

CASE UPDATE



HIGH COURT CONSIDERS NOVEL ISSUES IN THE APPLICATION OF SECTION 47 OF THE BMSMA

Introduction

1. Section 47(1)(b)(viii) of the Building Maintenance and Strata Management Act (Cap 30C) (“**BMSMA**”) states that Management Corporations must allow certain persons, including subsidiary proprietors (“**SPs**”), to inspect and copy “*any record or document in the custody of under the control of the management corporation*”.
2. Despite the wide nature of this provision, and the huge volume of documents it can potentially apply to, there has been a dearth of local case law on it. The local case law prior to 2020 is summarized as follows:
 - a. In *Yap Sing Lee v MCST Plan No. 1267* [2011] SGHC 24, the High Court held that Section 47 BMSMA did not exclude or abrogate legal advice privilege and was therefore to be read subject to legal advice privilege.
 - b. In *Tan Hee Chye v MCST Plan No 395* [2016] SGSTB 1, the Strata Titles Board held that an audio recording of an annual general meeting was a ‘*record or document*’ under Section 47 BMSMA.
 - c. In *Timothy Siah Yang Teck v 28th Management Council to MCST 1420* [2018] SGSTB 1, the Strata Titles Board held that Section 47(1) BMSMA imposed a mandatory obligation on management corporations, and that there was no need for the person applying for inspection or copying to give any reasons for wanting to do so.
 - d. In *MCST Plan No. 4436* [2018] SGPDP, the Personal Data Protection Commission held that Section 47 BMSMA prevails over Section 21 of the Personal Data Protection Act 2012.
3. In HC/RAS 4/2020, the High Court was faced with the novel issue of the application of Section 47(1)(b)(viii) BMSMA to documents obtained by a management corporation while representing SPs in an appeal to the Land Acquisition Appeals Board over compensation awards for the compulsory acquisition of land.
4. In deciding that the Respondent SP was entitled to the documents, the High Court considered various issues such as the relevance of how the management corporation obtained the documents, and whether the documents could be withheld on the ground of confidentiality.
5. The High Court also held that the Respondent SP was entitled to the documents pursuant to an agency relationship between it and the management corporation arising out of representation in the appeal.
6. The successful Respondent SP was represented by Mr Daniel Chen and Ms Loh Kah Yunn of Lee & Lee.

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Factual Background

7. The Management Corporation Strata Title Plan No. 827 (“**the MCST**”) is the Management Corporation constituted in respect of the strata titled development known as Da Jin Factory Building.
8. On 9 December 2011, part of the common property of Da Jin Factory Building was gazetted for compulsory acquisition under the Land Acquisition Act (Cap 152, 1985 Rev Ed).
9. At an Extra-Ordinary General Meeting of the MCST on 4 May 2012, it was resolved by way of a 90% resolution that:

“the (MCST) be authorized and empowered to take and handle the land acquisition proceedings on behalf of all the subsidiary proprietors as it thinks fit, including but not limited to ... decide whether to appeal to the Land Acquisition Board on the Collector’s award and to the Court of Appeal on the Land Acquisition Board’s decision as it thinks fit, and if so, to conduct the same as it thinks fit ...”.
10. There was some dissatisfaction with the Collector’s compensation awards, and the MCST lodged a petition of appeal on 26 May 2014 with the Land Acquisition Appeals Board (“**the Appeal**”).
11. 32 SPs declined to participate in the Appeal, and were paid their share of the compensation. The MCST represented the remaining 84 SPs (“**the Appealing SPs**”) in the Appeal and certain ‘without prejudice’ discussions, which culminated in a settlement agreement, signed by the MCST on behalf of itself and the Appealing SPs.
12. The terms of settlement were set out in a letter from the Collector dated 22 March 2018 (“**the Settlement Letter**”) which was addressed to the Appealing SPs, including the Respondent SP, a company named Aikyu Trading Co (Pte) Ltd (“**Aikyu**”).
13. However, the letter was sent by the Collector to the MCST only. None of the Appealing SPs saw it, save for those who were also members of the Council of the MCST, at least those involved in instructing the MCST’s solicitors, and at the minimum, the Chairman of the Council.
14. The MCST then sent the Appealing SPs a “Confidentiality and Settlement Agreement” in which it:
 - a. Stated that the Settlement Letter “*included a confidentiality clause wherein the (management corporation) and the (Appealing SPs) are, inter alia, obliged to keep the matters in the Appeal and the Settlement Letter strictly confidential*”;
 - b. Required the Appealing SPs to “*confirm (their) agreement to and acceptance of the confidentiality clause and other obligations imposed on the (Appealing SPs) in the Settlement Letter in consideration of the payment of (their) share of the Settlement Sum after deduction of all professional expenses and costs incurred in connection with the Appeal ...*”; and
 - c. Required the Appealing SPs to “*agree and confirm that (they) accept the decision of the Council of the (MCST) ... not (to) release to the (Appealing SPs) any information relating to the Settlement Sum and the professional fees and costs incurred in relation to the Appeal*”.

CASE UPDATE



15. 82 of the 84 Appealing SPs signed the “Confidentiality and Settlement Agreement” as required by the MCST, leaving only Aikyu and another SP for which payment was not collected as that SP was in arrears.

Proceedings in the District Court

16. Aikyu applied to the District Court in DC/OSS 39/2019 for orders that the management corporation:
 - a. Provide information on the settlement sum from the Collector of Land Revenue in Appeal No. AB 2013.007, and on expenses incurred including but not limited to professional fees and costs; and
 - b. Provide all documents relating to the above including but not limited to the letter from Collector and subsequent correspondence, all documents in relation to the professional fees and costs incurred.
17. Aikyu argued that the MCST was required to provide the abovementioned information and documents on 3 alternative grounds: Agency, Contract, and Section 47(1)(b)(viii) of the BMSMA.
18. The District Court was not prepared to grant Aikyu’s application on the grounds of Agency and/or Contract, taking the view that there were disputes of fact which made the Originating Summons an inappropriate mode of proceedings.
19. However, the District Court granted Aikyu’s application pursuant to Section 47(1)(b)(viii) of the BMSMA, ordering that:

“The (MCST) provide (Aikyu) with copies of the settlement letter dated 22 March 2018 from the Collector of Land Revenue and all documents relating to the settlement sum and professional fees and costs incurred in relation to the Appeal No. AB2013/007 pursuant to Section 47(1)(b)(viii) of the Building Maintenance and Strata Management Act” (“the Documents”).

Appeal to the High Court

20. Dissatisfied with the decision of the District Court in DC/OSS 39/2019, the MCST appealed to the High Court in HC/RAS 4/2020.
21. The High Court dismissed the appeal, affirming the decision of the District Court that the Documents fell within Section 47(1)(b)(viii) of the BMSMA and that Aikyu was entitled to them.
22. In addition, the High Court parted with the District Court by holding that there was an agency relationship between the MCST and Aikyu, and that Aikyu was also entitled to the Documents pursuant to that agency relationship.

Section 47(1)(b)(viii) BMSMA

23. Section 47(1)(b)(viii) of the BMSMA provides that:

“47. —(1) A management corporation shall, upon application made to it in writing in respect of a lot which is the subject of the subdivided building concerned by a subsidiary management corporation, or by a subsidiary proprietor or mortgagee or prospective purchaser or mortgagee of that lot or by a

CASE UPDATE



person authorised in writing by such a subsidiary proprietor or mortgagee and on payment of the prescribed fee ...

(b) make available for inspection by the applicant or his agent —

(viii) any other record or document in the custody or under the control of the management corporation ...”

24. The MCST agreed that the Documents were records or documents in its custody or under its control. However, it argued that:
 - a. “*any other record or document*” should be limited to documents coming into the custody or control of the management corporation pursuant to a power, duty or function conferred or imposed by the BMSMA itself, and in particular, in the course of the MCST’s regulation and management of the strata development; and
 - b. Since the MCST had obtained the Documents by acting in an ‘*ad hoc*’ arrangement pursuant to a resolution passed under the BMSMA, the Documents did not fall under Section 47(1)(b)(viii) of the BMSMA.
25. The High Court rejected the MCST’s arguments, holding that:
 - a. No such limitation appears on the face of Section 47(1) of the BMSMA;
 - b. The powers, duties and functions of a management corporation are not limited to control, management and administration of the common property. Various provisions in the BMSMA provide for other powers, duties or functions, including making available notices under Sections 3, 8 or 16 of the Land Acquisition Act (“**LAA**”), or any copy of an award received by the management corporation for any non-lot acquisition under Section 10 of the LAA; and
 - c. A management corporation’s powers, duties and functions arise not only from the BMSMA itself but also from resolutions made pursuant to the BMSMA (such as the resolution passed at the Extra-Ordinary General Meeting of the MCST on 4 May 2012 empowering the MCST to represent SPs in the appeal).
26. The High Court therefore affirmed the decision of the District Court that the Documents fell within Section 47(1)(b)(viii) of the BMSMA and that Aikyu was entitled to them pursuant to that provision.

Confidentiality

27. The MCST argued further that it was justified in withholding the Documents from Aikyu and the other Appealing SPs on the basis that if the confidential documents/information were provided to them, they might proceed to breach their confidentiality obligations, and that might jeopardise not only those in breach, but the MCST itself.
28. The MCST argued that the resolution passed at the Extra-Ordinary General Meeting of the MCST on 4 May 2012 empowered it to “*minimize the risk that the (MCST) or subsidiary proprietors would be liable for breach of confidentiality*” by withholding the Settlement Letter or related information/documents from the Appealing SPs.

CASE UPDATE



29. The High Court rejected the MCST's arguments, holding that:
- a. The Collector had imposed no obligation on the MCST to keep the Documents from the Appealing SPs, and as such a breach by any Appealing SP would not be a breach by the MCST; and
 - b. The resolution passed at the extra-ordinary general meeting of the MCST on 4 May 2012 authorized the MCST to claim compensation, conduct the appeal, and accept an offer from the Collector, but this did not allow it, when an agreement had been reached for additional compensation, to deprive the SPs it represented in arriving at the settlement, of the Settlement letter or related information/documents.
30. In coming to its decision, the High Court saw irony in the MCST's attempt to withhold the Documents from the Appealing SPs, given that the Settlement Letter was actually addressed to the Appealing SPs and imposed confidentiality obligations on the Appealing SPs. The High Court opined that the Collector would have expected the Appealing SPs to receive documents and information on the settlement since he had addressed the Settlement Letter to them and expected them to observe the confidentiality obligations set out therein.
31. However, it is relevant to note that the High Court did not rule out confidentiality as a ground on which a management corporation could refuse to disclose documents where otherwise required under Section 47(1) of the BMSMA. The High Court stated in *obiter dicta* that:
- "(It) is open to the court to likewise recognise confidentiality as a sufficient reason for not ordering production of documents under s 47 of the Act, either because s 47 of the BMSMA does not exclude or abrogate confidentiality, or pursuant to a discretion not to grant the mandatory order sought."*
- Agency
32. The High Court held that this was an "obvious case" of an agency relationship, observing that pursuant to the resolution passed at the Extra-Ordinary General Meeting of the MCST on 4 May 2012, the MCST acted on behalf of the Appealing SPs in concluding a settlement with the Collector on the terms of the Settlement Letter.
33. The High Court found that the two core elements of an agency relationship were present namely: (a) consent of both the principal and agent; and (b) authority conferred or power granted to the agent to legally bind the principal.
34. In finding an agency relationship, the High Court agreed with Aikyu that all the necessary facts to establish that relationship were before it. In doing so, the High Court parted with the District Court, which had held that it did not have sufficient facts to conclude that there was an agency relationship.
35. The High Court also agreed with Aikyu's submission that agents have a duty to provide information to their principals, particularly regarding facts that are material to the agent's duties to the principal, with the result that the MCST had to provide the Documents to Aikyu.

CASE UPDATE



36. In coming to its decision, the High Court stated that the following example provided by Aikyu's Counsel, though not a perfect analogy, resonated with it:

“Consider the case of a lawyer who has been authorised by his client to pursue or settle a claim; the lawyer concludes a settlement and then tells the client that he will only make payment to the client (after deducting his legal fees) if the client agrees: (a) that he will not know how much the settlement was for; and (b) that he will not know how much the legal fees were; otherwise, the lawyer will withhold payment.”

37. The High Court further observed that in this example:

“If the client agreed to those terms, he would never know if he had been paid the correct amount (or if some mistake may have been made); nor would he know what the lawyer's fees were (were they too high; might the client at least have grounds to seek taxation of those fees?).”

Conclusion

38. The High Court therefore dismissed the appeal and ordered that costs be payable by the MCST to Aikyu.

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