff would have no opportunity to examine the foundations since they had already been laid. The English Court of Appeal held that there was fraud under s 26 of the Limitation Act 1939 (c 21) (UK), which is substantially similar to s 29 of the Act.

50 This leads me to a second reason why the MCST's argument was unmeritorious. In the present case, the facts giving rise to the MCST's right of action were plain and obvious. The MCST was keenly aware of the signs of damage manifesting itself. The MCST had made complaints about such damage to Boustead as early as January 2004. This was not a situation where the MCST could not discover the purported defect, and where the defect was known only to Boustead, which was the case in *Archer v Moss*.

Conclusion

51 In conclusion, the MCST's claim against Boustead was time-barred. I dismissed the MCST's appeal.

Costs

52 After hearing the parties' submissions on costs, I ordered the MCST to pay Boustead's costs of the appeal fixed at $10,000, inclusive of disbursements.

[note: 1] Affidavit of Thomas Chu Kok Hong at p 43

[note: 2] Affidavit of Thomas Chu Kok Hong at p 71

[note: 3] Affidavit of Thomas Chu Kok Hong at p 5

[note: 4] Affidavit of Thomas Chu Kok Hong at p 100

[note: 5] Affidavit of Thomas Chu Kok Hong at p 113

[note: 6] Affidavit of Thomas Chu Kok Hong at p 132

[note: 7] Affidavit of Tan Yee Siong at p 12

[note: 8] Affidavit of Thomas Chu Kok Hong at p 187

[note: 9] Affidavit of Thomas Chu Kok Hong at p 189

[note: 10] Plaintiff's Submissions at para 21

[note: 11] Plaintiff's Submissions at para 24

[note: 12] Affidavit of Thomas Chu Kok Hong at p 189

[note: 13] Affidavit of Thomas Chu Kok Hong at p 183

[note: 14] Affidavit of Thomas Chu Kok Hong at p 185

[note: 15] Plaintiff's Submissions at para 30

[note: 16] Plaintiff's Submissions at para 32(ii)

[note: 17] Plaintiff's Submissions at para 33

[note: 18] Plaintiff's Submissions at para 33

[note: 19] Plaintiff's Submissions at para 32(i)

[note: 20] Plaintiff's Submissions at para 35