Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd (No 2) [2004] SGHC 160

Case Number : Suit 827/2003

Decision Date : 30 July 2004

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Leo Cheng Suan and Teh Ee-Von (Infinitus Law Corporation) for plaintiff; Christopher Chuah Chee Kian, Elly Tham and Lee Hwai Bin (Wong Partnership) for defendant

Parties : Management Corporation Strata Title Plan No 2297 — Seasons Park Ltd (No 2)

Civil Procedure – Originating processes and pleadings – Management corporation suing in contract – Whether management corporation must identify each party to the contract.

Land – Strata titles – Management corporation – Representative actions – Whether management corporation could sue developers on behalf of subsidiary proprietors – Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) s 116.

Tort – Negligence – Defence of independent contractor – Whether developers accused of direct and personal negligence could rely on defence.

Tort – Negligence – Indemnity – Whether management corporation entitled to indemnity from developers.

30 July 2004 Judgment reserved.

Choo Han Teck J:

1 This was an action commenced by Management Corporation Strata Title Plan No 2297 ("the plaintiff"), the management corporation of the condominium at 497 Yio Chu Kang Road known as Seasons Park Condominium, against the developers, Seasons Park Ltd ("the defendant"). The action was based on contract and tort, and also on "an indemnity". The claim was made on behalf of all the subsidiary proprietors in respect of defects and damage to the common property as well as individual units of the sub-proprietors. The list of defects was a long one and included leakage and seepage of water, the debonding of tiles, soil settlement, loose grille covers, obstruction of refuse chutes, and various other items. These defects were identified by the firm of building surveyors engaged by the plaintiff to study and review the alleged problems in the condominium.

2 Mr Christopher Chuah Chee Kian, counsel for the defendant, made an application to have some questions of law to be tried as preliminary issues. Mr Leo Cheng Suan, counsel for the plaintiff, strongly objected and I thus permitted the trial to proceed. The first witness for the plaintiff was a subsidiary proprietor. Her evidence related virtually to her personal complaint of water seepage, which she testified she once thought was caused by her dogs' poor toilet training. In any event, she said that her claim for about $5,000 was strictly in respect of repair costs to her own apartment unit. At that point, Mr Chuah made a renewed application to have the issues of law tried first. Counsel submitted that the three questions of law will determine substantially all, if not all, the issues at trial. He is right in saying that a point of law need not be one that will dispose of the entire trial. If it will lead to a disposal of a substantial part of the trial then the court may, at its discretion, order a trial

of the legal issues first. In this case, even Mr Leo agreed that the case will extend well beyond the five days allocated for the trial. Realistically, if all the factual issues are disputed, the trial might require about 20 to 30 days. The legal issues will, in any event, have to be determined. In these circumstances, I ordered the three questions posed by Mr Chuah to be tried as preliminary issues.

3 The three questions are as follows:

(a) Whether the plaintiffs are entitled to sue on behalf of all subsidiary proprietors of units who have entered into sale and purchase agreements as pleaded in para 26 of the statement of claim[1] read with paras 3 and 4 of the document entitled "Yet Further and Better Particulars" dated 25 June 2004[2] and if so, which purchasers.

(b) Whether paras 18, 19, 20, 24 and 25 of the defence filed in the proceedings would be a defence to the plaintiffs' claims in tort as pleaded.

(c) Whether the plaintiffs are entitled to seek a declaration of an indemnity from the defendants against claims by subsidiary proprietors as pleaded in para 30 of the statement of claim.

4 Mr Leo maintained that the plaintiff had two bases in support of its right to sue. First he relied on s 116(1) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) which provides as follows:

> Where all or some of the subsidiary proprietors of the lots in a subdivided building are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly (any such proceedings being proceedings for or with respect to common property), the proceedings may be taken by or against the management corporation as if it were the subsidiary proprietors of the lots concerned.

This is a provision empowering the management corporation to sue or be sued. Without it, it might be questionable whether the management corporation, as a separate legal entity, is entitled to exercise any right to sue that belongs to a subsidiary proprietor and, conversely, whether it is liable to a suit in respect of which the real and otherwise proper party would be the subsidiary proprietor. It is similar to other statutory provisions such as that empowering an incorporated company to sue and be sued in its own name. Section 116(1) does not, on its plain meaning, confer or create any cause of action. The power to "take proceedings against any person" is contingent upon a *right* or a *cause of action*. Hence, the management corporation may sue (on behalf of the subsidiary proprietors) a defendant in contract only where there is a cause of action in contract that is available to the subsidiary proprietors. The same reasoning applies in tort or to any other cause of action. Mr Leo's reliance on the words "where all or some" in the opening line of s 116(1) might have been the source of his misconstruction of this provision.

5 Counsel submitted that since "common property was badly maintained … this would entitle all the subsidiary proprietors to sue the defendant in contract." Mr Chuah argued that s 116(1) empowers the management corporation to sue only in tort. I do not think that the plain words should be read as restrictively as that. If a cause of action accrues in contract to any or all subsidiary proprietors, the management corporation should be entitled to sue in their stead. However, it does not follow that every subsidiary proprietor will sue just because he has a right to do so.

6 This brings me to Mr Leo's second ground. Mr Leo's second basis in support of the plaintiff's right to sue was the resolution passed by the members at their second annual general meeting held on 31 March 2002 that expressly authorised the plaintiff to sue. The 49 members who attended

unanimously passed the resolution in the following terms:

12.0 Ordinary Resolutions

12.1 To consider and if deemed fit, to approve by ordinary resolution that the Council of the Management Corporation be duly authorised:

12.1.1 on behalf of subsidiary proprietors, to commence legal actions/proceedings against Seasons Park Ltd, including Architect, Engineer, Contractors and/or any concerned parties, relating to all latent defects to the common property; and

12.1.2 to negotiate, compromise, enter into mediation, finalise settlement with Seasons Park Ltd and/or relating parties [*sic*] and to defend proceedings; and

12.1.3 to appoint, retain and collaborate [*sic*] solicitors, consultant or other experts; and

12.1.4 to expend up to S$100,000.00 from the management or sinking funds to pay consultants' and legal cost and other related expenditures.

Mr Leo strongly suggested that the fact that the general meeting ratified the plaintiff's decision to sue supported the plaintiff's standing in the matter. But this ignores the fact that a third party has no right to ratify or assert a contractual right that he does not possess. This is a different situation from one in which the general meeting authorises the management corporation to sue in tort in respect of the common property. Contractual rights are personal. Some of the subsidiary proprietors, as counsel conceded, were sub-purchasers who had no contract with the defendant. Thus, it behoves the plaintiff to identify all the subsidiary proprietors on whose behalf it is suing *in contract*. The identity of the parties ought to be made out in the pleadings and the originating process. This is basic and requires elaboration only because the writ and pleadings in this case identified the plaintiff as "the management corporation representing 390 subsidiary proprietors". As it transpired, this was not correct. Hence, Mr Leo submitted belatedly that the plaintiff represents the 49 subsidiary proprietors who voted at the second annual general meeting. Mr Chuah was entitled to ask, and had indeed asked in vain, for particulars of the subsidiary proprietors.

7 It is important to identify each principal or substantive plaintiff when a management corporation purports to act for him or her. One of the more practical reasons for this is that in the event that the opposing party has to enforce any personal orders or orders as to costs, he will know whom he may pursue. It is true, as Mr Leo pointed out, that costs are normally borne by the management corporation. However, in principle, a substantive party is not absolved from such responsibility should its agent default or be unable to pay. All that I have stated above in regard to the legal position was fully expounded by LP Thean JA in the Court of Appeal judgment in *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 at 119, [11]–[12]. It was not disputed by Mr Leo that of the 49 subsidiary proprietors who voted at the second annual general meeting, only 40 of them were original purchasers. Mr Leo submitted that the subsidiary proprietors, being laypersons, would not have known what the distinctions between suing in tort and contract were. That is true, but that cannot be said of their solicitors. Where a cause of action is to be founded on contract every party bound by that contract must be identified, and thus every subsidiary proprietor who had a contract with the defendant had to expressly authorise the plaintiff to sue on his behalf, whether in respect of common property or in respect of his individual unit if the plaintiff was prepared to sue on his behalf in that regard. I need not deal with the question whether the resolution was originally to empower the plaintiff to sue for "patent defects" or as later amended, to

"latent defects". What the true resolution was may involve findings of fact. On the first question of law, I find that the plaintiff's claim in contract must fail because it had no pleaded cause of action in contract. Section 116(1) of the Act does not provide a standing to sue where no cause exists.

8 The second issue involves the question as to whether the defence of independent contractor defeats the plaintiff's claim as it is pleaded. This is a straightforward point. In law, a person is not liable in negligence if he employed an independent contractor and the damage was caused by the negligence of that contractor. The plaintiff's claim in this regard was pleaded on the basis that the defendant was negligent in failing to exercise reasonable care and skill "in designing and/or building the [Seasons Park condominium] and/or supervising the construction and rectification works". The defendant cannot be expected to adduce evidence to prove or disprove the handiwork of his independent contractor, architect or engineer, all of whom the plaintiff had for unexplained "strategic reasons" declined to sue. All that is required of the defendant to prove is that he used reasonable care and skill in employing his independent contractor. Of course, whether the defendant exercised such skill and care is a question of fact for the trial, but the allegation in the pleading does not require this. As Mr Leo submitted, on the basis of the plaintiff's pleadings, the defendant is sued, not for failing to exercise skill and care in selecting his independent contractors, but for a *direct and personal failure in the design and construction of the condominium itself*. If that can be proved, it will be a shattering development in the building industry. This innovative attempt may prove more heroic than realistic, especially on the pleadings as they stand, which are significantly deficient in particulars. The plaintiff's case is echoed in its counsel's submission that, "for a project of this magnitude, it is inconceivable that the defendant would just leave everything to its independent contractors". Whether that is indeed so is obviously a question of fact, but no particulars were given. Counsel's second proposition was that the contractors could not have been independent because they worked for such a major employer. This seems very much like a wild and hopeful swing in the dark. The plaintiff's case looks very bleak, but if the plaintiff insists on its day in court it is entitled to it, though it may prove a very expensive day.

9 I now refer to the third question as to whether the plaintiff is entitled to a declaration of indemnity. Rights under an indemnity normally arise by reason of a contract or by operation of law. In so far as there is no contractual connection in the present case, there is no question of any right to an indemnity in contract. So far as the question relates to the tortious claim as pleaded, no such right arises either for the simple reason that an indemnity in respect of damage caused by a tortious act is relevant only where someone else caused the damage. In the present case, the plaintiff had chosen to plead and argue that the independent contractor defence does not apply because the contractor was not independent. If the contractor is not independent then liability against the defendant would have to be direct liability, in which event no question of an indemnity arises. Mr Leo argued that the plaintiff, as the management corporation, is obliged to rectify such damage that the subsidiary proprietors may complain of. Therefore, it must be entitled to an indemnity from the defendant on that account. The logic of this argument is slightly congested. No indemnity in contract or tort arises where, as here, the plaintiff is suing on behalf of the subsidiary proprietors.

10 For the reasons above, the plaintiff is only entitled to proceed to trial to determine the very narrow issue of fact in negligence as to whether the defects were caused by the defendant personally and, if so, whether it was an actionable wrong. That would be relevant only in the event that the plaintiff succeeds in showing that the defects were caused by the defendant; he must then proceed to establish that the faults were actionable and not, for example, that the defects arose from acceptable wear and tear. In the absence of a contract, the developer or contractor, or for that matter any other relevant party, cannot be expected to hold out a lifelong guarantee in respect of any work that is subject to wear and tear. I shall hear the question of costs at a later date.

[1]BP18.

[2]BP378.

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