

Tan and Au Partnership v Management Corporation Strata Title Plan No 2625
[2004] SGHC 183

Case Number : MC Suit 12394/2002, RAS 16/2004

Decision Date : 23 August 2004

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Carolyn Tan Beng Hui (Tan and Au Partnership) for plaintiff; Ang Hsueh Ling Celeste and Yip Yung Keong Justin (Drew and Napier LLC) for defendant; Khoo Boo Jin (Wee Swee Teow and Co) for HDB

Parties : Tan and Au Partnership — Management Corporation Strata Title Plan No 2625

Land – Strata titles – Privatisation of HUDC estate – Law firm engaged by group of resident volunteers to handle legal aspects of privatisation – Absence of contract or agreement between law firm and management corporation – Whether management corporation under legal or statutory duty to pay legal fees directly to law firm – Sections 126(9), 126A(3) Land Titles (Strata) Act (Cap 158, 1999 Rev Ed)

23 August 2004

Woo Bih Li J:

Background

1 On 27 September 1996, Bedok Reservoir HUDC estate ("the Estate") was gazetted for privatisation. "HUDC" refers to the Housing and Urban Development Corporation. The meaning of privatisation and the steps involved were explained in an affidavit by Carolyn Tan Beng Hui, a partner of Tan & Au Partnership ("TAP"), a firm of solicitors who is the plaintiff in the action before me. TAP was formed as a result of a merger between Tan-Au Associates ("TAA") and Thomas Au & Lim ("TAL") on or about 10 February 2001. Ms Tan's affidavit was executed on 3 December 2003. She said:

B. GENERAL BACKGROUND INFORMATION ON THE PRIVATISATION OF HUDC ESTATES

6. "Privatisation" is the conversion of a HUDC estate into a private estate, whereby HDB lessees relinquish their status as HDB lessees and instead upgrade their status to become owners of private property. More specifically, it is the conversion of HDB leases into strata titles under the Land Titles (Strata) Act ("LTSA"). I have used the term HDB lessees and not HUDC lessees as the owners of HUDC properties come under the HDB Act and are lessees of property belonging to the HDB who are the landlords.

7. As these proceedings involve the privatisation of a HUDC Estate, I would like to briefly set out at this stage, what the privatisation process entails, in the form of a chart below:

	Procedure	Remarks

A	The HUDC Estate is designated by the Ministry of National Development ("MND") for privatisation. The MND had stated the cost to be S\$25,000 per household for HUDC estates under this phase.	The LTSA governs the privatisation exercise, in particular, Sections 126 and 126A.
B	A Protem Committee comprising of lessees in the designated Estate is formed.	These are volunteers doing community service for the estate.
C	Support is garnered from the lessees of the designated Estate to privatise.	This is carried out over a period of time. There is no time limit imposed by the HDB as landlord or under the LTSA.
D	Upon obtaining support from the lessees of at least 75% of the housing units in the estate, HDB will commence the privatisation process.	The lessees supporting the privatisation would execute "Consent Forms" (prescribed by the Registry of Land Titles). A mass-signing or "Voting" exercise is normally conducted to expedite the process of signature collection.

E	Upon the HDB's direction, the Strata Title application/ Transfer Instrument/ Strata Title Plan is lodged with the Registry of Land Titles at the Singapore Land Authority.	
F	The Subsidiary Strata Certificate of Titles are issued by Registry of Titles at the Singapore Land Authority, replacing the former HDB leases for the lessees.	Legal Completion of privatisation takes place
G	The newly formed MCST created by the lodgment of the Strata Title Plan is billed the costs of conversion (including legal, stamp and survey fees). The Management Corporation in return apportions the conversion costs amongst the flat units and recovers the apportioned conversion costs from the subsidiary proprietors by way of contributions levied on the subsidiary proprietors. The MCST also takes over the unexpended funds from the relevant Town Council which can range from a deficit to a surplus of more than [sic] a million dollars.	The subsidiary proprietors receive an Invoice from the MCST in consequence requiring payment of the conversion costs within a deadline. The MCST then receives payment of their invoice from the various subsidiary proprietors.

8. Although the Protem Committee is not a registered entity (such as a society or business), it has been given the duty and responsibility to represent the lessees and to appoint solicitors to act on behalf of the lessees. This is because it is impractical for the HDB to liaise with and obtain feedback from all the lessees. The HDB uses the Protem Committee as a communication channel between themselves, the Town Council and various other government

authorities.

9. At every stage of the privatisation process, the HDB takes an extremely active role, whether in terms of carrying out specific steps or in terms of advising the Protem Committee on the appropriate steps to take.

...

13. On 27 September 1996, the Estate was gazetted by the Government for privatisation. A copy of the Government Gazette notification hereto and marked, "CT-2".

...

16. The Estate was privatised on 1 February 2002 and is now known as the Waterfront View Condominium.

D. THE ROLE OF THE PROTEM COMMITTEE

17. Based on the Information Package from the HDB, the role of the Protem Committee was to *inter alia*:

- (a) act as the flat owners' representatives in the privatisation process;
- (b) inform the HDB and other relevant authorities of the flat owners' views on the privatisation process;
- (c) keep flat owners informed of the activities and progress of the privatisation;
- (d) appoint a firm of solicitors to advise the Protem Committee, and to handle all the legal aspects of the privatisation process;
- (e) liaise with HDB and other organisations, such as the Town Council, on [issues] related to the privatisation; and
- (f) to garner the support of at least 75% of the flat owners for privatisation.

18. The Protem Committee was at all times a group of resident volunteers set up to co-ordinate the privatisation process and liaise with the flat owners of the Estate. ...

...

21. The composition of the Protem Committee was continually in a flux, as the members who left (whether due to work commitments or due to the fact that they moved out of the Estate) would generally be replaced by new members.

C. THE TERMS OF TAA'S RETAINER IN 1998/ QUANTUM OF LEGAL FEES

22. On or about mid December 1997, Mr Adrian Tang ("Adrian") and Ms Jeanie Hoon ("Jeanie"), who were members of the Protem Committee for the Estate, approached TAA to give the Protem Committee a quotation of TAA's legal fees for handling the legal aspects of privatisation. ...

23. After this meeting and after some bargaining and negotiations via telephone and correspondence, TAA finally gave a quotation to the Protem Committee by way of a letter dated 5 January 1998 ("Retainer Agreement"). Thereafter, the Protem Committee replied on the same day confirming the appointment of TAA.

24. It is significant that the letter confirming TAA's appointment was copied to the HDB's Ms Ong Gan Bee Ghee, the Head of the Special Projects Unit at HDB. ...

2 Upon privatisation, TAP sent a bill dated 1 February 2002 for \$197,911.31 being its fee and disbursements in the privatisation exercise. The bill was addressed to the defendant who is the Management Corporation Strata Title Plan No 2625 ("the MCST"). TAP claimed \$47,634.64 being the balance payable under their bill but the MCST refused to pay the same for a number of reasons. One of the reasons was that the MCST was not the correct party who was liable to pay TAP. As a consequence, TAP filed a writ of summons in the Subordinate Courts. The writ was filed on 13 May 2002 as Magistrate's Court Suit No 12394 of 2002. The parties eventually agreed that the following be tried as a preliminary question or issue:

Whether, in the absence of contract or any other agreement between the Plaintiffs and the Defendant, the Defendant is the proper party legally obliged and/or under a statutory duty to pay the sum claimed by the Plaintiffs under Section 126(9), Section 126A(3) of the Land Titles (Strata) Act (Cap 158).

3 TAP's application for a preliminary issue to be tried was heard on 29 December 2003 by a deputy registrar who ruled that in the absence of contract or any other agreement between the parties, the MCST was not legally obliged, and/or under a statutory duty, to pay the sum claimed under s 126(9) or s 126A(3) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("the Act"). The deputy registrar also made consequential orders for, *inter alia*, the amendment of the statement of claim and costs.

4 TAP filed a notice of appeal to a district judge in chambers. TAP's appeal was heard on 25 February 2003. On 1 March 2003, the district judge allowed TAP's appeal and awarded costs of the appeal to TAP. In allowing the appeal, the district judge answered the preliminary issue in the affirmative.

5 The MCST then filed a notice of appeal to a judge of the High Court in chambers. The MCST's appeal was heard by me. After hearing submissions from the parties as well as from the Housing and Development Board ("HDB"), I dismissed the MCST's appeal with costs. In so doing, I was of the view that notwithstanding the absence of contract or any other agreement between the parties, the MCST was legally obliged and under a statutory duty to pay the sum claimed by TAP under s 126(9) but not under s 126A(3) of the Act. I set out below the arguments and my reasons.

6 Although the preliminary issue concerned ss 126(9) and 126A(3) of the Act, I first set out below other provisions as well for a better appreciation of these two provisions. Sections 126(9) and 126A(1)(a), (2), (3) and (4) of the Act state:

126. (9) Upon the registration of the strata title plan, the management corporation of the parcel of land shall reimburse the person or persons who incurred any expenditure for the purpose of —

(a) applying for the issue of subsidiary strata certificates of title for all those flats comprised in a building or buildings erected on the parcel;

- (b) lodging the transfer under subsection (1);
- (c) the preparation of the strata title plan for the parcel;
- (d) the publication of the notices referred to in subsection (6)(a); and
- (e) issuing notices to the proprietors of the flats under subsection (6)(b).

Application of section 126 to land vested in Housing and Development Board and HUDC dwellings

126A.—(1) In the application of section 126 to any designated land which is vested in the Housing and Development Board —

- (a) any reference therein to the registered proprietor of the land shall be read as a reference to the Board;

...

(2) In addition to its duties specified in section 126(9) and (10), the management corporation for any estate or interest in land transferred by the Board under an application under section 126(1) shall pay to the Board —

- (a) the cost of any estate or interest in land which was the subject of such transfer; and
- (b) the cost of any work carried out by the Board in accordance with the directions of any other public authority prior to such transfer.

(3) The management corporation for any land transferred by the Board pursuant to an application under section 126(1) shall, under a written demand by the Board to pay the costs referred to in subsection (2) or any part thereof and the expenses referred to in section 126(9), pay to the Board not later than 30 days of notice of the written demand those costs or that part thereof and those expenses.

(4) If the costs or expenses referred to in subsection (3) are not paid by the management corporation on the date due, the management corporation shall be liable to pay interest in accordance with the rate specified by the Minister charged with the responsibility for national development, such interest, if unpaid, to constitute a debt due to the Board and recoverable as such.

The arguments

7 The MCST made various arguments. First, it argued that the reference to reimbursement of persons who “incurred any expenditure” in s 126(9) was directed at persons who were claiming reimbursement after having incurred expenditure in paying someone who had provided services. Section 126(9) did not make the MCST liable to pay the service provider itself. Furthermore, “expenditure” did not imply an element of profit. Following from this argument, the MCST’s position was that TAP should obtain payment from the persons whom TAP contracted with and such persons would then seek reimbursement from the MCST. However, if a lessee were to engage TAP to do the work stated in s 126(9) on an individual basis, the lessee could not claim against the MCST unless the work was done for the entire estate.

8 The MCST argued that when a party contracting with solicitors for a privatisation exercise sought to claim reimbursement from the MCST, the MCST would surely be entitled to raise an issue as to whether such an expenditure was properly incurred.

9 The MCST further argued that if it were obliged to pay TAP directly, this would leave it open to claims under contracts which it was not privy to and had no control over, and this would deprive it of the protection afforded to it to question whether the expenditure was properly incurred.

10 The MCST did not dispute that invoices had been sent to subsidiary proprietors for payment of various items connected with the privatisation exercise. The items included legal fees and the quantum of the legal fees payable by the subsidiary proprietors of each unit as was charged by TAP, and included TAP's disbursements. However, the MCST stressed that while some payments had been received pursuant to these invoices, it was not the council of the MCST which had sent the invoices but the then managing agents, PREMAS International Limited ("PREMAS"), and this was done before the council for the MCST was elected. The council for the MCST was first elected only on 4 May 2002 after the HDB had convened the first Annual General Meeting of subsidiary proprietors pursuant to the Act. From the time the Estate was privatised on 1 February 2002 until 4 May 2002, PREMAS was the managing agent appointed by HDB.

11 The MCST also did not dispute that part payments of TAP's bill had been made but the MCST also stressed that such payments had been made by PREMAS and not the council.

12 The MCST further pointed out, by analogy, that third party surveyors for the privatisation exercise were paid by HDB and HDB would then claim back the fees of such surveyors from the MCST. The MCST also relied on a page from one of the information packages supplied by HDB which stated that HDB would bill the costs (of the privatisation exercise) to the management corporation. I will come back to this point later.

13 As for s 126A(3) of the Act, the MCST argued that this provision obliged it only to make payment to the HDB.

14 The MCST further argued that as s 126A of the Act was to apply to land vested in HDB, any reimbursement of expenditure would be governed by s 126A and not s 126. The cleanest solution was for TAP to make its claim against HDB, and for HDB to pay out of its own pocket first, and then claim the amount from the MCST. The MCST's counsel went on to suggest that if it was successful in its appeal, it would be seeking repayment from TAP of whatever had already been paid to it in respect of its bill. The MCST would then pay the moneys to HDB when HDB makes a demand on the MCST for payment of the bill. Counsel was not certain whether the MCST was prepared to short-circuit the process in that if HDB gave a letter of demand to the MCST for payment, the MCST would assume that payment had been made through the HDB to TAP and thereby, would not require repayment from TAP.

15 On the other hand, TAP argued that it could not charge what it liked. It had to submit a draft bill for HDB's approval first. After approval had been given, TAP then engrossed and sent the bill. It believed that after its draft bill was approved, PREMAS then prepared and sent invoices to subsidiary proprietors to claim for payment of various items, including legal fees, as I have mentioned above. The subsidiary proprietors would pay the MCST and the MCST could either pay HDB, with HDB then forwarding the payment to TAP, or HDB would ask TAP to address the bill directly to the MCST. The latter was done in the present case. TAP argued that HDB had never departed from this practice and other management corporations had paid TAP directly. I would add that TAP had acted in privatisation exercises in respect of some other HUDC estates as well.

16 As for the meaning of the word "reimburse", TAP submitted that it was not confined to a situation where the claimant was already out of pocket first. It relied on *The Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press, 3rd Ed) which defined "reimburse" at vol 2, p 1784 as:

1. To repay or make up to a person (a sum expended).
2. To repay, recompense (a person) ...

In turn, "recompense" was defined in the same dictionary at vol 2, p 1765 as:

4. Compensation or return for trouble, exertion, services or merit ...

The word "expenditure" was defined at vol 1, p 705 as:

1. The action or practice of expending; disbursement; consumption ...

The word "expend" was defined at vol 1, p 705 as:

1. ... To pay away, lay out, spend (money)

The word "expense" was defined at vol 1, p 705 as:

3. Burden of expenditure; ... b. In pl esp.: 'Money out of pocket', or its reimbursement ...

17 TAP argued that where two interpretations were possible, one of which would frustrate the intention of the legislature and the other would smoothly implement the scheme under the legislation, the latter should be preferred.

18 TAP also mentioned that, in fact, invoices had been sent to subsidiary proprietors for payment of various items, including legal fees, associated with the privatisation exercise and TAP had received part payments on its bill, although this was done by PREMAS as the managing agent.

19 Pursuant to my direction to TAP to inquire of the HDB as to whether the HDB would wish to be heard at the next hearing date before me, the HDB did file an affidavit by Ong-Gan Bee Ghee, the Head, Special Projects Unit of HDB. Her affidavit stated:

4. The billing from HDB for the privatised Phases III/IV HUDC estates is for costs incurred by HDB for the conversion of the existing HDB leases to strata titles. So far the billing has been in 2 parts.

5. The first bill comprises the cost of the transfer of the common property, stamp duty for the transfer of the common property, survey fees payable to the land surveyor, submission/processing fees for surveying works and lodgement of transfer of the land.

6. The second bill is essentially for works carried out to obtain the Certificate of Statutory Completion. This comprises the construction costs for the works in the estate to meet the barrier free requirements and the professional fees for consultants (comprising architects, engineers, accredited checkers, etc) and the processing fees for the various plan submissions.

7. The above costs are claimable by the HDB pursuant to section 126A(3) of the Act. The works have to be carried out for the leases to be converted to strata title.

8. HDB had engaged land surveyors to carry out land and strata subdivision and prepare Strata Title Plan for the privatisation of HUDC estates. Hence, HDB paid the survey fees & related processing fees charged by the relevant authorities such as the SLA, etc.

9. With regard to the legal fees of the private solicitors, it is the usual practice in our privatisation exercise for the private solicitors to collect the fees directly from the MCST. The legal fees are for works the solicitors undertake and carry out for and on behalf of the flat owners in the privatisation exercise. This has been the practice adopted by HDB in privatisation exercises involving Phases III & IV HUDC estates.

20 Although this affidavit did not specifically state that the Estate was a Phase III or IV HUDC estate, it was not disputed that the Estate was a Phase III or IV HUDC estate.

21 However, the affidavit of Ms Ong-Gan also did not make it clear whether private solicitors acting in a privatisation exercise are engaged by HDB and, if so engaged by HDB, whether private solicitors' bills are usually covered by the first bill from HDB under the cost of the transfer of the common property. The affidavit also did not elaborate as to whom HDB's bills are addressed, *ie*, to the management corporation or to the subsidiary proprietors individually. Unfortunately, her affidavit also did not elaborate why private solicitors are to collect their fees directly from the management corporation but land surveyors are paid directly by HDB. It seemed to me that her affidavit was suggesting that private solicitors are engaged by HDB but, in practice, these solicitors will collect their fees directly from the management corporation. I say this because her affidavit did not specifically say that private solicitors are engaged by the Protam Committee. Perhaps the situation varied from one privatisation exercise to another.

22 At the next hearing before me, HDB also provided an explanatory statement which was treated as its submission. In its explanatory statement, HDB opined that ss 126A(3) and (4) are to assist HDB, and only HDB, to obtain prompt payment. These provisions have no application to costs and expenses incurred by other parties who would nevertheless be entitled to reimbursement from the management corporation under s 126(9) of the Act. In the opinion of HDB, the legal fees of private solicitors should be reimbursed by the management corporation under s 126(9). As the work of the private solicitors are for and on behalf of the lessees, the lessees are the ones ultimately liable to pay the legal fees, through the management corporation.

23 It was not in dispute that the lessees are ultimately liable to pay the legal fees of private solicitors. However, the explanatory statement did not elaborate on why private solicitors would have to claim their fees from the management corporation but land surveyors need not when, from information packages provided by HDB, the lessees are also ultimately liable to pay land survey fees.

24 Notwithstanding the lack of clarity as to the reason why the mechanics of payment of legal fees and survey fees are different, the issue before me remained, *ie*, whether the MCST was liable to pay TAP's bill under s 126(9) and/or s 126A(3) of the Act in the absence of any contract or agreement between TAP and the MCST.

The court's reasons

25 I will deal with s 126A(3) first. I was of the view that this provision did not assist TAP on the present facts. If HDB had paid TAP and then sought reimbursement from the MCST, s 126A(3) would apply. Even if HDB had not yet paid TAP but were under a legal obligation to pay them, it was likely that HDB would still be able to claim payment from the MCST under s 126A(3). However, in either scenario, HDB would have to make a written demand on the MCST for payment before s 126A(3)

kicked in.

26 The question, therefore, was whether the MCST was liable to pay TAP directly under s 126(9).

27 Although TAP and HDB took the position that TAP could claim payment direct from the MCST, a page from one of the information packages supplied by HDB suggested otherwise and, as I have mentioned, the MCST relied on this page. This page stated:

PAYMENT

HDB will bill the costs to the MC upon registration of the STP.

MC to recover costs from the subsidiary proprietors by way of contributions.

The costs payable by CPF monies are:

- i) carpark costs; and
- ii) survey/legal costs

This page suggested that HDB would claim the legal and other costs of a privatisation exercise from the management corporation and appeared to support the MCST's contention that it was for HDB to claim the legal costs from the MCST and not TAP.

28 However, I noted that the information package is not part of the legislation. Furthermore, it did not prohibit HDB from asking solicitors to direct their bills and claim payment directly from the management corporation. It seemed to me that HDB had initially contemplated that it would claim all costs of a privatisation exercise from the management corporation but subsequently decided that legal costs should be claimed by private solicitors directly from the management corporation.

29 After careful consideration, I was of the view that the other arguments of the MCST were without merit.

30 As regards the MCST's argument that it could question whether the expenditure was properly incurred before paying the party who had contracted with TAP, I was of the view that if the MCST had a right to question that party, then likewise, it would also have the right to question TAP. After all, it would also not have a contract with the party who had contracted with TAP. Furthermore, no one was suggesting that the MCST would have to close its eyes and pay TAP blindly. The issue before me was whether the MCST was liable to pay in the absence of a direct contractual relationship, assuming that there was no other reason to deny payment.

31 Also, as it was the Protem Committee which engaged TAP, the MCST's argument meant that the Protem Committee would have to pay TAP first. Yet where would the Protem Committee get the money from? Were the individual members of the Protem Committee supposed to pay from their own pockets first?

32 Likewise, I did not agree that the cleanest solution was for TAP to claim payment from HDB and then for HDB to claim reimbursement from the MCST. That was one mechanism but not the only one, and not necessarily the cleanest one. It would entail HDB being out of pocket first. It made sense to me that private solicitors should be able to claim directly from the management corporation.

33 As for the terms of s 126(9) of the Act, I was of the view that it was not well-drafted. The reference to reimbursement of persons who incurred any expenditure would commonly be taken to mean the payment to someone who has already incurred an expenditure but not payment to the service provider itself. Nevertheless, I accepted TAP's argument that this was not its only meaning and it could mean the payment to the service provider. Furthermore, TAP would have incurred disbursements which would, in any event, be covered by the MCST's interpretation of the reimbursement of persons who have incurred expenditure. If the MCST's interpretation were correct, this would mean that the MCST is liable to pay TAP's disbursements but not its fees which had to be claimed through the Protem Committee or HDB. In my view, such an absurd result could not have been intended by Parliament.

34 It also seemed to me that the purpose of the scheme under s 126(9) was to facilitate payment, whether it be payment to the person who incurred the stipulated expenses and/or engaged the service provider, or payment to the service provider itself. Accordingly, in my view, this purposive interpretation was the correct one.

35 I did not agree with the MCST's argument that because the land on which the Estate stood was HDB land, s 126A applied to the exclusion of s 126. In my view, s 126A was meant to apply the provisions of s 126 to HDB land upon the undertaking of a privatisation exercise and not to exclude s 126.

36 As mentioned in [5] above, I dismissed the MCST's appeal with costs.

Appeal dismissed.