Management Corporation Strata Title Plan No 1938 v Goodview Properties Pte Ltd another [2000] SGHC 69

Case Number : Suit 1374/1999

Decision Date : 28 April 2000

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Woo Bih Li SC and Rodney Keong (Bih Li & Lee) for the plaintiffs; Philip Jeyaretnam and Paul Wong (Helen Yeo & Partners) for the defendants

Parties : Management Corporation Strata Title Plan No 1938 — Goodview Properties Pte Ltd another

Land – Strata titles – Management corporation – Defects in common property not affecting all subsidiary lots – Representative action by management corporation on behalf of affected subsidiary proprietors – Not all individual purchasers were subsidiary proprietors – Whether need to establish substantive cause of action against developers – Whether management corporation can rely on agreements between purchasers and developers and sue in contract – Ambit of s 116(1) of the Land Titles (Strata) Act (Cap 158)

Land – Strata titles – Management corporation – Whether management corporation entitled to sue developer in contract in its own right – ss 33(1), 33(2) Land Titles (Strata) Act (Cap 158)

Land – Strata titles – Operation of s 116(1), Land Titles (Strata) Act (Cap 158)

: ***Background***

The plaintiffs are the management corporation for the condominium known as Orchid Park (hereinafter referred to as `the condominium`). The defendants were the developers of the condominium.

The plaintiffs brought an action in contract for and on behalf of 24 subsidiary proprietors who had entered into direct sale and purchase agreements (the `agreements`) with the defendants for the purchase of units in the condominium, for alleged breaches of the agreements, specifically cll 8, 9, and 11, relating to faulty and defective construction of certain areas of the common property of the condominium. Damages were sought by the plaintiffs for the loss and damage suffered by those 24 subsidiary proprietors occasioned by the defects in the common property.

By SIC 600355/2000 (the defendants` application), the defendants applied, pursuant to O 18 rr 19(1)(a), (b), (c) and/or (d) of the Rules of Court 1996 (`the Rules`) or under the inherent jurisdiction of the court, to strike out the statement of claim and to dismiss the action filed by the plaintiffs. The affidavit in support of the application deposed that the plaintiffs` claim is not sustainable in law. The defendants submitted that a claim in contract is only sustainable if all the present subsidiary proprietors of the condominium were purchasers who had entered into agreements with the defendants.

By a notice under SIC 600425/2000 (the plaintiffs` application), the plaintiffs sought a determination of a question of law pursuant to O 14 r 12 of the Rules, namely, whether the plaintiffs are entitled at law to sue the defendants on behalf of two or more of the subsidiary proprietors who had entered into agreements with the defendants for the purchase of units in the condominium and to strike out parts of the defence in the event that the court answers the question in the affirmative.

Both applications were heard together on 31 January 2000. On the defendants` application, the learned senior assistant registrar (`SAR`) determined the issue under the plaintiffs` application with

the consent of the defendants. The SAR ordered that:

(a) the statement of claim in the action be struck out;

(b) the action be dismissed;

(c) costs fixed at $5,000 be paid by the plaintiffs to the defendants.

No order was made on the plaintiffs` application. The plaintiffs appealed against both orders to a judge-in-chambers.

I dealt with both appeals on 16 February 2000. After hearing counsel for both parties, I dismissed both appeals with costs fixed at $4,000 to be paid to the defendants on RA 600047/2000 (relating to the order made under the defendants` application). I made no order for costs on RA 600046/2000 (which related to the plaintiffs` application). I also certified that no further arguments were required.

The plaintiffs have since filed a notice of appeal against my orders (in CA 29/2000).

Issue of law

In brief, the issue which arose for determination before me was whether the plaintiffs are competent to sue the defendants in contract, on behalf of two or more of the subsidiary proprietors who had entered into sale and purchase agreements with the defendants for the purchase of units in the condominium, for alleged defects in construction of the common property.

Before me, the plaintiffs relied on s 116(1) of the Land Titles (Strata) Act (Cap 158) (the `Strata Act`), stressing that the action is only commenced on behalf of those subsidiary proprietors who have an agreement with the defendants, numbering 24 out of a total of 615 strata lots in the condominium. The plaintiffs argued that since these 24 subsidiary proprietors are entitled to sue the defendants for alleged contractual breaches relating to the common property, s 116(1) operates to vest the authority in the management corporation to sue in a representative capacity.

The defendants relied on the Court of Appeal decision in **RSP Architects Planners & Engineers v Ocean Front Pte Ltd and another appeal** [1996] 1 SLR 113 (the ` ***Ocean Front*** case`) and submitted that the plaintiffs would only be competent to sue for defects in the common property if all the subsidiary proprietors are themselves entitled to sue the plaintiffs in contract. The defendants further argued that the plaintiffs have not pleaded or shown that the 24 subsidiary proprietors were especially affected or damaged by the alleged defects in the common property.

The decision in the Ocean Front case

I shall set out briefly the decision in the ***Ocean Front*** case which is germane to the central issue in the case before me. One of the preliminary issues which the Court of Appeal had to determine in that case was whether the management corporation was competent to institute and maintain an action in its own name. There, the management corporation sued the developers of that condominium in tort and/or contract for damages arising out of faulty construction of the common property which had led to spalling of concrete in the ceilings of the car parks of the various blocks and water ponding in the area surrounding the lift.

The Court of Appeal held that the management corporation was entitled to bring the action under s 33 or s 116 of the Strata Act. The court went on to hold that the management corporation had no cause of action in contract and could not rely on contractual clauses in the sale and purchase agreements made between the developers and the individual purchasers, some of whom may or may not be the present subsidiary proprietors of the lots. LP Thean JA, delivering the judgment of the court, rejected counsel`s further argument based on s 57(2) of the Conveyancing and Law of Property Act (Cap 61) (`the CLPA`), stating as follows (at p 123 E- F):

> *It would really be straining the language of the sale and purchase agreements to say that it was the intention of the developers and the purchasers that cll 8 and 9 of their sale and purchase agreements would run with the land. Such agreements are intended to govern the relations only between the developers and their purchasers, and clearly the developers did not intend to extend the benefit of these provisions to others down the line. In our judgment, the management corporation had no cause of action in contract against the developers.*

The Court of Appeal eventually held that the management corporation had a cause of action in tort.

Locus standi or legal capacity of management corporation

I now move on to the case before me. Since the argument revolves around the interpretation and scope of application of s 116(1) of the Strata Act, I shall set out the provision for convenient reference. Section 116(1) states:

> *Where all or some of the subsidiary proprietors of the lots in a subdivided building are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly (any such proceedings being proceedings for or with respect to common property), the proceedings may be taken by or against the management corporation as if it were the subsidiary proprietors of the lots concerned.*

Section 116 was taken (with some amendments) from s 147 of the New South Wales Strata Titles Act 1973, which now appears as s 227 of the New South Wales Strata Schemes Management Act 1996 (`SSM`). However little assistance can be gleaned from the Australian provisions. Section 227 of the SSM has the effect of making the owners` corporation the representative of owners in situations where proceedings may be taken by or against all the owners jointly in respect of the common property. Significantly, there is no equivalent to that part of s 116(1) in our Strata Act which enables the management corporation to represent only ***some*** of the subsidiary proprietors. As observed by the Court of Appeal in the ***Ocean Front*** case (at p 121B), `the purpose of our s 116 may well be different from that of s 147 of the New South Wales Act.`

The insertion of the phrase `all or some of` into s 116(1) was recommended by the Select Committee on the Land Titles (Strata) (Amendment) Bill (No 10/86), Parl 10 of 1987 at D63, on the basis that the amendment serves to clarify `that a management corporation may represent all or some of the subsidiary proprietors in proceedings against any person.` Apart from that brief explanation, the Select Committee Report does not shed any further light on the legislative intent and scope of the provision.

In interpreting and applying s 116(1), it must first and foremost be noted that s 116(1) is a procedural provision and does not confer any separate substantive right on the management corporation. Clearly, any party wishing to rely on this procedural provision must point to an underlying substantive cause of action against the intended defendants. As stated by LP Thean JA, delivering the judgment of the court in the ***Ocean Front*** case (at p 121B-E):

> *... the purpose of our s 116 is clear: it is to enable the management corporation to bring an action on behalf of all or some of the subsidiary proprietors, as the case may be, and also to enable a third party to bring an action against the management corporation as representing all or some of the subsidiary proprietors. As between, on the one hand, all or some of the subsidiary proprietors, as the case may be, and on the other hand, a third party, the management corporation is interposed so that as a matter of convenience, it would not be necessary for all or some of the subsidiary proprietors concerned to be joined in suing a third party, and, conversely, it would not be necessary for the third party to sue and name all the subsidiary proprietors concerned. As the learned judge held, and we agree, the management corporation represents the subsidiary proprietors, and it is the subsidiary proprietors who are the substantive party, although the proceedings are instituted by or against the management corporation. The purpose of this section is to simplify the procedural aspect of the proceedings so as to avoid naming all the subsidiary proprietors or some of them who are concerned in the proceedings as plaintiffs or defendants, as the case may be.*

The Court of Appeal (at p 121F-G) cited and approved GP Selvam J`s dicta in **MCST Plan No 1279 v Khong Guan Realty Pte Ltd** [1995] 1 SLR 593 at p 596D (`the ***Khong Guan*** case`), which case involved an action brought by the management corporation against the developers for the amount spent on repair and damages for breach of contract. GP Selvam J, in response to the defendants` argument that the management corporation was not entitled to bring the action on behalf of the purchasers as it was not a party to the sale and purchase agreements between the defendants and the purchasers and could not therefore sue on the terms of the agreements stated that:

> *The action, however, is properly brought for the subsidiary proprietors and their successors or assigns for it comes squarely under s 116(1) of the Land Titles (Strata) Act. On the assumption that the claim relates only to common property, the plain words of s 116(1) entitle a management corporation to represent the subsidiary proprietors where the subsidiary proprietors have a cause of action whether it be an action in tort or contract. It is an action in a representative capacity authorized by statute.*

Reading the above passages together with s 116(1) in isolation, they ostensibly support the plaintiffs` submission that s 116(1) entitles the management corporation to sue in a representative capacity on behalf of those 24 subsidiary proprietors simply by virtue of the fact that they each have a substantive cause of action in contract against the developer. To my mind however, this is a flawed argument and constitutes a misunderstanding of the interpretation which had been placed upon s 116(1) of the Strata Act by the Court of Appeal.

It is pertinent to note that GP Selvam J in the ***Khong Guan*** case viewed the addition of the phrase `successors in title or assigns` as words of limitation, that is, that the action may only be brought for the benefit of current proprietors in the nature of direct purchasers or derivative title holders. The learned judge in that case was merely concerned with the procedural question of whether the

management corporation had the capacity to bring an action in a representative capacity. The relatively brief grounds of decision says nothing about the circumstances under which s 116(1) may be invoked or the causes of action available to the management corporation. In the light of the later Court of Appeal decision in the ***Ocean Front*** case, it is extremely doubtful whether the management corporation would have been able to sustain an action in contract on behalf of all current proprietors, including non-direct purchasers.

The crucial subsequent portions of LP Thean JA`s judgment (at p 121H-I) sets down the conditions triggering the operation of s 116(1):

> *This section may be invoked* ***where there is some thing or matter in relation to the common property which is common to or affects all or specifically only some of the subsidiary proprietors concerned. In particular, this section may be invoked where the thing or matter in question affects only some of the subsidiary proprietors of the lots comprised in a condominium****, for example, the subsidiary proprietors of the lots comprised in a particular block or subdivided building of a condominium.* ***The words, `jointly entitled`*** *and `are liable to have proceedings taken against them jointly`* ***refer to the procedural aspect of the proceedings and not to substantive rights of the subsidiary proprietors in the subject matter of the proceedings****. [Emphasis added.]*

To assist in understanding the import of this statement, I am much guided by the reasoning of Warren LH Khoo J in **MCST Plan No 1272 v Ocean Front Pte Ltd (Ssangyong Engineering & Construction Co Ltd & Ors, third parties)** [1995] 1 SLR 751 where he stated (at pp 761E-762G):

> *I do not find it easy to interpret [s 116]. Given that there are already provisions in s 33 enabling the management corporation to sue in respect of any matter concerning the common property, it is difficult to see that there should be any need for this section. I assume, however, that the legislature does not enact anything in vain. I should assume that s 116 is intended to serve a purpose different from that served by s 33.*
>
> *...*
>
> *... I do not have all the answers but the terms in which s 116(1) is cast leads me to think that it is probably intended to cover cases where individual lots affect specially, or are affected specially by, the common property. Note the words `as if [the management corporation] were the subsidiary proprietors of the lots concerned`, particularly the words `the lots concerned`. These words seem to be apt to cover situations where something exists in some or all of the individual lots which specially and adversely affects the common property, or where something exists in the common property which specially and adversely affects some or all the lots in the condominium. An example would be where a common roof has been so poorly constructed that water leaks through it and adversely affects all or some of the units in the condominium. The subsidiary proprietors of the lots affected could take action under their sale and purchase agreements against the developer. Instead of those affected taking individual actions against the developer or joining in one action with numerous plaintiffs, the management corporation may, under this section, take action in its own name but substantively on behalf of the subsidiary proprietors concerned. The proceedings would be for the account of the subsidiary proprietors.*

This impression of the effect of s 116(1) is reinforced by the words at the end of the subsection referring to a judgment or order obtained in such proceedings as having effect as if it was a judgment or order given or made in favour of or against the subsidiary proprietors concerned. If the proceedings were about aspects of the common property which do not specially affect particular lots or which are not specially affected by something in the particular lots, then on my view of the matter as I have expressed it when discussing s 33 above, there is hardly any need for such a provision. The judgment would simply be for or against the management corporation as management corporation.

This impression of the effect of s 116(1) is also reinforced by the provision of sub-s (2) of that section, which speaks of a subsidiary proprietor making a contribution to another subsidiary proprietor in respect of a judgment debt arising under a judgment referred to sub-s (1).The following section, s 117, provides that where the condition of a lot affects the support or shelter provided by that lot for the common property and the subsidiary proprietor of that lot neglects to take proceedings to get that condition rectified, the management corporation may take such proceedings as the agent of the subsidiary proprietor but at its own cost. It seems to me that this is an extension of the principle of s 116 to the situation where only one particular lot is specially concerned, an extension of `all or some` in s 116(1) to a single lot.

If my view is correct, then s 116 would have no application to situations where no particular lots are specially affected by, or specially affect, the common property. Take the case of a dust bin centre or a visitors` car park, or a swimming pool, not constructed properly. The defect affects no lots in particular but it does affect the general body of owners in their enjoyment of the common facilities and amenities of the condominium. In these situations, it would be unrealistic to expect individual subsidiary proprietors, as subsidiary proprietors, to take proceedings. The management corporation is the suitable party to sue. It sues in its own name, on its own behalf and for its own account, and it sues under s 33(2), not s 116(1).

The highlighted portion of LP Thean JA`s judgment is of particular significance. Having examined and considered the entire judgment in the ***Ocean Front*** case, I am disposed towards the view that the operation of s 116(1) is confined to two situations:

(a) when some of the strata lots are specially affected by or specially affect the common property in which case the management corporation can represent those affected subsidiary proprietors; and

(b) when all the strata lots are specially affected by or specially affect the common property in which case the management corporation can represent all the subsidiary proprietors.

The plaintiffs have deliberately instituted the claim on behalf of those 24 subsidiary proprietors who have agreements with the defendants. The defendants submitted, with which I agreed, that the plaintiffs did not, in their statement of claim or arguments before me, advance the position that these 24 subsidiary proprietors are specifically affected by the alleged defects in the common property.

I have perused the statement of claim in the case before me. The benefit conferred by the material contractual clauses accrue to all the subsidiary proprietors and is not limited to any one particular or groups of, subsidiary proprietor(s). Further, the statement of claim lists a number of alleged defects in the common property in general terms, which defects were not limited to any particular lots of any subsidiary proprietor. It further omits any claim that the subsidiary proprietors on whose behalf the

suit was instituted, suffered any special damage by reason of the alleged defects.

Under these circumstances, and applying the decision in the ***Ocean Front*** case, it is clear to me that the plaintiffs are not entitled to rely on that part of s 116(1) which authorises the management corporation to take proceedings on behalf of `some of the subsidiary proprietors`. In other words, it is not enough, as sought to be argued by the plaintiffs, simply for each of these subsidiary proprietors to have a substantive cause of action against the developer. In order to rely on s 116(1), it must be shown that the strata lots in question comprise a sub-group of proprietors who have been specially affected by the alleged defects in the common property. In my opinion, the plaintiffs have not brought themselves within the ambit of the provision and hence, have no legal capacity to sustain an action on behalf of the 24 subsidiary proprietors under 116(1) of the Act.

I then asked myself a further question, are the alleged defects of a nature which specially affect all the subsidiary proprietors? If not, the management corporation would not be able to bring the action under s 116(1) but under s 33(2) since s 116(1) has no application to `situations where no particular lots are specially affected by, or specially affect, the common property` - per Warren LH Khoo J in ***MCST Plan No 1272 v Ocean Front Pte Ltd*** .

I am unable to ascertain this to any degree of certainty from the pleadings although some of the particulars of defects listed in the statement of claim, for example, eg `[l]eaks to, and poor construction of, the roofs of the buildings, causing water penetration into and internal damage to the buildings` and `internal water ingress due to poorly designed and/or constructed external walls on the building elevations causing damage and/or staining to the walls and interior of the buildings` (paras 7.2 and 7.5) could be of a nature which specially affects all the lots.

Assuming, for the purposes of these proceedings, that the alleged defects are of a nature which affects all subsidiary lots, it is clear from the ***Ocean Front*** case that the plaintiffs have no cause of action in contract against the defendants if it brings the action on behalf of all the subsidiary proprietors as not all of these proprietors have agreements with the defendants. Even so, do the plaintiffs have the capacity to bring the action in contract on behalf of only those subsidiary proprietors who have agreements with the defendants, thereby avoiding the difficulties posed by the lack of contractual relations between the defendants and the other subsidiary proprietors?

In my view, the redress sought by the management corporation in such a situation is for collective damages with respect to the alleged damage to the common property. The exercise is in reality, effectively and substantively brought for the benefit of all the subsidiary proprietors, particularly as the alleged effects are not limited to any particular strata lots. Thus, the plaintiffs cannot seek to rely on s 116(1) unless it brings the action on behalf of all the subsidiary proprietors. The plaintiffs cannot circumvent the ruling in the ***Ocean Front*** case by simply framing their action such that they are only suing on behalf of those subsidiary proprietors who have agreements with the defendants. Accepting the plaintiffs` proposition would provide far too easy an avenue of evading the import and significance of the Court of Appeal`s ruling in the ***Ocean Front*** case. To take as an extreme example, suppose that only two out of the 615 subsidiary proprietors are direct purchasers from the developers, can the management corporation bring an action on the sale and purchase agreement, ostensibly only on behalf of these two proprietors, to recoup damages incurred in rectifying defects to the common property which affect all strata lots? Bearing in mind the above considerations, this scenario, to my mind, could not have been intended by the Court of Appeal.

I am further emboldened in my conclusion when I examine the alternative pleadings of the management corporation in the ***Ocean Front*** case. The action was based in tort. Alternatively, the action was based on contractual breaches of certain clauses in the sales and purchase agreements

between the developer and some of the subsidiary proprietors. The relevant contractual clauses in the sale and purchase agreements in the ***Ocean Front*** case are very similar to the material contractual clauses in the case before me.

Both paras 13 and 23 of the amended statement of claim in the ***Ocean Front*** case, which were helpfully provided by counsel for the plaintiffs, read as follows:

> *Alternatively, the plaintiffs are suing the defendants* ***on behalf of such subsidiary proprietors of units in the condominium who have entered into sale and purchase agreements with the defendants as developers.*** *In the further alternative, the plaintiffs are suing the defendants on behalf of all subsidiary proprietors of units in the condominium at the material time, whether the said subsidiary proprietors were original purchasers from the defendants or by virtue of s 57(2) of the Conveyancing and Law of Property Act (Cap 61) (`CLPA`) [Emphasis added.]*

The first sentence is similar to para 3 of the statement of claim in the case before me which reads:

> *The plaintiffs bring this action in respect of the common property of the condominium* ***for and on behalf of the subsidiary proprietors who had entered into sale and purchase agreements (the `sale and purchase agreements`) with the defendants*** *for the purchase of units in the condominium. [Emphasis added.]*

The Court of Appeal in the ***Ocean Front*** case was certainly fully aware that some of the existing subsidiary proprietors in that case had sales and purchase agreements with the developers. The fact that the Court of Appeal nonetheless held that the management corporation had no cause of action in contract is a clear vindication of my opinion. Although this alternative pleading was not specifically addressed in the judgment, I took the view that the interpretation placed on s 116(1) by the Court of Appeal rendered it unnecessary for the court to specifically address that alternative pleading in its grounds of decision. It is also pertinent to note that LP Thean JA specifically addressed the further alternative argument based on s 57(2) of the CLPA at considerable length (at pp 122G-123F). I am thus unable to accept any suggestion that the Court of Appeal did not consider the first alternative submission of the management corporation in that case.

Section 33 of the Strata Act

I will now briefly deal with s 33 of the Strata Act. The plaintiffs` application was also premised on this section and argued before the SAR although not before me.

Section 33(2)(b) of the Strata Act provides that the management corporation may `sue and be sued in respect of any matter affecting the common property`. I need only refer to the following passage from the judgment of the Court of Appeal in the ***Ocean Front*** case:

> *In our opinion, s 33(1) of the Strata Act constitutes the management corporation a body corporate with a perpetual succession and confers on it the legal capacity to sue and be sued and s 33(2) specifies the subject matters in respect of which the management corporation may sue and/or be sued (as the case may be).*

Under s 33(1), the management corporation sues in its own right and not, as in s 116(1), as a representative of the subsidiary proprietors. It is however equally clear from the decision of the Court of Appeal in the ***Ocean Front*** case that s 33(2) does not confer on the management corporation the various causes of action.

> *In our judgment, the management corporation must turn to the general law to found its cause of action in any action instituted by it in respect of any of those matters listed in paras (a) to (c) of s 33(2).*

The plaintiffs have in the case before me, framed their cause of action in contract. Applying the decision in the ***Ocean Front*** case, the plaintiffs have no cause of action in contract against the defendants. This suffices to dispose of this issue.

Other matters

The instant case is, in my view, eminently suitable for an application under O 14 r 12 of the Rules as a decision in favour of the defendants would finally dispose of the action between themselves and the plaintiffs, thereby resulting in substantial savings of time and costs.

As my decision on RA 600047/2000 affirming the SAR`s decision to strike out the statement of claim and to dismiss the action effectively disposed of the proceedings, it was not necessary for me to give a separate ruling on RA 600046/2000 relating to the plaintiffs` application to strike out parts of the defence. I therefore dismissed that appeal as well. However I only awarded one set of costs ($4,000) to the defendants as both appeals effectively related to one and the same issue.

Outcome:

Appeals dismissed.