CASE UPDATE

A TALE OF TWO COOLING TOWERS

8 September 2017

Introduction

1. On 22 September 2016, the management corporation of Leonie Towers off Orchard Road passed a by-law by way of a special resolution to remove two cooling towers which had been around for almost twice their estimated service life of 20 years.

2. On 3 March 2017, upon the application of a subsidiary proprietor in *STB No. 80 of 2016*, one Yap Choo Moi, the Strata Titles Board held that a management corporation has no power to dispose of common property, and declared the decision of the management corporation invalid. The management corporation appealed against the decision of the Board.

3. On 7 August 2017, the High Court allowed the management corporation's appeal and held that a management corporation has the power to remove common property.

4. The High Court's decision in *The Management Corporation Strata Title Plan No. 361 v Yap Choo Moi* HC/TA 10/2017 (unreported) is a significant decision which clarifies a management corporation's powers in relation to common property comprised in a strata title plan, under the present provisions of the Building Maintenance and Strata Management Act ("BMSMA").

5. The management corporation was successfully represented by Toh Kok Seng and Daniel Chen of Lee & Lee in the appeal.

Facts

6. The Management Corporation Strata Title Plan No. 361 is the management corporation constituted in respect of the development known as Leonie Towers.

7. Leonie Towers comprise 92 units in two tower blocks of 25-storeys each. There is a central air-con system in the estate and each tower block is serviced by two central cooling towers. The central air-con system was approximately 35 years old in 2015. According to an "ASHRAE Applications Handbook", the estimated service life for a cooling tower is 20 years.

8. In October 2015, PCA Consulting Engineers were engaged by the Appellants to study and report on the system. They found that:

    a. There was corrosion of the steel piping and related components that was continuous and unstoppable – cost of replacing them was expensive;

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b. Water quality was poor (cloudy) – there was likelihood of Legionella (Legionnaire's disease); and

c. The system was operating at below average level (because 60% of the residents were then using their own air-con units).

9. At an extraordinary general meeting on 22 September 2016, the following motion was tabled for consideration:

"To consider, and if deemed fit, to pass with or without amendments, the following Additional By-Law by way of a special resolution pursuant to section 32(3) of the Building Maintenance and Strata Management Act: That the 2 central cooling towers, and its related fixtures and fittings, be permanently removed after 6 months from the date of the passing of this Additional By-Law"

10. The general body was presented with the following information:

a. Estimated yearly costs for maintaining and repairing the cooling towers was $4,624 per month, i.e. $55,488 per annum;

b. Costs for carrying out major repairs estimated at $520,000;

c. Costs for installing a new central air-con system, $750,000; and

d. To remove and discontinue the system, $85,000.

11. 84% of the subsidiary proprietors who were at the meeting voted in favour of the resolution, and the additional by-law was made for the removal of the cooling towers ("the Additional By-Law").

12. Ms Yap Choo Moi, a subsidiary proprietor of a unit within Leonie Towers, applied to the Strata Titles Board in *STB No. 80 of 2016* seeking an order that the Additional By-Law be invalidated.

13. The Strata Titles Board, allowing the application, held that:

a. The duty to maintain and keep common property in a state of good and serviceable repair under Section 29(1)(b) BMSMA is unconditional;

b. Section 23(1) Land Titles Strata Act ("LTSA") previously provided for the disposal of common property by way of a unanimous resolution but there is currently no provision in the BMSMA or LTSA that allows for a management corporation to dispose of common property; and

c. The management corporation therefore did not have the power to make the Additional By-Law, which was declared invalid.

14. The result of the decision was extremely far-reaching as it effectively meant that all condominiums and other strata titled developments in Singapore could not remove any item of common property even if 100% of the subsidiary proprietors decide to do so. Instead, management corporations would have to retain and maintain the item of common property indefinitely, regardless of the cost involved and/or the wisdom of doing so.

Improvements under Section 29(1)(d) BMSMA

15. Section 29(1)(d) BMSMA provides that:

> *"… it shall be the duty of a management corporation – when so directed by a special resolution, to install or provide additional facilities or make improvements to the common property for the benefit of the subsidiary proprietors constituting the management corporation".*

16. Before the High Court, the management corporation argued that the removal of the cooling towers constituted an improvement to the common property, and would therefore be within its powers under Section 29(1)(d) BMSMA.

17. The High Court agreed with the management corporation's reasoning that:

    a. There is no requirement that the improvement must be an addition or new construction. Removing something can be an improvement. Case law was cited to show that the removal of a wall, staircase, toilets can be considered improvements to the property.

    b. The improvement in question did not have to be an improvement of the cooling towers themselves. Instead, the removal of the cooling towers could be an improvement to the common property as a whole, which would be within the management corporation's powers under Section 29(1)(d) BMSMA.

    c. The duty to maintain common property under Section 29(1)(b) of the BMSMA, which the Board held would prevent the Appellants from removing the cooling towers, applied not to common property as at the date of the formation of the management corporation, but rather to common property at any time as it stands The duty to maintain common property did not prevent the operation of any other provision empowering the management corporation to terminate or decommission the cooling towers.

    d. Whether or not the removal of the cooling towers constituted an improvement to the common property, was something for the subsidiary proprietors to decide. Parliament's intention was to allow the subsidiary proprietors to decide that something was an improvement to the common property by way of a special resolution at a general meeting.

18. The High Court observed further that if the management corporation did not have the power to remove any part of the common property, the estate would be stuck in a time warp. Regardless of changes in circumstances, the management corporation would have to keep the common property exactly as it was at the time the development was completed, which could be many years ago. One example would be the inability to remove squash courts which are no longer in use.

19. Along the same lines, the High Court observed that interpreting the BMSMA to allow management corporations to improve the common property by removing parts of the common property, would facilitate the objectives of the BMSMA and be consistent with the legislative intent.

20. The Court agreed that it is not correct to say that the previous Section 23 LTSA provided for the "*disposal*" of common property. Those provisions refer instead to "*disposition*" of common property by

way of transfer of title, and the common property referred to would be land or any building or immovable property affixed to the land.

21. In light of all the above, the High Court held that the management corporation has the power to remove the cooling towers under Section 29(1)(d) of the BMSMA.

Other Arguments

22. The High Court did not appear to agree with the management corporation's alternative arguments that:

    a. The removal of the cooling towers could also constitute "*replacement works*" under Section 29(1)(b) BMSMA; and

    b. That the management corporation would have the power to carry out the removal of the cooling towers pursuant to Section 29(2)(b) BMSMA, which empowered the management corporation to "*do all things necessary for the performance of (their) duties under this Part (of the BMSMA) and for the enforcement of the by-law*s".

23. The High Court was also informed by the management corporation of the Building Maintenance and Strata Management (Amendment) Bill 2017, which was introduced just before the hearing of the appeal. Clause 20 of the Bill seeks to amend Section 29(1) BMSMA to clarify that the duty of a management corporation to improve and enhance common property extends to installing, replacing, removing or providing additional facilities or structures.

Technical Irregularity

24. The Court noted that the decision to remove the cooling towers was made by way of an Additional By-Law under Section 32 BMSMA when it should properly have been passed as a special resolution under Section 29(1)(d) BMSMA.

25. However, the High Court agreed with the management corporation that since the merits of the decision to remove the cooling towers had been fully ventilated before the general meeting, and the outcome at the general meeting would have been the same if it was presented under Section 29(1)(d) BMSMA, it did not operate to prejudice any party to treat the resolution as a special resolution under Section 29(1)(d) BMSMA. .

26. The Court also noted that arguments on Section 29(1)(d) BMSMA were not ventilated before the Board.

Decision

27. In the circumstances of this case, the High Court ordered that:

    a. The Order by the Strata Titles Board in STB No. 80 of 2016 invalidating the by-law to remove the cooling towers and its related fixtures and fittings, be set aside;

    b. The resolution passed at the Extraordinary General Meeting on 22nd September 2016 to remove the cooling towers and its related fixtures and fittings, be declared validly passed, and constituted a special resolution passed under Section 29(1)(d) of the Building Maintenance and Strata Management Act; and

    c. The Respondent pay the Applicant costs of the appeal fixed at S$3,000.00.

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