BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT

BUILDING MAINTENANCE AND STRATA MANAGEMENT (STRATA TITLES BOARDS) REGULATIONS 2005

STB No.2 of 2020

In the matter of an application under **section 101(1)(c)** of the Building Maintenance and Strata Management Act in respect of the development known as **Bukit Timah Plaza/Sherwood Towers** MCST No.568)

Between

1. Lai Yew Sin

2. Chua Boon Keng

... Applicants

And

The MCST Plan No. 568

… Respondent

GROUNDS OF DECISION

BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT

BUILDING MAINTENANCE AND STRATA MANAGEMENT (STRATA TITLES BOARDS) REGULATIONS 2005

STB No.2 of 2020

In the matter of an application under **section 101(1)(c)** of the Building Maintenance and Strata Management Act in respect of the development known as **Bukit Timah Plaza/Sherwood Towers** MCST No.568)

Between

1. Lai Yew Sin
2. Chua Boon Keng

... Applicants

And

The MCST 568

… Respondent

2 July 2020
8 October 2020

Coram:	Mr Alfonso Ang	(President)
	Mr Lawrence Ang	(Member)
	Mr Frankie Chia	(Member)

Background Facts

1. Lai Yew Sin and Chua Boon Keng ("**the Applicants**") are the subsidiary proprietors ("**SPs**") of a unit in the apartment development known as Bukit Timah Plaza/Sherwood Towers ("**the Development**"). The Respondent is the Management Corporation Strata Title Plan No. 586 ("**the MCST**"). On 31 December 2019, the Applicants filed the present application against the Respondent.

2. On 31 July 2010, the 28th Annual General Meeting ("**28th AGM**") was held and a special resolution passed. Th special resolution empowered the Respondent to look into concepts and plans to replace the existing inefficient air-conditioning plants and related equipment proposed and recommended by Equation Energy Pte Ltd ("**EEPL**"), an accredited energy services company, and also to enter into contract with EEPL for a fixed lump sum of S$1,630,000.00 excluding GST, and a further 10% as contingency sum.

3. On 1 June 2011, the Respondent entered into a contract with EEPL and the terms of the contract for the payment of the S$1,630,000.00 were as follows:

   a. 5% would be paid by the Respondent to EEPL on the signing of the contract;
   b. 25% would be paid by the Respondent to EEPL on the confirmation of award for chiller units; and
   c. 70% would be borne upfront by EEPL but recoverable from the Respondent from the monthly energy savings, if any, for the maximum period of 6.7 years.

4. During the assessment to obtain the cooling load for the air-conditioning system, a bottle-neck was discovered at a section of the chilled water pipes at basement 2 of the building which affected the flow of chilled water. The Respondent then spent S$59,000.00 to urgently rectify this problem so as to allow for the smooth and efficient running of the replacement air-conditioning systems upon completion.

5. The contract for the replacement of air-conditioning and related equipment were carried out in January 2012 and completed in March 2012, with average energy savings of more than S$200,000.00 per year.

6. On 15 January 2020, the Applicants commenced proceedings against the Respondent.

Orders Sought by the Applicants

7. The Applicants are seeking the following orders:

   a. That the Respondent be held liable for "failure in performing best practices and acting in the best interests of the estate" in awarding the contract for the replacement of air-conditioning and related equipment to the sole vender EEPL;

b. That the Respondent be held liable for professional misconduct in:
   i. Material misstatement on entry of wrong item in account code;
   ii. Illegal alteration of past audited report without declaration; and
c. That a committee of inquiry be convened to investigate for civil and possible criminal charges.

The Applicants' Case

8. The Applicants' case is that the Respondent failed to perform their duties by awarding the contract for the replacement of the inefficient air-conditioning plants to the sole vendor, EEPL, on 31 July 2010 on the basis EEPL was green mark certified and provided financing without calling for the tender for other vendors.

9. The Applicants questioned the need for the tender of chiller units, which was awarded to Johnson Controls (S) Pte. Ltd in November 2011, when EEPL was already hired to carry out the air-conditioning replacement. They further questioned why there was no amount disclosed for the chiller units.

10. The Applicants also questioned the need for another tender for replacement of chilled water pipes at basement 2 of the plaza, which was awarded to Aim Aircon Engineering Pte Ltd on October 2011 that led to a further incurrence of S$59,000.00.

11. The Applicants submitted that the Respondent had withheld documents relating to the irregularities in the hiring of EEL.

12. The Applicants further submitted that the auditor had amended the 2018 Audit Report to include a new classification "Energy Saving" and that these amendments were made without the approval of the SPs at the 36th Annual General Meeting ("**36th AGM**").

13. The Applicants requested that the Respondent hold the managing agent (M/s Knight Frank Property Asset Management Pte Ltd), auditing firm (M/s Tan, Chan & Partners) and law firm (M/s Lee & Lee) liable for failure in performing their professional duties and acting in the best interests of the estate.

14. The Applicants also requested that the Respondent convene a committee of inquiry to investigate for possible civil and criminal charges.

The Respondent's Case

15. The Respondent submitted that at the 28th AGM, the general body was informed of the various vendors that the Respondent approached and that they were either unable to provide financing or the green mark certification. An overwhelming majority of 99.26% of the SPs voted in favor of EEPL. This was reflected in the minutes of meeting.

16. The Respondent submitted that EEPL is an accredited energy service company and not a specialist equipment manufacturer or supplier and therefore there was a need to tender for the supply of chiller units which was awarded to Johnson Controls (S) Pte. Ltd. Further, as the supply of the chiller units was part of the scope of EEPL's obligations in the contract, it was EEPL's obligation to purchase and supply the chiller units. No additional costs were incurred as the costs of the chiller units were already included in the EEPL contract.

17. The Respondent argued that a bottleneck was discovered at a section of the chilled water pipers at basement 2 of the building which will affect the flow of chilled water. The changing or renewing of the entire chilled water pipe network in the building is not included in the scope of work set out in the EEPL contract. Therefore, a tender had to be called for urgent rectification and the tender was awarded to Aim Aircon Control.

18. The Respondent argued that there is no evidence that it had withheld any documents from the Applicants and that the Applicants' requests for documents had been acceded to.

19. The Respondent argued that during the 36th AGM, the auditor had already explained to the Applicants that the financial statements conformed to the standards of the International Financial Reporting Standards ("**IFRS**"). The "Energy Savings" category was created to address the Applicants' queries in the previous years which they, however, now find fault with.

20. The Respondent submitted that there is no evidence or proof to the Applicants' case. There was no improper conduct on the part of the Respondent, managing agent, auditor and solicitors and that the Applicants' case is nothing more other than mere suspicion and speculation.

21. The Respondent argued that the Applicants have confused merits/wisdom with legality. The Respondent also submitted that the Board should look at the legality of decisions made and whether the provisions of the Building Maintenance and Strata Management Act (Cap. 30C, 2008 Rev. Ed.) ("**BMSMA**") have been complied with. Where the Respondent had complied with the provisions of the BMSMA with no illegality found in the decision(s), the Board will not and should not enquire into the merits and wisdom of the decision as it is for the SPs of every MCST to decide how they want their development to be run.

22. The Respondent argued that the section 101(1)(c) of the BMSMA does not provide it with any power to grant the orders sought by the Applicants, where the Applicants wanted the Respondent to hold third parties (the managing agent, auditing firm and law firm) liable for professional misconduct especially when there is no evidence of impropriety. In the same vein, the Respondent also has no power in the section 101(1)(c) of the BMSMA to convene a committee of inquiry to investigate for civil or possible criminal charges.

23. The Respondent further submitted that apart from the claims relating to the auditor's classification of "energy savings" in the audited accounts, all the other potential claims the Applicants are seeking are time barred pursuant to section 6 of the Limitation Act (Cap. 163, 1996 Rev. Ed.) ("**Limitation Act**").

24. The Respondent concluded that by virtue of the above reasons, the application should be dismissed with costs.

The Board's Decision

Awarding of contract to EEPL on 31 July 2010

25. One of the contentions that the Applicants had was the managing agent's typographical error in the exemplary note to the proposed EEPL project where electricity savings were stated to be S$200,000.00 per month instead of S$200,000.00 per year during the 28th AGM on 31 July 2010. This was undisputed. The Applicants contended that the typographical error had "*affected the decisions of the SPs not present at the 28th AGM*"[1] and had "*significant*

[1] Paragraph 1 on page 2 of Applicant's Submissions.

ramification".[2] The Applicants also took issue that there was no open tender for other vendors and that the Respondent had "*pre-decided prior*"[3] to choose EEPL for the project.

26. As evidenced in the minutes of the 28th AGM, the management agent had informed the members present of the typographical error at the start of the meeting before the members casted their votes. Therefore, it cannot be said that the members voted without taking the typographical error into consideration.

27. Contrary to the Applicants' contentions, the Board finds that the Respondent had exercised due diligence and had approached four other vendors for the project.[4] Further, the members present at the 28th AGM were informed, before casting their votes, that the other vendors were either not green mark certified or not able to provide financing.[5] Therefore, it is not the case that EEPL was the "sole vendor" as what the Applicants had contended.

28. Based on the evidence presented before the Board, the Board is of the view that the vote to award the contract to EEPL was an informed decision by the Development's members at the 28th AGM and there was no misconduct on the part of the Respondent in awarding the contract to EEPL. The Board also agrees with the Respondent that what was extremely surprising was that the Applicants had not questioned the lack of a tender at the first opportunity during the 28th AGM and that it is only after ten (10) years that they decide to commence this proceeding.[6]

Tender for chiller units and chilled water pipes

29. The Board did not find anything untoward with respect to the tender for the chiller units and chilled water pipes by the Respondent.

Withholding and alleged illegal alteration of documents

30. The Applicants submitted that the Respondent had intentionally "withheld key documents"[7] in relation to the "*potential corrupt practices*"[8] in awarding of the air-conditioning replacement contract to EEPL. From the evidence presented, the Board finds that the Respondent had acted promptly and acceded to the Applicants' requests for the documents. In fact, the Applicants, at the hearing, said that they had inspected all the documents that were requested from the Respondents.

---

[2] *Ibid*.
[3] *Ibid*.
[4] Page 33 (Exhibit CYP-1) of Chan's Affidavit of Evidence in Chief ("**AEIC**").
[5] Paragraph 12 of Chan's AEIC.
[6] Paragraph 31 of Respondent's Submissions.
[7] Paragraph 3(a) of Lai's AEIC.
[8] Section D of Lai's Form 8.

31. In relation to the audit reports, the Board is of the view that it is not in the position to comment on the accuracy of its presentation as it is not within the Board's expertise. The Board was informed by the Applicants at the hearing that they had reported the matter to the police and the matter was referred to the Institute of Singapore Chartered Accounts ("ISCA"). As such, the Board will leave the investigation, if any, of this matter to the relevant authorities.

Respondent to hold the managing agent, auditing firm and law firm liable

32. The Applicants in their application on 31 December 2019 sought for the Board under section 101(c) of the BMSMA to make the Management Corporation hold the managing agent and auditor liable for "*professional misconduct and possible corrupt practices*".[9] In their AEIC, they sought for the Board to hold the management council, managing agent, auditing firm and law firm liable for failure in performing their duties. In their submissions, the Applicants changed the orders once again, asking the Board to hold the Management Corporation, which now consists of "*Members of the Council, Management Agent, Legal Advisor, and Auditor*"[10] as a collective body, liable for "*failure in performing best practices and acting in the best interests of the estate*"[11] and to convene a committee of enquiry.

33. The Board agrees with the Respondent's submissions that there is no power, duty or function imposed on the Respondent by the BMSMA to hold third parties liable for any unsubstantiated allegations of impropriety nor convene a committee of inquiry.[12]

34. The Board also agrees with the Respondent's submission that pursuant to section 85(1A)(a) of the BMSMA, "*unless authorized by an ordinary resolution, a management corporation must not institute any proceedings against any person*".[13] There was no ordinary resolution passed or proposed by the Applicants to make the Respondent hold the management agent and auditor liable and as such the Respondent is not in breach of the BMSMA by not taking action against the management agent, auditor and solicitors.

35. Further, the Board is also of the view that the Applicants are cherry-picking sections from the BMSMA in an attempt to fit the orders they are seeking, which were not the original orders they had sought for in their Form 8 application. As mentioned at paragraph 32 above, the Applicants had attempted to change the orders thrice during the course of this proceeding. The Board is of the view that the Applicants are doing this as an attempt to circumvent section 85(1A)(a) of the BMSMA so that they

[9] Lai's Form 8, Section D.
[10] Paragraph 1 on page 1 of Lai's Submissions.
[11] *Ibid*.
[12] Paragraph 20 of Respondent's Submissions.
[13] Section 85(1A)(a) of BMSMA.

can hold the management agent, auditor and solicitors liable as a collective body under the Management Corporation without the need to hold an ordinary resolution. Any complaints against the auditor and solicitors should be sought with the respective relevant bodies and not the Board.

Section 6 of the Limitation Act

36. The Board agrees with the Respondent's submission[14] that apart from the Applicants' complaints about the auditor's classification of energy savings in the audited accounts, all other complaints regarding the contracts for the replacement of the air-conditioning and other related equipment are time-barred pursuant to section 6 of the Limitation Act.[15]

37. Section 6 of the Limitation Act provides as follows:

> *"**6**. – (1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:*
>
> *(a) actions founded on a contract or on tort;*
>
> *(b) actions to enforce a recognizance;*
>
> *(c) actions to enforce an award;*
>
> *(d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or sum by way of penalty or forfeiture."*

38. From the evidence, the contract with EEPL was signed on 1 June 2011 and completed on 3 December 2012. The contract for the chiller plants was awarded to Johnson controls (S) Pte. Ltd. in November 2011 and the contract for the replacement of a section of the chilled water pipes was awarded to Aim Aircon Engineering Pte. Ltd. The whole project to replace the inefficient air-conditioning plants and other related equipment concluded on or around December 2012. All these contracts were concluded more than 6 years ago and are, hence, time-barred from any action pursuant to section 6(1)(a) of the Limitation Act.

Subpoena of witnesses

39. At the conclusion of the Respondent's case, the Applicants applied to subpoena the following persons to give evidence:-

a. Lew Soon Poh, Council member;
b. Eleana Teo, Management Agent from Knight Frank;

[14] Paragraph 27 of Respondent's Submissions.
[15] Section 6 of Limitation Act.

c. Irene Fong, from Knight Frank;

d. Celeste Tee, former employee from Knight Frank;

e. Auditor from Tan Chan & Partners, former auditors for the Respondent; and

f. Toh Kok Seng, legal advisor and solicitor from Lee & Lee for the Respondent.

40. The Board had rejected the application for the subpoenas. The proposed witnesses are not relevant to the issues before the Board and would merely cause unnecessary inconvenience to them.

THE BOARD'S ORDER

41. The Board finds that the application is without merits in law and in fact. The application is dismissed.

42. The Board will hear the Applicants on the issue of costs on 21 October 2020 at 10am.

Dated this 8th day of October 2020

MR ALFONSO ANG
President

MR LAWRENCE ANG
Member

MR FRANKIE CHIA
Member

Applicants (in person)

Mr Toh Kok Seng (M/s Lee & Lee) for the Respondent