Regenthill Properties Pte Ltd v Management Corporation Strata Title Plan No 2192 [2002] SGCA 32

Case Number : CA 600153/2001

Decision Date : 05 July 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J

Counsel Name(s) : Chuah Chee Kian Christopher And Dawn Ho (Drew & Napier) for the appellants; Leo Cheng Suan (Infinitus Law Corp) for the respondent

Parties : Regenthill Properties Pte Ltd — Management Corporation Strata Title Plan No 2192

Civil Procedure – Originating processes – Originating summons – Regularity – Whether sufficient particulars to identify cause of action – Whether failure to itemise specific documents sought for fatal to application – O 7 r 3(1) Rules of Court

Civil Procedure – Originating processes – Originating summons – Irregularity – Setting aside for non-compliance with rules – Whether irregularity serious or prejudicial to opposing party – Fresh step in proceedings constituting waiver of irregularity – O 2 r 2 Rules of Court

Land – Strata titles – Management corporation – Delivery of documents – Whether developers of condominium have to hand over accounting documents pertaining to maintenance fund – s 37(4) Land Titles (Strata) Act (Cap 158, 1999 Ed)

Statutory Interpretation – Construction of statute – Right to institute proceedings – Whether s 39 of Interpretation Act (Cap 1, 1999 Ed) precludes civil action based on penal provision when plaintiff suffers no injury – Whether documents relating to maintenance fund relate to condominium developer's 'transaction and financial position' – s 199 Companies Act (Cap 50, 1994 Ed) – s 39 Interpretation Act (Cap 1, 1999 Ed)

Trusts – Trustees – Trust documents – Delivery of documents – Determination of trusteeship – Whether successor trustee can require outgoing trustee to deliver up records pertaining to trust

Judgment

GROUNDS OF DECISION *Curia Advisari Vult*

1 This appeal raises the single issue as to whether a developer of a condominium is obliged under s 37(4)(b) of the Land Titles Strata Act, Cap 158 (LTSA) or any other law, to surrender the original accounting records and contracts relating to the maintenance fund to the management corporation (MC), after the latter has been established. At the High Court, Lai Siu Chiu J ruled in favour of the MC, the respondent in this appeal.

The facts

2 The appellants, Regenthill Properties Pte Ltd (Regenthill), were the developers of a condominium located along Yio Chu Kang Road known as "Regent Park Development". By the end of December 1996 the construction of the condominium was completed. On 6 January 1997, a temporary occupation permit (TOP) for the condominium was issued by the relevant authority. The effect of the issue of the TOP was that the subsidiary proprietors were obliged and did pay contributions to a maintenance fund which Regenthill were required to set up under s 9 of the Building and Common Property (Maintenance and Management) Act (BCP Act).

3 On 20 April 1998, pursuant to s 33 of the LTSA, the MC for the condominium was constituted. Its first annual meeting was held on 6 May 2000. Shortly after, Regenthill handed over to the MC all the documents (including accounting documents) in respect of the period after the constitution of the MC. The dispute concerns the documents relating to the maintenance fund for

the period from TOP to the formation of the MC.

4 We should explain here that even after the establishment of the MC, the developer is still obliged under s 34 of the LTSA to undertake the following duties:-

(a) open a bank account in the name of the MC;

(b) cause to be kept such accounting and other records as well, inter alia, as would sufficiently explain the transactions and financial position of the MC up to the first annual general meeting.

The rationale for this provision would appear to be the recognition by the legislature that while a MC might have been set up it may not have, until the first AGM, the means to discharge its duties. Thus the developer is made to operate the MC account.

5 There are therefore three distinct periods which one has to bear in mind:-

(i) first period : from TOP to the establishment of the MC where contributions by subsidiary proprietors are paid into a maintenance fund managed by the developer.

(ii) second period : from the establishment of the MC up to approximately the holding of the first AGM, where contributions are paid by the subsidiary proprietor into an account in the name of the MC but managed by the developer.

(iii) third period : on and after the first AGM: the MC will assume all charge of the financial affairs of the condominium.

6 On 11 January 2001, the solicitors for the MC wrote to Regenthill, asking, pursuant to s 37(4) of the Act, for the delivery of the following documents:-

(a) all plans, specifications, certificates (other than certificates of title for lots), diagrams and other documents obtained or received by you and relating to the parcel or building; and

(b) if they are in your possession or under your control, any notices or other records relating to the subdivided building.

7 In response to Regenthill's request for particulars of the documents, the solicitor for the MC furnished a list. This was followed by a series of correspondence between them. The upshot of it all was that the parties could not agree whether the MC is entitled to the originals of the accounting records relating to the management fund (the first period). They included payment vouchers, journal vouchers, cash book, cheque butts, bank statements (current and multi-link), financial statements, invoice, official receipt, accounts receivable, audit reports, fixed deposit slips/statements and bank-in slips. Regenthill even sought the assistance of the Commissioner of Buildings (under the BCP Act) on the dispute but the latter was not able to assist. Eventually, Regenthill indicated that they were prepared to allow the MC to inspect the accounting documents at their premises but the documents could not be transferred as the property in the documents remained vested in them.

8 It soon became inevitable that the MC had to file an Originating Summons to have the issue determined, which it did. At the hearing, the MC also orally asked for the contracts relating to various matters (cleaning, security, management and staff). Giving it a purposive interpretation, the judge ruled that most of the documents asked for by the MC came within the scope of s 37(4)(b). She said:-

"On a purposive interpretation, it is hard to envisage that Parliament, in enacting the section, intended only for documents such as plans, certificates and diagrams and other documents *ejusdem generis* with this class of documents to be handed over to the management corporations. Under the Act, upon the formation of a management corporation, the same takes over control, management and administration of the common property as well as its records and accounts. In order to properly exercise its powers and perform its duties and functions, a management corporation would need to have possession of necessary records relating to the subdivided building, including accounting records."

9 The trial judge held that the originals of the following documents be delivered to the MC:-

(a) Contract on cleaning services

(b) Contract on Security

(c) Water and electricity bills

(d) Contract on management fees

(e) Contract on staff costs

(f) Printing/stationery and postages

(i) payment vouchers

(ii) journal vouchers

(iii) cash book (soft copies or print out copies)

(iv) invoices/statements

(v) official receipts

(vi) accounts receivables/interest computation

(vii) fixed deposit slips (photocopies only)

(viii) bank-in slips

Issues

10 The substantive issue formulated by Regenthill is as follows:-

"Whether Regenthill are obliged under s 37(4) to deliver up the original copies of the contracts and accounting records relating to the maintenance fund to the MC."

Regenthill accept that they are obliged in law to allow the MC to inspect the accounting records and to make copies thereof. So the battle line is drawn on just the narrower issue as to whether Regenthill are obliged to hand over the originals of the accounting documents to the MC.

11 However, beside this, Regenthill have also raised two preliminary/procedural issues, which they also did in the hearing below. First, they say that the Originating Summons (OS) instituting the proceeding is flawed because it did not identify the specific classes of documents which the MC would want Regenthill to deliver, thus contravening O 7 r 3(1) of the Rules of Court. Second, they contend that the MC does not have the right to commence an action under s 37(4). Before the court below, both issues failed. We shall deal with them in turn.

Regularity of OS

12 To determine this issue, it is necessary for us to set out the provisions of O 7 r 3(1) as well as the precise formulation of the OS:-

"3(1) Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy."

13 In the OS, after reciting ss 37(4), 65 and 121 of the LTSA at the heading, the MC sought an order to compel Regenthill to deliver the following:-

"(i) all plans, specifications, certificates (other than certificates of titles for the lots), diagrams and other documents obtained or received by the Defendants relating to Regent Park Condominium;

(ii) any notices or other records relating to Regent Park Condominium, other than any such documents which exclusively evidence rights or obligations of the Defendants and which are not capable of being used for the benefit of the Plaintiffs or any of the subsidiary proprietors, other than the Defendants."

14 Essentially, the point made by Regenthill is that the OS only stated in very vague and broad terms what the MC wanted and did not identify the specific classes of documents which Regenthill are required to deliver. They relied upon the High Court decision in *Engineering Construction Pte Ltd v AG* [1993] 1 SLR 390.

15 It will be seen that under O 7 r 3(1) there are two alternative manners in which a plaintiff in an OS could formulate his case. One is to include a statement as to the question on which the court's determination is sought (first limb). The other is to set out concisely the relief or remedy claimed, with sufficient particulars to identify the cause or causes of action (second limb). Having regard to the manner in which the present OS is formulated it is clear that it does not fall under the first limb.

16 The question is: does the OS, as filed, fulfil the second limb? Regenthill contend that it was only in the affidavit filed in support of the OS did the MC list out the classes of document which the MC wanted. They submit that these particulars should have been stated in the OS. While in a broad sense the basis of the claim is indicated, as the OS has cited s 37(4), we would agree with Regenthill that the relief claimed lacks sufficient particulars. Comparing the two prayers in the OS with s 37(4) (set out later at 29), it is apparent that the MC had merely copied the provisions of that section. It should have identified the classes of documents which it required Regenthill to deliver. It did this only in the affidavit in support. Any person reading the OS would not know the specific types of documents which the MC is seeking. Accordingly, the OS is defective. The fact that the specifics were given in the affidavit does not cure the defect.

17 As indicated in 9 above, six additional classes of documents, besides those set out in the affidavit, were also asked for orally at the time of the hearing and in respect of which an order was granted by the court below. Although the appellants had lodged the appeal, they had nevertheless on 26 December 2001 handed these six classes of document to the MC.

18 What then is the effect of non-compliance with O 7 r 3(1)? The answer is to be found in O 2 r 1(1) which provides that "where, … there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of … form or content … the failure shall be treated as an irregularity and shall not nullify the proceedings." Under r 1(2), where there is such a failure, the court may set aside the proceeding wholly or allow amendments to be made.

19 In the court below, the judge seemed to think that the OS is in order. She said:-

"In my view, the plaintiffs, in listing down the types of accounting documents which they required, had given sufficient particulars to identify the cause of action in the originating summons. It would be most unreasonable to require the plaintiffs to further itemise every single specific document in the categories which they had listed, as the plaintiffs could not be expected to be able to identify specific documents which were not in their possession."

20 With respect, we think she misunderstood the contention of Regenthill. From the passage cited above, it is clear that she thought Regenthill were saying that particulars of each document should be set out in the OS when they were only asking that

the categories or classes of document be set out, as the MC did in its affidavit in support.

21 Be that as it may, there are two reasons why this objection has to be rejected. First, under O 2 r 2, it is provided that an application to set aside for irregularity "shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity." Regenthill should have objected upon being served with the OS. Instead, they proceeded to file their substantive affidavit in response. Having taken a "fresh step" in the proceeding, it shall be deemed that they had waived that irregularity; see *Rein v Stein* (1892) 66 LT 469 at 471 and *Ong Heok & Anor v Ooi Bee Tat & Ors* [1982] 2 MLJ 326. It was too late to raise it at the time of the hearing.

22 Second, even if the point was raised timely, the court would not have exercised its discretion to set aside the OS for non-compliance. Although spelling out in the affidavit the classes of document required to be delivered does not regularise a defective OS, it nevertheless does indicate clearly to the defendants what the plaintiff, in fact, wants. Such an irregularity is in no sense serious. As far as Regenthill were concerned, they were not prejudiced. They knew the case they had to meet notwithstanding that the MC even made some oral additions at the hearing. We find support for this approach from the case, *Metroinvest Ansalt v Commercial Union* [1985] 1 WLR 514, where Cumming-Bruce LJ said,

> "I would say that in most cases the way in which the court exercises its powers under Order 2, rule 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe Order 2, rule 1(2) as being so framed as to give the court the widest possible power in order to do justice …"

23 We are confident that if the judge had not misunderstood the point taken, she would have given leave to the MC to amend, as we ourselves would be inclined to do. But the proceedings having come to this stage, we see no point in granting leave to the MC to amend.

24 The case *Engineering Construction,* relied on by Regenthill, concerned proceedings relating to the construction of a contract. There, on the facts, the High Court held that the originating summons contained enough particulars to identify the cause of action as it referred to a contractual clause in issue and the relief sought.

Right to institute proceedings

25 This point rests entirely on s 39 of the Interpretation Act which provides that –

> "The imposition of a penalty by any written law, in the absence of express provision to the contrary, shall not relieve any person from liability to answer for damages to a person injured."

26 Regenthill argued that this section implies that, where there is criminal sanction for contravention of a written law, like s 37(4) read with s 37(8), no civil suit may be brought by any other person unless the latter has been injured or suffered damages. In the present case, as it has not been alleged that the MC was injured or suffered damages the MC are, therefore, not entitled to commence the present action.

27 This point is wholly without merit and was rightly rejected by the court below. It is based on a misunderstanding of the scope of s 39. This section is merely a provision to clarify matters. It does not seek to take away the rights of any party. We endorse the following views expressed by the judge (except in relation to the scope of s 37(4) which will be dealt with next):-

> "In my view, s 39 of the Interpretation Act is merely a clarification provision which makes it clear that even when there is an imposition of penalty, civil recovery is not necessarily denied. However, it does not mean that only when there are damages, would one be allowed to bring a civil action. Section 37(4) of the Act imposes a duty on the proprietor of the land to hand over certain documents to the management corporation. In this case, the cause of action lies in requiring the delivery-up of documents which the plaintiffs believed to fall within the ambit of s 37(4). Section 39 of the Interpretation Act should not be used to limit the positive obligation found in s 37(4) of the Act to deliver up documents required by the

management corporation, otherwise, the provision would be rendered otiose when it was meant for the party entitled to the documents i.e., the management corporation to sue for the same. The plaintiffs need not show that damages have been suffered before they can bring this application."

Construction of s 37(4)

28 We now turn to the substantive question of this appeal. The problem arose because under the LTSA, subsidiary proprietors of units in a condominium are allowed to take possession when the temporary occupation permit (TOP) is issued by the relevant authorities. Between the issue of the TOP and the establishment of the MC, the developer is required to establish a maintenance fund, into which contributions from the subsidiary proprietors of the units within the condominium are to be paid and which fund is to be used for the maintenance of the undivided building and the common property. Once the MC is established, it will take over the functions of the developer in that regard and the developer shall transfer any remaining money in the maintenance fund to the MC: see ss 9 and 10 of BCP Act and s 34 of the LTSA.

29 As the issue concerns the interpretation of s 37(4) of the LTSA, we shall set it out in full:-

> The proprietor of the land comprised in a strata title plan shall deliver to the management corporation at its first annual general meeting –
>
> > (a) all plans, specifications, certificates (other than certificates of title for the lots), diagrams and other documents obtained or received by him and relating to the parcel or building, and,
> >
> > (b) if they are in his possession or under his control, any notices or other records relating to the subdivided building.
>
> other than any such documents which exclusively evidence rights or obligations of the proprietor and which are not capable of being used for the benefit of the management corporation or any of the subsidiary proprietors, other than the proprietor."

The judge found that the accounting documents requested came within the ambit of s 37(4)(b).

30 Before us the main contention of Regenthill is that the accounting documents relating to the maintenance fund are not "notices or other records relating to the subdivided building" within s 37(4)(b). They say that the maintenance fund is for the upkeep of the common property and the subdivided property and as s 37(4)(b) only refers to notices and other documents relating to the subdivided building, that clearly indicates that documents relating to the common property and the maintenance fund are not within contemplation.

31 They pointed out that "subdivided building" is defined in the LTSA to mean any one or more buildings comprised in a strata subdivision plan approved by the relevant authority. On the other hand "common property" is defined as –

> "(a) in relation to subdivided buildings in an approved plan bearing the title of "condominium" and issued by the relevant authority, means so much of the land for the time being not comprised in any lot shown in a strata title plan or in any parts of any building unit (partially erected or to be erected) intended to be included as lots in a strata title plan to be lodged with the Registrar after strata subdivision of the building unit has been approved by the relevant authority;
>
> .
>
> .
>
> (c) unless otherwise described specifically as comprised in any lot in a strata title plan and shown as capable of being comprised in such lot, includes –

(i) foundations, columns, beams, supports, walls, roofs, lobbies, corridors, stairs, stairways, fire escapes, entrances and exits of the building and windows installed in the external walls of the building;"

32 From these definitions, Regenthill contended that while the "subdivided building" would include some parts of the common property, it does not encompass all the common property. The maintenance fund required to be set up by the developer as provided in s 9 of the BCP Act is intended for maintenance of the "subdivided building" and "common property". As non-compliance with s 37(4) would attract penal sanction, a strict interpretation should be adopted. Regenthill also refer to the equivalent New South Wales provisions to support their contention.

33 We must, at this stage, point out that this argument, based on the distinction between "subdivided building" and "common property" was not taken at the hearing below. It is a new point. Before the judge, the contention centred on the application of the *ejusdem generis* rule to the construction of s 37(4). Having said that, it does not mean that this argument, which is a point of law, may not be raised in this appeal (see O 57 r 9A[4]).

"Common property" and "subdivided building'

34 Central to the contention of the appellants is the issue whether there is a difference between "subdivided building" and "common property". As defined, a subdivided building effectively refers to any building in a strata title plan. Of course, a building would include, *inter alia*, foundations, columns beams, walls, roofs, lobby, corridors, stairways. As these are also part of the common property as defined, it is true to say that a subdivided building or buildings would include some parts of the common property. But as not all the common property in a strata title plan is found in a subdivided building, and notwithstanding some overlap, the two terms are distinct concepts.

35 Section 34(a) of the LTSA refers to the maintenance fund set up by the developer as being a fund "for the maintenance of the subdivided building and the common property". Clearly the draftsman of the LTSA viewed the "subdivided building" as being distinct from the "common property", even though some parts of the "undivided property" are also common property. This distinction is also maintained in section 35(1) of the LTSA which refers to contributions made by subsidiary proprietors to the MC for the maintenance of the subdivided building and the common property. There are, therefore, merits in the argument that if the draftsman had intended to refer to the maintenance fund he would have referred to the common property as well, instead of only the subdivided building. Indeed, if the accounts of the maintenance fund were contemplated, there is no reason why the draftsman would not refer expressly to the maintenance fund.

36 We are reinforced in this view when we trace the source of s 37(4). It was added to the LTSA in 1987. Indeed the entire Part IV of the LTSA on "Management of the Subdivided Building" was revised extensively and re-enacted by the 1987 Amendment Act. Section 37(4) would appear to have been modelled after s 57(4) of the New South Wales Strata Tiles Act (NSW Act). The initial version of s 57(4) (1973 version) reads:-

"An original proprietor shall not fail or neglect to deliver to the body corporate at its first annual general meeting –

(a) all plans, specifications, certificates (other than certificates of title for lots), diagrams and other documents (including policies of insurance) obtained or received by him and relating to the parcel or building; and

(b) If they are in his possession or under his control, *the certificate of title for the common property, the strata roll, the books of account* and any notices or other records relating to the *strata scheme.*

other than any such documents which exclusively evidence rights or obligations of the original proprietor and which are not capable of being used for the benefit of the body corporate or any of the proprietors, other than the original proprietor." (emphasis added).

37 In 1984, s 57(4)(b) of the NSW Act was amended, and a new subsection 4(c) added, as follows:-

"(b) if they are in his possession or under his control, the certificates of title for the common property, the strata roll and any notices or other records relating to the strata scheme; and

(c) the accounting records kept pursuant to s 68(1)(g) and the last preceding financial statements prepared in accordance with s 68(1)(h) …

38 At the time our Parliament enacted the revised Part IV and added s 37(4), it would have been aware of the two versions of the NSW provisions. It would appear that the draftsman chose to follow the 1973 version but deleting the reference to "certificate of title for the common property, the strata roll, the books of account." The term "strata scheme" is defined in the NSW Act to cover the whole scheme of development, including "the manner of division … of a parcel into lots and into lots and common property." It seems to us that the equivalent to "strata scheme" in our Act is "strata title plan". Why did the draftsman delete the reference to "books of account"? Why did it adopt just "subdivided building" instead of "subdivided building and common property" or "strata title plan"? Obviously, he must have had something different in mind. After all, just a couple of sections before [in ss 34(a) and 35(1)] the draftsman had referred to "subdivided building and common property".

39 In any case, looking at s 37(4) as a whole, in relation to both limbs (a) and (b) therein, it seems to us clear that the subsection has nothing to do with the maintenance fund or the maintenance of the common property. It has all to do with title, rights and designs of the condominium and subdivided building. We also think it rather odd that the draftsman would have referred to the accounting documents relating to the maintenance fund as "any notices or other records relating to the subdivided building."

40 For completeness, we would add that we agree with the judge below that those same accounting documents could not, applying the *ejusdem generis* rule, come within the meaning of "other documents" in limb (a) of s 37(4).

Common Law

41 It will be recalled that it is s 9 of the BCP Act which requires the developer to set up a maintenance fund upon the issuance of TOP. Section 10(2) of the BCP Act provides that the developer shall hold all moneys in the maintenance fund on trust for the subsidiary proprietors. Section 10(4) requires the developer to transfer the surplus moneys in the maintenance fund to the MC upon its establishment. However, s 10 does not state what would be the position with regard to the accounting documents relating to the maintenance fund. It seems to us that the answer is to be found in common law. We would be inclined to think that s 10(4) of the BCP Act and s 34(a) of the LTSA only provide for the transfer of the money in the maintenance fund to the MC upon its establishment because the position of the accounting documents in relation thereto is abundantly clear under general principles.

42 The judge below who also relied upon general principles to order Regenthill to release the documents said:-

As trustee of the maintenance fund, a developer would have to be accountable to the owners and purchasers of all the flats in a condominium for the monies in the maintenance fund. As representative of the owners and purchasers of all the flats in the condominium, the properly constituted management corporation has a right to ensure such accountability on the part of the developer.

43 Regenthill argued that the judge below had over-extended the duty of a trustee as far as delivering trust documents is concerned. They said that a beneficiary is only entitled to see and inspect the accounts and if he wants a copy he must pay for it. For this proposition they relied on *Ottley v Gilby* (1845) 8 Beav 602. They also relied on a passage in *Hanbury & Martin on Modern Equity (14th Edn)* at p. 539 where this principle is recited.

44 With respect, we think that counsel for Regenthill has misapplied *Ottley v Gilby* to the fact situation in the present case. Here is not a case where a beneficiary requests to see the accounts of the trust or the delivery of trust documents. The true position here is that the MC has become the new trustee in place of Regenthill and is asking for all documents relating to the trust. In as much as moneys in a trust do not belong to the trustee (in this case Regenthill), so are the documents of the trust.

Trust assets would include trust documents.

45 While there could be some difficulties in defining "trust documents", as recognised by Salmon LJ in *In Re Londonderby's Settlement* [1965] 918 at 938, he nevertheless ventured to suggest that they would have these common characteristics:-

> (1) they are documents in the possession of the trustees as trustees; (2) they contain information about the trust which the beneficiaries are entitled to know; (3) the beneficiaries have a proprietary interest in the documents and, accordingly, are entitled to see them."

There cannot be any dispute that all three characteristics are satisfied in relation to the documents of account asked for by the MC.

46 Under s 10(4) of the BCP Act, upon the establishment of the MC, Regenthill were obliged to pay into the bank account of the MC the surplus moneys in the maintenance fund. This means that trusteeship has come to an end and all moneys and related documents must be passed over to the successor trustee. It stands to reason that the MC, as the person stepping into the shoes of Regenthill, should be entitled to have all the records of the trust. The following passage in Regenthill's Case demonstrates that they have miscomprehended the position:-

> If the Appellants are obliged to hand over the original accounting documents before the constitution of the Respondents by reason that they are trustees of the maintenance moneys, this would mean that each and every subsidiary proprietor will be entitled to ask for delivery up of the original accounting documents as the monies in the maintenance fund is held on trust for owners and purchasers of all the flats in the development according to s 10(2) of the BCPMMA. Surely, this cannot be correct and could impose an administratively onerous and impossible burden on the Appellants since condominiums may have hundreds of units. Hence, the Appellants submit that at best, the owners, subsidiary proprietors and/or the Respondents are only entitled to inspection of these records and should they require copies, to be furnished copies. The originals of these accounting records should remain with the Developers.

The MC is not a "beneficiary" or "subsidiary proprietor".

47 It is settled law that the new trustees are entitled to all the documents of the trust. *Lewis on Trusts (17th Edn)* states at 12-55 that "a new trustee is entitled to require the outgoing trustees to deliver up to him all records, books and other papers belonging to the trust" and cites in support of this proposition the case *Tiger v Barclays Bank Ltd* [1952] 1 All ER 85.

48 In *Wentworth v De Monsfort & Ors* [1988] 15 NSWLR 348, the Court of Appeal of New South Wales held that where a solicitor was acting only as an agent for a client who was his principal in the doing of some act, the ordinary rules of agency applied to him and a document brought into existence or received by him when so acting belonged to the client. Hope JA said (at 356):-

> Normally when a trustee ceases to hold office, either on appointment of a new trustee or the determination of the trust, he would be required to handover all trust property, including documents and financial records, to the new trustee, or to the sole beneficiary or all the beneficiaries if more than one, if required to do so. In *Re Cowin* (1886) 33 Ch D 179 at 185, North J quoted with approval the following passage in *Lewin on Trusts*, 8th ed (1885) at 975: "All documents held by the trustee in that character must be produced by him to the *cestuis que trust*, who in equity are the true owners." This position would generally apply to a trustee who is a solicitor, but there are important qualifications in some cases. If he is solicitor for the client as well as trustee, he is required by law (as I shall describe later) to maintain and to retain proper financial records. He is entitled to retain these records, some of which may refer to other clients as well as the trust but the beneficiary should be provided with copies if asked for.

49 Counsel for Regenthill argues that the situation here comes within the exception referred to by Hope JA. For this contention, Regenthill rely upon s 10(5) of the BCP Act which provides:-

The developer shall –

(a) cause proper books of accounts to be kept in respect of all sums of money received for and all payments out of the maintenance fund, specifying the matters in relation to which the receipts and expenditure take place;

(c) file with the Commissioner a certified true copy of the audited accounts within 28 days of the accounts being audited;

(d) permit the Commissioner, or any person authorised by him to act on his behalf, at all reasonable times full and free access to accounting and other records of the maintenance fund and permit the Commissioner or the person to make copies or make extracts from those accounting or other records; and

(e) furnish a certified true copy of the accounts to the Commissioner at such intervals as may be required by the Commissioner.

50 It would appear that the exception referred to by Hope JA is a narrow one and relates to the special position of a solicitor. Here Regenthill were trustees simpliciter of the maintenance fund although the trust was imposed under the BCP Act. While it is true that under s 10(5), the Commissioner had the responsibility of ensuring that Regenthill discharged their duties of trustee properly, this, in our view, must relate to the period while Regenthill were the trustees of the fund. Upon the closure of the maintenance fund, with the moneys therein being transferred to the account of the MC, the trusteeship ended. At that point, Regenthill must hand everything relating to the trust, including the documents, to the MC and account to the MC in respect of the transactions effected while the maintenance fund was under their stewardship.

51 It seems to us clear that s 10(5) is to ensure that the interests of the subsidiary proprietors are protected during the interim period between the issue of the TOP and the constitution of the MC. While we see that s 10 of the BCP Act does not deal expressly with the question of the accounting documents of the trust, it is our opinion that this point is not expressly addressed because it is a settled principle that where there is a change of stewardship, the documents of account of a trust must follow the trust and be delivered to the new trustee. We agree with the following observations of the judge below:-

"… a plain reading of s 10(5) of the Management Act makes it patently clear that it does not impose any obligation on the developer to keep the accounts continually or exclusively. Section 10(5) merely requires the developer to have proper accounts in respect of the maintenance fund and to file the audited accounts with the Commissioner. The Commissioner is empowered under the section to verify the accounts. However, it is my view that the developer only remains accountable to the Commissioner for the period of which he (the developer) is in charge of the monies in the maintenance fund.

All the remaining monies in the maintenance fund have to be transferred over to a management corporation upon its formation. Thenceforth, it would be the management corporation who would be managing the funds for the benefit of the subsidiary proprietors or residents of the condominium. It seems rather nonsensical to say that the developer has to continue to keep proper accounts of a fund of which he is no longer in control and that the Commissioner could verify such accounts."

Section 199 of the Companies Act

52 The final argument of Regenthill concerns s 199 of the Companies Act which requires a company to keep such accounting and other records "as will sufficiently explain the transactions and financial position" of the company for a period of 7 years after the completion of the transactions. Therefore, they cannot part with the physical possession of the accounting records relating to the maintenance fund.

53 There is a serious flaw in this argument. The documents to which s 199 applies are those relating to the "transactions and financial position" of the company. As far as the moneys in the maintenance fund are concerned, Regenthill stands in the position of a trustee. Documents relating thereto are not documents relating to the "transaction and financial position" of Regenthill but to a fund in respect of which s 10 of the BCP Act has rendered Regenthill to be a trustee. The "transactions"

which Regenthill had undertaken on behalf of the maintenance fund were not the transactions of Regenthill. They did not affect the financial position of Regenthill. The records maintained by Regenthill in respect of those transactions were clearly records maintained under s 10(5) of the BCP Act. With respect, the reference to s 199 of the Companies Act is a red herring.

Judgment

54 In the result the appeal is dismissed. On the question of costs, the following two points need to be noted. First, the MC made the application essentially on the ground of s 37(4) of the LTSA, and the parties' submissions were largely on the construction of that section, even though the judge in coming to her decision also, to an extent, relied on common law. Second, the argument which Regenthill raised before us in relation to s 37(4)(b) was not raised in the court below. How the court below would have construed s 37(4)(b) had this argument been raised is a matter of speculation. In the circumstances, even though the appellants have failed, we do not think the MC should obtain full costs of the hearing here and below as the MC has failed on its main point, the construction point. Viewing the matter as a whole, we think a fair order would be that the respondent, the MC, shall only have 40% of the costs, here and below. The security for costs, together with any accrued interest, shall be released to the MC to account of the latter's costs.

Sgd:

CHAO HICK TIN TAN LEE MENG

JUDGE OF APPEAL JUDGE

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