

BUILDING MAINTENANCE AND STRATA MANAGEMENT ACT

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

STB No. 69 of 2009

In the matter of an application under section 101 and 113 of the Building Maintenance and Strata Management Act in respect of the development known as Yong An Park (MCST No. 1267)

Between

Yap Sing Lee

... Applicant

And

- 1) The MCST Plan No. 1267(Yong An Park)
- 2) Knight Frank Estate Management Pte Ltd

... Respondent

Coram: Mr TAN LIAN KER
President

Panel Members: Mrs TAN SOOK YEE
Mr RICHARD TAN MING KIRK

Counsel: Mr Kenneth Tan S.C. (Kenneth Tan Partnership) for the First
Respondent

GROUND OF DECISION

1. In this application, the Applicant sought from the Board 7 wide-ranging orders for the Respondents to, among other things, make available to him all documents that are in their custody pursuant to section 113 of the Building Maintenance and Strata Management Act (“BMSMA”).

2. The Applicant is the subsidiary proprietor of a penthouse unit in Yong An Park while the 1st Respondent is the management corporation and the 2nd Respondent is the managing agent of Yong An Park.

3. On the first day of the hearing, the 1st Respondent confirmed that the 2nd Respondent was acting under the directions of the 1st Respondent on the matters concerned and had not been delegated any powers pursuant to section 67 of the BMSMA. Following that, the Applicant's application against the 2nd Respondent was withdrawn without any objections from the parties and with no order as to costs.

Facts

4. The Applicant has a number of differences with the 1st Respondent. Just to mention two: one concerned its refusal to approve his proposal to carry out alterations and additions to enclose the roof terrace of his penthouse and another involved certain alterations and additions made by the Applicant without the approval of the 1st Respondent.

5. Using the right given to him under section 47(1) of the BMSMA, the Applicant made a number of applications to inspect a wide range of documents including minutes of council and sub-committee meetings of the management corporation and correspondence between 1st Respondent and its lawyers. Suffice to say, the Applicant was not given prompt and complete access to inspect all the documents requested and it resulted in him sending repeated reminders and eventually filing this application against the Respondents.

6. Despite two attempts at mediation by the Board, the parties could not reach any settlement and the matter proceeded for hearing. During the cross examination of the Applicant on the first day of the hearing, the 1st Respondent's counsel mentioned that the 1st Respondent had sent a letter dated 5 March 2010 (the last working day before the hearing) informing the Applicant that he may inspect all the documents requested save for a few documents for which legal professional privilege was being claimed. The Applicant had not yet received this letter but in view of this and following a suggestion of the Board, the Applicant and the 1st Respondent were able to subsequently agree that the Board need only determine whether to order the inspection of the 4 remaining items in dispute.

7. These were:

- (a) The redacted portion of the Council minutes of the 4th Council Meeting held on 15 September 2009;
- (b) The redacted portion of the Council minutes of the 5th Council Meeting held on 27 October 2009;
- (c) The redacted portion of the recommendations of the Legal Sub Committee referred to in the draft council minutes of the 3rd Council Meeting held on 21 July 2009; and
- (d) The legal advice given to the MCST by its lawyers on the MCST's claims/potential claims against Ponda (of 333 #XXX), Karim (of 329 #XXX) and Yap (of 327 #XXX).

8. The hearing was then adjourned to 26 April 2010 to enable the Applicant and 1st Respondent to submit their written arguments and address the Board on their submissions. Although the Applicant, in paragraph 34 of the Applicant's Reply to 1st Respondent's Submission, said the Applicant never withdrew any of the original orders sought by the Applicant, the Applicant conceded during his oral submission that he had agreed that the Board need only determine the 4 remaining items in paragraph 7 above. Therefore, the hearing proceeded on that basis.

Applicant's Arguments

9. The Applicant acknowledged that the law provides for legal professional privilege. However, he maintained that the 1st Respondent was not entitled to claim legal professional privilege.

10. The Applicant relied on a literal interpretation of section 47(1) of the BMSMA. The section required the management corporation, upon the written application of a limited category of persons including a subsidiary proprietor, to make available for inspection, among other things, all minutes of the council and "any other record or document in the custody or under the control of the management corporation". This would cover all the 4 documents for which the 1st Respondent was claiming legal professional privilege.

11. The Applicant also referred to the case of *Re The Estoril (Strata Titles Plan No. 843)* [1991] SGSTB 3 ("*The Estoril*") where the Board there was of the view that the MCST there was obliged to disclose the entire minutes, including a redacted portion that was the subject of a claim of legal professional privilege, under an equivalent inspection provision of the law.

12. In addition, the Applicant relied on paragraph 199 of the Court of Appeal's decision in *Ng Eng Ghee and others v Mamata Kaplidev Dev and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR 109 (the "*Horizon Towers case*") to support his contention that the management corporation is not entitled to claim legal professional privilege against a subsidiary proprietor.

13. The Applicant also argued that the 1st Respondent had failed to show that any of the documents concerned were protected by litigation privilege because the 1st Respondent's litigation against one Ponda was settled and there was also no pending or contemplated litigation against one Karim or the Applicant.

Respondent's Arguments

14. Counsel for the 1st Respondent argued that the 1st Respondent was entitled to legal professional privilege in respect of the 4 remaining items because it is a substantive right that may be asserted in answer to any demand for documents and the right is not restricted to legal proceedings.

15. The 1st Respondent's counsel also argued that in accordance with section 9A of the Interpretation Act, section 47(1)(b) of the BMSMA had to be given an interpretation that would promote the underlying purpose or object of the BMSMA. He argued that it could not have been intended that, in providing for a management corporation to maintain and manage the common property, the BMSMA would also at the same time have intended to impede the management corporation's ability to obtain good legal advice by depriving it of the protection of legal professional privilege. He also submitted that is settled law that clear words are required to override legal professional privilege and those are absent from the BMSMA.

16. Counsel for the 1st Respondent then submitted that legal advice privilege and litigation privilege are but inextricable aspects of legal professional privilege as a whole and it could not have been the intention behind the BMSMA and it is also not rational to slice up integral parts of legal professional privilege so as to allow the management corporation to rely on one related part of the privilege but not the other.

17. The 1st Respondent's counsel distinguished the *Horizon Towers case* by contending that it addressed an entirely different situation relating to the onerous duties of a sale committee in a collective sale, which duties are akin to a trustee with a power of sale.

18. Counsel for the 1st Respondent also submitted that to the extent that the decision of *The Estoril* suggested that Council minutes should be capable of being inspected as a whole and without redaction, it should be confined to its specific facts. He argued that it dealt with a different situation and with a subsidiary proprietor who was also a council member of the management corporation.

Board's Decision

19. The Board has considered the matter and is of the view that legal professional privilege is an important legal right and clear words or a necessary implication are required in order to abrogate it. As acknowledged by the Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR (R) 367; [2007] at 43 to 46, legal professional privilege comprises two forms that may sometimes overlap and legal advice privilege existed regardless of whether litigation is contemplated.

20. The Board agrees with counsel for the 1st Respondent that in the case of section 47(1)(b) of the BMSMA, there are no clear words restricting the application of legal professional privilege. In addition, Parliament could not have intended to impede the management corporation's ability to obtain good legal advice by depriving it of the protection of legal professional privilege, while at the same time in section 29 providing for the management corporation to maintain and manage the common property.

21. In the Board's view *Horizon Towers case* may be distinguished. In a collective sale as in the *Horizon Towers case*, the sale committee may not claim legal professional privilege as against the minority subsidiary proprietors, since they act on behalf of all the subsidiary proprietors regardless of whether they are in the majority or minority. The Board agrees with counsel for the 1st Respondent that the present case deals with a different situation. This case concerns the management corporation in the exercise of its ordinary functions of managing the development and the common property rather than a sale committee in a collective sale of an entire development.

22. The Board also agrees with counsel for the 1st Respondent that the case of *The Estoril* should be confined to its specific facts. In addition, the case was decided before section 9A of the Interpretation Act became law and therefore decided under different circumstances.

23. Accordingly the Board agrees with the 1st Respondent that items (a) the redacted portion of the Council minutes of the 4th Council Meeting held on 15 September 2009 in paragraph 7 above and (d) the legal advice given to the MCST by its lawyers on the MCST's claims/potential claims against Ponda (of 333 #XXX), Karim (of 329 #XXX) and Yap (of 327 #XXX) in paragraph 7 above are entitled to legal advice privilege.

24. However, the Board disagrees with the 1st Respondent that all the remaining items in dispute are entitled to be protected by legal professional privilege.

25. The Board is of the view that item (b) in paragraph 7 above (or the redacted portion of the Council minutes of the 5th Council Meeting held on 27 October 2009) is not entitled to be protected by legal professional privilege because it merely reports information and records an instruction to the managing agent. Neither does it constitute legal advice or reproduces or otherwise reveals information or advice between the 1st Respondent and its lawyer.

26. For the same reasons, the Board is of the view that substantially the whole of item (c) of paragraph 7 above (i.e. paragraphs (ii) and (iii) of the redacted portion of the recommendations of the Legal Sub Committee referred to in the draft council minutes of the 3rd Council Meeting held on 21 July 2009 with the exception of the 8 words after "not to further pursue the legal suit with Mr Ponda" in paragraph (ii)) is also not entitled to be protected by legal professional privilege.

27. Accordingly, the Board orders the 1st Respondent disclose to the Applicant the following:

- (a) the redacted portion of the Council minutes of the 5th Council Meeting held on 27 October 2009; and
- (b) paragraphs (ii) and (iii) of the redacted portion of the recommendations of the Legal Sub Committee referred to in the draft council minutes of the 3rd Council Meeting held on 21 July 2009 with the exception of the 8 words after "not to further pursue the legal suit with Mr Ponda" in paragraph (ii).

Legal Costs

28. On the issue of costs, after taking into account all the circumstances, the Board is of the view that parties should bear their own costs in the matter.

Dated this 10th day of June, 2010.

MR TAN LIAN KER
President
Strata Titles Board

MRS TAN SOOK YEE
Member
Strata Titles Board

MR RICHARD TAN MING KIRK
Member
Strata Titles Board