Diora-Ace Ltd and others *v* Management Corporation Strata Title Plan No 3661 and others [2015] SGHC 89

Case Number : Originating Summons 994 of 2014

Decision Date : 02 April 2015

Tribunal/Court : High Court

Coram : Hoo Sheau Peng JC

Counsel Name(s) : Lim Chee San (TanLim Partnership) for the plaintiffs; Cheo Chai Beng Johnny (Cheo Yeoh & Associates LLC) for the defendants.

Parties : Diora-Ace Ltd and others — Management Corporation Strata Title Plan No 3661 and others

Land – Strata titles – Management corporation – Management council

2 April 2015

Hoo Sheau Peng JC:

1 This case is the sequel to the dispute in Originating Summons No 392 of 2014 ("OS 392/2014") between a group of subsidiary proprietors and the management corporation of a condominium development known as "Riveria Gardens" ("the Development"). The grounds of decision in relation to the original dispute have been set out in *Diora-Ace Limited and others v The Management Corporation Strata Title Plan No 3661 and another* [2015] SGHC 88 ("*Diora-Ace (No 1)*").

2 In the present case, Originating Summons 994 of 2014 ("OS 994/2014"), the seven plaintiffs ("the Plaintiffs") sought a declaration and an injunction to enforce a notice issued under s 58(3) of the Building Management and Strata Maintenance Act (Cap 30C, 2008 Rev Ed) ("BMSMA") on 29 April 2014 ("the Notice"), so as to prevent the first defendant in this action, the Management Corporation Strata Title Plan No 3661 ("the MCST"), the management corporation of the Development, from incurring legal costs in the defence of OS 392/2014. The Notice was addressed to one Mr Heng Chih Yang ("Mr Heng"), the secretary of the third council of the MCST. Mr Heng is the third defendant in this action. The Plaintiffs also served the Notice on one Mr Joel Chang Chung Yhow ("Mr Chang"), the chairman of the third council of the MCST and the second defendant in this action. The three defendants in this case will collectively be referred to as "the Defendants".

3 After hearing the parties, I dismissed the Plaintiffs' application with costs. The Plaintiffs have appealed against my decision. I now set out the grounds for my decision.

The Facts

4 As stated in *Diora-Ace (No 1*), the Plaintiffs own a total of 18 out of the 49 units in the Development, and hold 123 out of 321 of the total share value therein. On 29 April 2014, the Plaintiffs filed OS 392/2014, seeking a number of declarations that the MCST had acted in breach of the BMSMA. On the same day, the Plaintiffs issued the Notice which states:

> Dear Sirs
>
> **SECTION 58(3) OF THE BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT**

> We who together own not less than one-third of the lots in the MCST hereby give written notice pursuant to Section 58(3) of the Building Maintenance and Strata Management Act that:
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> a) we oppose any decision of the Council which may result in the MCST incurring legal costs pertaining to the Originating Summons No. OS 392/2014 filed in the High Court of Singapore, and
>
> b) any decision made by the Council which may have the said result shall have no force or effect.
>
> …

5 On 29 September 2014, the seventh plaintiff, I.Contemporary Living Pte Ltd ("I.Contemporary"), sent a notice to the MCST requesting an inspection of financial documents, such as financial statements, payment vouchers and bank books, under s 47 of the BMSMA. Two further reminders were sent on 8 October 2014 and 13 October 2014 respectively. The MCST replied on 13 October 2014 notifying I.Contemporary that they would accede to its request on 20 November 2014. On 17 October 2014, I.Contemporary's then solicitors, Richard Lim & Co, sent a letter to the MCST demanding the immediate production of the financial documents requested for.

6 The authorised representative of I.Contemporary was granted access to the documents on 20 October 2014. During this inspection, the representative discovered a letter of engagement dated 23 May 2014 by way of which the MCST engaged the law firm Cheo Yeoh & Associates LLC ("Cheo Yeoh LLC") as its counsel. The letter of engagement stated that the scope of Cheo Yeoh LLC's services to the MCST would comprise reviewing the documents, and advising on the merits of the claims in OS 392/2014 among other things. I.Contemporary's representative also came across a cheque for a sum of $10,000 drawn in favour of Cheo Yeoh LLC.

7 On 24 October 2014, the Plaintiffs commenced this action and sought, *inter alia*, the following orders:

> (a) a declaration that the council of the MCST acted in breach or in threatened breach of s 58(3) of the BMSMA; and
>
> (b) an injunction to prohibit the council of the MCST from acting in breach or in threatened breach of s 58(3) of the BMSMA.

8 In OS 392/2014, the Defendants objected to the Notice, and submitted that it should be declared null and void. However, the Plaintiffs took the position that OS 392/2014 and OS 994/2014 should be dealt with separately, and need not be consolidated. The Plaintiffs accepted that I was not bound by the Notice in relation to the costs of OS 392/2014. Accordingly, OS 392/2014 proceeded without the issue of the Notice being dealt with. Consequently, by 26 January 2015, when I first heard the present case, the party and party costs in OS 392/2014 had been determined in *Diora-Ace (No 1)*. The Plaintiffs explained that they had decided to continue with the present case so as to prevent the MCST from incurring (i) solicitor and client costs for the hearing of OS 392/2014 at first instance, as well as (ii) the costs of the appeal to the Court of Appeal in relation that action.

Parties' Arguments

9 The Plaintiffs' main case was that by using the MCST's funds to engage Cheo Yeoh LLC as their counsel in the defence of OS 392/2014, the Defendants had acted in breach of the Notice and s 58(3) of the BMSMA. The Plaintiffs argued that the Defendants should have obtained a resolution by

simple majority in a general meeting of the subsidiary proprietors to act against the Notice.

10 The Defendants challenged the validity of the Notice on the basis that it was issued in bad faith and made to stifle the MCST's defence in OS 392/2014. The Defendants also pointed out that the Notice was signed by unidentified persons who claimed to be directors of the respective plaintiffs. Although the Plaintiffs' then counsel, Richard Lim & Co, had written to confirm that the Notice was signed by the duly authorised representative of the respective directors of the Plaintiffs, the Defendants contended that the basis for the confirmation was not set out. The Defendants also argued that the sum of $10,000 which was drawn in favour of Cheo Yeoh LLC was paid to the firm strictly as a deposit. As no monies were used to pay for legal costs, there was therefore no breach of the Notice.

The Decision

11 At the outset, I note that the Plaintiffs applied for both declaratory and injunctive reliefs. It is settled law that the grant of these reliefs is discretionary. The main issue therefore was whether, in all the circumstances of the case, I should exercise my discretion to order the declaratory and injunctive reliefs prayed for.

12 Section 58(3) of the BMSMA states:

> **Council's decisions to be decisions of management corporation**
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> …
>
> (3) A council shall not make a decision on any matter if, before the decision is made, notice in writing has been given to the secretary of the council by subsidiary proprietors who altogether own *not less than one-third* of the lots in the subdivided building concerned that the making of the decision is opposed by those subsidiary proprietors, and any decision, if made by the council, shall have no force or effect.
>
> [emphasis added]

13 As stated above at [4], the Plaintiffs own 18 out of the 49 units (or lots) in the Development. These amount to more than one-third of the lots in the Development, and the Plaintiffs were therefore *prima facie* entitled to issue a notice under s 58(3) of the BMSMA to the secretary of the council of the MCST to prevent or oppose any decision made by the council.

14 The Defendants did not dispute this. However, they argued that a notice made under s 58(3) of the BMSMA should be made in good faith and for a good reason. The Defendants' case was that the Plaintiffs' issue of the Notice was oppressive and an abuse of s 58(3) of the BMSMA. Section 58(3) was not intended to prevent a management corporation from defending itself in an action commenced by the issuer(s) of the notice.

15 In support of their argument, the Defendants relied on *Lark Lounge and Nite Club Pte Ltd v Management Corporation Strata Title Plan No 1420* [1997] 3 SLR(R) 945 ("*Lark Lounge*") and a commentary on the case in Teo Keang Sood, *Strata Title in Singapore and Malaysia* (LexisNexis, 4th Ed, 2012) ("*Strata Title in Singapore and Malaysia*").

16 The facts in *Lark Lounge* are as follows. The plaintiff had purchased four lots in a strata development known as Balestier Point. The defendant was the management corporation of that strata

development. The plaintiff sought the defendant's approval to use the four lots as a karaoke and music lounge. As Balestier Point had a history of violence, gang clashes and vandalism which stemmed from the existing karaoke lounges, the subsidiary proprietors who owned more than one-third of the lots in the development wrote to the council of the management corporation objecting to having another karaoke lounge in the development. This objection was made under s 63(3) of the Land Titles (Strata) Act (Cap 158, 1988 Rev Ed), which is *in pari materia* to s 58(3) of the BMSMA.

17 The plaintiff then applied to court for, *inter alia*, a declaration that the notice given by the subsidiary proprietors amounted to "obstructive and oppressive conduct" and was "an abuse of law and accordingly null and void and of no effect". Goh Joon Seng J, as he then was, dismissed the plaintiff's application for two reasons. First, Goh J stated that as the subsidiary proprietors were not party to the proceedings, no declaration could be made without them being heard. In the alternative, Goh J also found that in light of the history of violence, gang clashes and vandalism emanating from the existing karaoke lounges, the opposition of the subsidiary proprietors through the notice to the council was "not without good reason" (at [29]).

18 Professor Teo, in *Strata Title in Singapore and Malaysia*, made the following comments on *Lark Lounge* (at p 327):

> … Implicit in the court's decision is that service of such a notice must be for a good reason having regard to the relevant circumstances concerning the development in question. This would be especially so where the interest of another subsidiary proprietor would be affected. It is likely that a notice served *mala fide* or in bad faith would be ruled null and void and of no effect by the court.

19 I agree with the Defendants' submission and Professor Teo's observations. A notice should be given *bona fide* and for good reasons. The court should not assist a subsidiary proprietor to enforce the right under s 58(3) of the BMSMA, or to enforce a notice given thereunder, through the grant of a declaration or an injunction if there is bad faith. Doing so may unfairly prejudice the rights of the other subsidiary proprietors in the strata development.

20 The Plaintiffs argued that the Notice was issued because the Plaintiffs did not wish the MCST to "incur legal fees unnecessarily" on the basis that the MCST would not "suffer any loss or detriment even if the orders sought in OS 392/2014 [were] granted". This, the Plaintiffs said, was evidence of their good intentions.

21 On the facts, these good intentions were not readily apparent. It bears reiterating that the Notice was issued on the same day as the filing of OS 392/2014. At the material time, there was nothing objective to indicate whether the Plaintiffs' claims were meritorious. Furthermore, the Notice was drafted very widely, objecting to *any* legal costs being incurred for the action, which would prevent the MCST from seeking legal advice on the merits of the Plaintiffs' claims. At the material time, there was also no sign that the council of the MCST would unnecessarily incur legal costs in respect of OS 392/2014.

22 Clearly, the issuance of the Notice was a self-serving attempt to stifle the MCST's right to defend against the action instituted by the Plaintiffs. By issuing the Notice in such terms, the Plaintiffs were effectively asking the MCST to capitulate to the Plaintiffs' legal demands. Such a stifling of the right to legal advice and representation could cause the council or the MCST to suffer potentially unfair legal consequences. This was hardly a reasonable position to take.

23 Indeed, the Plaintiffs had, by the first prayer of OS 392/2014, sought an order that the then

council of the MCST be removed, and elections be held to elect a new council. While this prayer was subsequently withdrawn, the Plaintiffs only did so at the adjourned hearing on 24 December 2014, a number of months after OS 392/2014 was filed in April 2014. I did not see how it could be argued that such an order, if made without due consideration of the substantive merits, would not cause "any loss or detriment" to the council or the MCST. In the circumstances, the MCST was entitled to obtain legal advice on the import of such a prayer. Further, if the MCST had not defended the action in OS 392/2014 and the court had proceeded to grant the other declarations sought by the Plaintiffs, this could potentially have led to further consequential relief being sought not only by the Plaintiffs, but also by other subsidiary proprietors. It would have been neither fair nor just to allow the MCST to be exposed to the Plaintiffs' claims without having a fair opportunity of being advised or heard.

24 The Plaintiffs also argued that the council could have sought a resolution from the MCST in a general meeting in order to overcome the Notice. Section 58(2) of the BMSMA provides that:

> **Council's decisions to be decisions of management corporation**
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> …
>
> (2) Notwithstanding that a council holds office, the management corporation may in a general meeting continue to exercise or perform all or any of the powers, duties and functions conferred or imposed on the management corporation by this Act or the by-laws.

25 A notice issued by the subsidiary proprietors under s 58(3) of the BMSMA does not bind a management corporation. This makes sense under the scheme of the BMSMA, where the council of a management corporation performs a role akin to a board of directors in a company. In this regard, Professor Teo explains in *Strata Title in Singapore and Malaysia* (at p 305):

> The council of a management corporation consists of a small elected group of proprietors whose principal function is the day-to-day management of the strata scheme. The council is likened to the board of directors of a company or the executive committee of a club. If not for its existence, it would be necessary to convene a general meeting of the proprietors each time the management corporation makes a decision. … It is obvious from the above that the council is distinct from the management corporation, the latter consisting of all the subsidiary/parcel proprietors …
>
> *Despite the existence of the council, the BMSMA affirmatively empowers the management corporation in general meeting to exercise or perform all or any of its powers, duties and functions conferred or imposed on it by the said Act or by the by-laws.* … It can be seen, therefore, that as between the council and the management corporation, it is the latter which has control of the strata scheme.
>
> [emphasis added]

26 Hence, while a notice issued under s 58(3) of the BMSMA restricts the *council's* ability to make a decision on a matter, this does not bind the management corporation, which in a general meeting, may continue to exercise all the powers imposed on it by the BMSMA or the relevant by-laws.

27 While it may be theoretically possible for a general meeting of subsidiary proprietors to be called for the passing of the appropriate resolution, I agreed with the Defendants that in the present case, it was not practical or practicable to do so. More importantly, it was unreasonable to expect such a step to be taken. The Notice was drafted in the widest possible terms, and was issued the same day

OS 392/2014 was commenced. Faced with the legal action, it was not reasonable to expect the council of the MCST to expend considerable time and effort to convene an extraordinary general meeting to override the Notice before getting legal advice to even understand the Plaintiffs' case against it and to prepare its defence.

28 On the other hand, the Plaintiffs had other reasonable options to pursue, such as asking the court for the appropriate costs orders in OS 392/2014 at the suitable juncture. This would have allowed the merits of the Plaintiffs' claims to be dealt with without any stifling of the MCST's defence.

29 By the foregoing, I found that the Notice was tainted by bad faith, and was not given for good reasons. For completeness, I should add that as it transpired, in *Diora-Ace (No 1)*, most of the Plaintiffs' claims for declarations against the MCST were dismissed. The Plaintiffs also withdrew the first prayer, which had been contested by the MCST, as it was no longer necessary.

30 Three miscellaneous points remain to be dealt with. It appeared to me that the position taken by the Plaintiffs in these proceedings was inconsistent with their earlier position in OS 392/2014. In OS 392/2014, the Plaintiffs did not object to the defendants in that action, being the MCST and Dr Sim Chiang Khi ("Dr Sim"), the chairman of the second council of the MCST, defending the action and being represented by legal counsel. In fact, the Plaintiffs submitted that in determining the party and party costs at first instance in OS 392/2014, I was not bound by the Notice. I note the Plaintiffs' explanation that they were proceeding with the present case to deal with the solicitor and client costs for the first instance hearing, and the costs of the appeal to the Court of Appeal in relation to OS 392/2014. Nonetheless, there is an element of inconsistency. In effect, by proceeding with the present case, the Plaintiffs have adopted the stance that the MCST should not have defended OS 392/2014.

31 The Plaintiffs also submitted that even if the MCST was prevented by the Notice from incurring costs in OS 392/2014, the fact that the action was commenced against Dr Sim meant that the action could still be defended by Dr Sim in his personal capacity. I saw no merit in this argument. In the first place, the Plaintiffs should not have commenced any action against Dr Sim. As I stated in *Diora-Ace (No 1)*, the complaints in OS 392/2014 were of alleged breaches of the BMSMA committed by the MCST, and there was no basis to include Dr Sim as the second defendant. Even if the addition of Dr Sim was not wrongful, Dr Sim could not have defended the action on behalf of the MCST. The complaints were against the MCST, and the Plaintiffs should not have issued the Notice to stifle the MCST's legitimate defence.

32 For the same reason stated above, Mr Chang and Mr Heng should not have been added as defendants in the present action. The reliefs that the Plaintiffs sought were in relation to acts of the *council of the MCST*, and not of Mr Chang and Mr Heng in their personal capacities. There was thus no basis for the Plaintiffs to have commenced this action against them personally.

Conclusion

33 In the light of all the foregoing, I was of the opinion that the court should not exercise its discretion to assist the Plaintiffs in enforcing the Notice by granting the declaration or injunction sought. I therefore dismissed the Plaintiffs' application against all the Defendants. I also awarded the Defendants costs of $3,000, with disbursements to be agreed or taxed.