Cheng Fu Zay and Another v Management Corporation Strata Title Plan No 1919 (Scott Vickers Engineering Pte Ltd, Third Party)
[2008] SGHC 56

Case Number : DC Suit 863/2002, RAS 92/2007

Decision Date : 14 April 2008

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Wong Yoong Phin (Wong Yoong Phin & Co) for the plaintiffs; Leo Cheng Suan (Infinitus Law Corporation) for the defendants

Parties : Cheng Fu Zay; Lai Foong Har — Management Corporation Strata Title Plan No 1919 — Scott Vickers Engineering Pte Ltd

Damages – Assessment – Management Corporation Strata Title of condominium failing to properly maintain common roof – Loss of rent – Whether owners were expected to mitigate by adopting temporary measure of jet-grouting – Section 48(1)(b)(i) Land Titles (Strata) Act (Cap 158, 1999 Rev Ed)

14 April 2008 Judgment reserved.

Woo Bih Li J:

Background

1 The plaintiffs, Cheng Fu Zay and Lai Foong Har ("the Owners"), are the subsidiary proprietors of units #29-03 and #30-01 (collectively "the Units") in the condominium development known as Harbour View Towers ("the Development"). The Units are sited at the topmost level immediately below the common roof of Tower A of the Development. #29-03 is a double-storey apartment and #30-01 is a single storey apartment.

2 The defendant is the Management Corporation Strata Title Plan No 1919 ("the MC"). At all material times, the MC had and has the sole control, management and administration of the common property of the Development.

3 There was apparently a Third Party in the action, Scott Vickers Engineering Pte Ltd ("Scott Vickers"). Scott Vickers was the roof waterproofing contractor in the Development which had given a 10 year warranty on the common roof.

4 In this action, the Owners had claimed against the MC for an order that the MC re-waterproof the common roof and for losses and damages, including loss of rental income, arising from the MC's negligence and/or breach of its duty under the then Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("the Act") in refusing and/or failing to properly maintain and keep the common roof in a state of good and serviceable repair under s 48(1)(b)(i) of the Act.

5 The action was filed on 4 March 2002. The parties unsuccessfully attempted Court Dispute Resolution from 3 July 2003 to 20 January 2005 (for more than 1½ years).

6 On 5 July 2005, the High Court allowed the action to be transferred from the District Court in view of the quantum of damages claimed.

7 However, on 17 August 2005, all parties executed a Memorandum of Agreement pursuant to s 23 of the Subordinate Courts Act (Cap 321, 1999 Rev Ed). In so doing, the parties agreed that the District Court would continue to have jurisdiction to try the action even if the Owners' claim exceeded the usual limit of the jurisdiction of the District Court.

8 On 30 August 2005, the MC consented to interlocutory judgment being entered against it for, *inter alia*, damages to be assessed. In that judgment, the MC admitted that there was leakage to the Units from the common roof. Simultaneously, interlocutory judgment was entered in favour of the MC against Scott Vickers.

9 On or about 21 November 2005, the Defendants re-waterproofed the common roof.

10 On 10 and 19 April 2007, after hearing parties' witnesses for six days (over about six months), the assessing Deputy Registrar ("the DR") delivered his grounds of decision and granted the Owners the following:

(a) cost of repairs for the Units at $4,580.00;

(b) fees of building surveyors and valuers at $9,553.33;

(c) loss of rent for #30-01 from January 2003 to August 2006 at $97,440.00;

(d) loss of rent for #29-03 from February 2001 to August 2006 at $125,580.00;

(e) interest at 6% per annum from date of Writ to payment; and

(f) costs of $70,000.00 with reasonable disbursements to be paid by the MC to the Owners.

11 On 23 April 2007, the MC filed a Notice of Appeal in RA 84 of 2007 against the decision of the DR seeking an order that the MC need not pay the Owners any loss of rent for the Units or any interest or costs. The MC also sought an order that if the MC was to pay any amount to the Owners then Scott Vickers should be ordered to pay the amount to the Owners directly and to pay the MC's costs on an indemnity basis.

12 On 24 April 2007, the Owners filed a Notice of Appeal in RA 85 of 2007 against the decision of the DR seeking higher amounts for their claim for loss of rent for #29-03, *i.e.* $418,600 instead of the $125,580 allowed by the DR. As for loss of rent for #30-01, the Owners did not appeal for more than the $97,440 allowed by the DR. The other substantive reliefs sought in the Owners' Notice of Appeal, excluding costs, were for:

(a) $4,580.00 for costs of repairs to the Units;

(b) $9,553.33 for building surveyors' and valuers' fees;

(c) interest at 6% per annum from the date of Writ to payment.

13 However, the DR had already awarded the Owners $4,580 being the costs of repairs to the Units and $9,553.33 being the fees of the building surveyors and the valuers. He had also awarded interest at 6% per annum on the sums assessed from the date of the Writ to payment. Accordingly, these items in the Owners' Notice of Appeal were academic and the only real item on appeal by the Owners was the sum awarded by the DR for loss of rent for #29-03.

14 After hearing arguments on the cross-appeals, the District Judge ("the DJ") issued his judgment on 11 September 2007. He decided that the Owners were not entitled to claim for loss of rent as they had not acted reasonably to mitigate their loss. Nevertheless, the DJ allowed the Owners to recover $16,093.33 which was conceded by the MC. This amount comprised the following:

(a) cost of jet-grouting at $6,000.00 ($1,000.00 for #29-03 and $5,000.00 for #30-01);

(b) cost of repairing the Units at $4,580.00;

(c) the building surveyors' fees of $4,000.00 and $1,513.33;

15 The DJ also allowed interest on the $16,093.33 at the rate of 5.33% p.a. from the date of the Writ until full payment.

16 However, the DJ's judgment did not state what order he was making as regards Scott Vickers.

17 Being dissatisfied with the DJ's decision, the Owners filed a Notice of Appeal in RAS 92/2007 on 19 September 2007 seeking the following reliefs (excluding costs):

(a) the DR's order allowing $97,440.00 for loss of rent for #30-01 to be restored;

(b) $418,600.00 for loss of rent for #29-03;

(c) $4,580.00 for costs of repairs to the Units;

(d) $9,553.33 for surveyors' and valuers' fees;

(e) interest at 6% per annum from the date of the Writ to payment.

18 After hearing arguments, I allowed the Owners' appeal regarding loss of rent in principle but reduced the amount granted to the Owners by the DR for reasons which I shall elaborate on later.

19 As for the $4,580 for costs of repairs to the Units, this sum had already been allowed by the DR. As mentioned, it should not have been included in the Owners' appeal to the DJ but it was. In any event, the DJ had allowed this sum as well.

20 This sum of $4,580 was strictly speaking not an issue as the DR and the DJ had allowed this sum and the MC had not appealed against it before me. Nevertheless, as the parties saw it fit to include the $4,580 in the draft order they had prepared for my approval, I decided to allow the sum to remain in the draft so that the draft would encapsulate all sums payable by the MC and parties would not have to consider another order to find out what other sum was payable by the MC.

21 As for the $9,553.33 for the building surveyors' and valuers' fees, this sum had already been allowed by the DR and again, should not have been included in the Owners' appeal to the DJ but it was. Also, this item was not the subject of appeal by the MC but the DJ apparently overlooked this point and awarded the Owners $5,513.33 (instead of $9,553.33) for this item because that was the sum said to be conceded by the MC.

22 I awarded the Owners the $9,553.33 for the building surveyors' and valuers' fees because it was really not in dispute in the arguments before me. In the first place, the DJ should not have allowed the smaller sum of $5,513.33 as these fees were not part of the MC's appeal.

23 The MC has filed an appeal to the Court of Appeal against my decision to allow the Owners their claim for loss of rent.

The court's reasons

24 As mentioned above, the DR had allowed the claim for loss of rent. I set out below his reasons for allowing this item, including his findings on the state of the Units, and his computation of the loss of rent. He said at [22] to [33]:

> **LOSS OF RENTAL INCOME**
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> 22. A very brief submission was made by the defendants that such a claim for 'loss in rental was pure economic loss in tort which is too remote, and not of a dangerous nature, and therefore cannot be claimed'. No authority was cited to support the submission. Having reviewed the law in this area, I find the submission wholly misconceived in these circumstances. Water leaking into a home would undoubtedly affect the comfort of its occupants. The more severe and prolonged the leakage, the more severe the extent of the damage. If it results in the owner being deprived the use of the premises, then rental costs of alternative accommodation (in owner occupied situations) or loss of rental (in rented out situations) would be claimable since both flow directly from the damage caused. In either situation, costs of repairs would also be claimable.
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> 23. In my opinion, the key issue is whether the extent of the leakage was severe enough to render the units untenantable. If the leakage had some impact, then the degree had to be assessed. If the leakage was part of a whole host of factors rendering the unit untenantable, then the contribution it played towards that result had to be assessed.
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> *- The Extent of the Leakage and its Impact on the tenantability of the units*
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> 24. Given the circumstances under which the joint expert was appointed, his observations about the conditions in the units would be the least disputed and would be a convenient starting point. I summarize the evidence as follows:
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> - #29-03: the single point of water proofing failure manifested itself at the doorway at bedroom 3 leading to the adjoining bathroom and at the bathroom itself. Photos of the area show obvious staining and discolouration at the ceiling board and walls. Damage to the doorframe was also noted. No other forms of damage were noted.
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> - #30-01: the two points of water proofing failure manifested throughout the unit. Damp staining and associated peeling/blistering/discoloured paint was noted at the ceilings and some walls in the living and dining room (3 areas), master bedroom (2 areas), bedroom 1 and 2 (one area each), yard and common toilet (one area each). Even the common area just outside the entrance to the unit was affected. In all, there were at least 10 areas. Other forms of damage not related to roof leakage were however also noted; these included wall cracks, seepage at the bin shute lining area and the window sill at bedroom 2.
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> 25. The joint expert's findings on the extent of the leakage is corroborated by evidence (including photos) in the plaintiffs' expert's report (exhibit CFZ8), the photos taken by the tenant in #30-01 (exhibit CFZ3), the photos taken by the property appraiser (Teo Yik Weng) (exhibit CFZ20).
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> 26. Apart from all this, perhaps the best evidence on how the leakage affected the units comes

from the tenants who were staying there. In the case of #30-01, the tenant was one Sue Olivier. In an email dated 13 March 2001, she complained about wall cracks and roof leakage. When repairs were not forthcoming, she wrote another letter dated 18 February 2002 articulating her frustrations over the delayed repairs and also gave a vivid description of the deteriorating conditions (see exhibit CFZ4). She finally quit the tenancy prematurely on 1 January 2003 when the repairs were still not done.

27. In respect of #29-03, the tenant was one Bruno Fallegger. After reviewing the relevant correspondence (exhibited at CFZ5), I find that the termination was primarily due to the fact that the tenant was being posted overseas. Although leakage at one of the bedrooms was cited in passing, this appeared to be more of an inconvenience to the tenant. Had he not received his posting orders, it appears that the tenant would have continued staying there. Clearly, the severity of the leakage problem was unlike #30-01, in that it did not render the unit uninhabitable and thereby resulting in the premature termination of the tenancy.

28. All considered, I do find that #30-01 was uninhabitable given the many defects manifesting within the unit. Given that condition, I accept the plaintiffs' and their property agent's evidence (*i.e.* Daniel Teng) that the unit could not be tenanted out. However, to be fair to the defendants, we only need to concern ourselves with what proportion the roof leakage contributed to that result. In this regard, I assess the fair proportion for that specific component to be at 70%.

29. The situation is a little more complicated in respect of #29-03. This is a spacious 400sqft penthouse maisonette unit with 4 bedrooms and with a panoramic sea-view. Given that the leakage was confined to one bedroom, I do not find that it rendered the entire unit uninhabitable. Finding a suitable tenant who is willing to pay rental for the unit (to enjoy all its other aspects) will still be possible – such as Bruno Falleger who was willing to continue staying there until he received his posting orders. Ultimately, I agree with the defendants' and the third party's submissions here that it is a matter of appropriate pricing. Since the unit is not without defect, it would be unrealistic to expect it to fetch fair rental value. The plaintiffs' efforts in continually advertising the unit on those terms irregardless [sic] was therefore unreasonable (see exhibit CFZ22 and PDB1715-1733). The need to lower one's expectations should have become apparent as months wore on without any takers, yet no action was taken to price down the unit. In the circumstances, I find that it would have been appropriate to price down the asking price by about 30% (given that one bedroom and the attached toilet was affected) so as to increase its attractiveness. Receiving rent, albeit at a lesser amount, would also have mitigated the damage suffered pending the repairs.

- The proper rate of rental period the plaintiffs should be compensated for:

30. Unit #30-01 was rented out in April 1999 to Sue Olivier for 24 months. The tenancy was renewed for another 24 months from 1st April 2001 to 31st March 2003 at a monthly rent of $3,300/-. The tenancy was prematurely terminated on 1 January 2003 when conditions kept deteriorating given the delayed repairs. Since that is the case, the period the plaintiffs should be compensated for should begin immediately thereafter. The calculations are as follows:

- January to March 2003 at $3,300/- per month (3x$3,300/-) = $9,900/-

- March 2003 to December 2004 at $3,300/- per month (21x$3,300/-) = $69,300/-

- January to December 2005 at $3,000/- per month (12x$3,000/-) = $36,000/-

- January to August 2006 at $3,000/- per month (8x$3,000/-) = $24,000/-

Total: $139,200/- x 70% = **$97,440/-.**

31. Unit #29-03 was rented out in May 2000 for 24 months to Bruno Fallegger at a monthly rent of $7,200/-. The tenancy was prematurely terminated on 31st January 2001 when Bruno received his posting orders. The calculations are therefore as follows:

- February 2001 to December 2002 at ($7,200/- x 0.3) per month = $49,680/-

- January 2003 to December 2004 at ($6,000/- x 0.3) per month = $43,200/-

- January 2005 to August 2006 at ($5,450/- x 0.3) per month = $32,700/-

Total: **$125,580/-.**

32. As can be seen from the above calculations, I have adopted the assessment of Teo Yik Weng of Allied Appraisal Consultants Pte Ltd on the fair rental value of the two units over the relevant period. Indeed, he was the only expert called to give evidence by the parties on this crucial aspect, and I did not find his assessment unreasonable.

33. As regards the proper period which the plaintiffs should be compensated for, I agree with the submissions tendered by counsel for the plaintiffs and have adopted them in the above calculations. If there was evidence that the plaintiffs had unreasonably refused any offer of rectification, then that would have served to shorten the period claimable. But as the evidence stands, I found that no credible offer to effect repairs was made to the plaintiffs for their serious consideration. Certainly none came from the defendants. Whereas the third party's offer was laughable: to paint over the extensive areas of leakage in #30-01 just so as to tide the unit over till the end of the third party's liability period under the warranty (*i.e.* until 30 July 2005). Rather than repair the waterproofing (much less replace), the third party's proposed action merely sought to temporarily hide/mask the problem.

24 As mentioned above, the DJ reached the opposite conclusion on the claim for loss of rent and disallowed such a claim. In summary, the DJ was of the view that while the Owners had tried to mitigate their loss by taking steps to try to rent out the Units, they had failed to mitigate in that they should have allowed jet-grouting to be carried out to the Units, although such a solution was temporary, instead of insisting on the re-waterproofing of the entire common roof. The DJ stressed that the evidence of various witnesses, *i.e*. Ong Chin Hoe Steven (PW2), Bruce Loggie (PW3) and Paul Crispin Casimir (DW2), had shown that jet-grouting as a rectification alternative would work, albeit temporarily (see [40] to [56] of the DJ's grounds of decision).

25 Before me, the Owners stressed that none of the expert witnesses referred to by the DJ had recommended jet-grouting as a remedial measure. Indeed, when the MC had commenced action in Suit No 182 of 2000 on 19 April 2000 against the developer and the architect, its own expert, Mr Casimir, was of the view that the waterproofing to the main roof had to be completely redone. Further, the parties (in the present action before me) had agreed to the joint appointment of Bruce Loggie to inspect and report on the problem of water seepage. Mr Loggie had also recommended that the waterproofing system be repaired/replaced and did not recommend jet-grouting. According to the Owners, the MC also did not suggest jet-grouting specifically until a letter dated 7 December 2004 from its solicitors. Although none of the experts had recommended jet-grouting as such, the DJ relied on their evidence for a different point *i.e*. that jet-grouting was a viable alternative. That is

why he concluded that the Owners should have allowed jet-grouting to be done so as to avoid future loss of rent. I would add that it was not disputed that jet-grouting had, in the past, been carried out to one of the Units but that this was not a permanent solution.

26 I did not agree with the DJ's conclusion on loss of rent. If the Owners had allowed jet-grouting to be done and let the Units out, who would bear the consequences if the water seepage returned in the future (a situation that would likely arise since jet-grouting was at best a temporary solution)? Supposing the water seepage then damaged the tenants' belongings or, worse still, supposing the damage was aggravated because a tenant was absent from Singapore for a prolonged period of time and therefore did not notice the water seepage earlier, would the MC have agreed to pay for such damages and the cost of the jet-grouting or would the MC have denied all liability on the argument that it was irresponsible for the Owners to let out the Units knowing that the water seepage problem had not been permanently rectified? I have no doubt that the MC would have denied all liability for such damage and quite rightly so.

27 I was of the view that the duty to mitigate did not require the Owners to take such a risk. Had they done so, they might have been accused of hiding the truth from tenants and acting irresponsibly. Indeed it was not surprising that none of the experts had recommended jet-grouting. That would only have postponed the need to re-do the water-proofing while incurring the costs of jet-grouting plus the risk I have mentioned.

28 Accordingly, I allowed the Owners' appeal on the issue as to whether loss of rent was claimable. However I reduced the quantum allowed by the DR for two reasons.

29 Firstly, the DR had allowed the Owners to claim loss of rent up to the end of August 2006. The Owners alleged that although the MC eventually re-waterproofed the entire roof by November 2005, the Owners did not realise this until later (on or about 24 April 2006). Thereafter, the Owners were not granted access to conduct a water-flood or ponding test until 13 June 2006. The test was conducted on 13 June 2006 and Mr Loggie rendered his report on 20 June 2006 to confirm the effectiveness of the rectification works. The Owners thereafter needed one month to dry out in order to carry out internal repairs although they accepted that they carried out more repairs than was attributed solely to the water seepage. The Owners were not claiming the cost of these other repairs.

30 However, I noted that the information that the MC had re-waterproofed the entire roof was already stated in an affidavit served by the MC on or about 5 January 2006 although the Owners' counsel said it was not highlighted therein and was mentioned obliquely. He did not dispute that the Owners' solicitors had received the same and a copy of the affidavit would have been sent to the Owners by their solicitors. However, counsel himself only noticed the relevant information on or about 24 April 2006 when he was preparing for cross-examination.

31 Given the importance of the re-waterproofing of the roof, I agreed that some criticism could be levelled against the omission to highlight the fact of the completion of the re-waterproofing to the Owners or their solicitors. Nevertheless, as it was mentioned in the affidavit for the MC which was served on or about 5 January 2005, I was of the view that the Owners' claim for loss of rent should stop by end February 2006 instead of end August 2006. I allowed the period from 6 January 2006 to 28 February 2006 in order to take into account the time required to obtain access from the MC, conduct the requisite test and allow for drying out and internal repairs (attributable to the water seepage) to be done.

32 Secondly, I was of the view that the damages for loss of rent should be reduced by the income tax which the Owners would have paid had they received the rent. Rent is subject to income tax but

damages are not. Although this point had apparently not been raised before the DR or the DJ, the Owners' counsel quite readily accepted the point when I raised it.

33 The Owners produced documents in respect of their respective tax rates over the years and I left it to both counsel to agree, if they could, on the quantum of damages for loss of rent taking into account the findings of the DR and the two points I mentioned above. The eventual figure agreed on was $171,266.13 for loss of rent.

34 I should mention two points which counsel for the MC raised. He argued that the Owners should have tried to let out the Units at a reduced rent in view of the water seepage. However, the DR had already not imposed the full loss of rent onto the MC. As mentioned in his grounds of decision, he had allowed the Owners 70% of the loss of rent for #30-01 and 30% of the loss of rent for #29-03. This would have addressed the argument about a reduced rent. I saw no reason to disagree with the DR's assessment.

35 The second argument raised by counsel for the MC which I wanted to mention was that, at one point of time in or about April 2003, the Units were occupied by relatives of the Owners and hence the Units were not uninhabitable. Counsel for the Owners countered this by the argument that even a void deck of a block of flats could be said to be habitable. I was of the view that the issue was whether the Units could be let out to paying tenants and that the Owners would not have been able to receive the full market rent. As stated above, the DR had already not imposed the full loss of rent on the MC.

36 I was of the view that the MC had only itself to blame. It knew about the water seepage problem and that its own expert Mr Casimir and the joint expert Mr Loggie had recommended that the common roof be re-waterproofed. It chose to rely on Scott Vickers who had given a warranty on the original waterproofing to take remedial action but Scott Vickers was not going to re-do the waterproofing. In such circumstances, the MC should not have been overly concerned that any initiative that it took to re-waterproof might render the warranty void. There was no use in clinging to the warranty when Scott Vickers was not carrying out its obligations thereunder. It was only much later, around November 2005 as I have mentioned, that the MC finally re-did the waterproofing.

37 There is one other point I should mention. The Owners had sought an order pursuant to s 118 of the Land Titles (Strata) Act, (Cap 158, 1999 Rev Ed) ("LTSA") that the MC was not to levy against the Owners, as subsidiary proprietors of the Units, any claim for contribution for any money payable by the MC pursuant to any order which the court might make in favour of the Owners. Sections 118 (1) and (2) LTSA state:

> (1) In any proceedings brought by one or more subsidiary proprietors against the management corporation, or by the management corporation against one or more subsidiary proprietors (including subsidiary proprietors joined in third party proceedings), the court or a Board may order that any moneys (including costs) payable by the management corporation pursuant to an order of the court or a Board, as the case may be, in those proceedings shall be paid, in respect of such lots as are specified in the order and in such proportions as may be specified, by the management corporation out of contributions levied for the purpose.
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> (2) Where a court or a Board makes an order under subsection (1), the management corporation shall, for the purpose of paying the moneys ordered to be paid by it, levy contributions in accordance with the terms of the order and shall pay the moneys out of the contributions paid pursuant to that levy.

38 Counsel for the Owners submitted that since it was the Owners who had contested and won against the MC, they should not be made to bear a *pro-rata* portion, based on their status as subsidiary proprietors, of the money which the MC would otherwise have to raise from all subsidiary proprietors to pay their claim for damages.

39 On the other hand, if the Owners were not required to pay their pro-rata portion, then the other subsidiary proprietors would have to bear their portion. It seemed to me that the other subsidiary proprietors were, in their capacity as such proprietors, just as blameless as the Owners and I therefore declined to make the order sought under s 118 LTSA.

40 I should also mention that with effect from 1 April 2005, s 118 was replaced by s 87 of the Building Maintenance and Strata Management Act 2004 (Act 47 of 2004). For present purposes the differences between the two provisions are insignifcant.