

Court rules that management corporation may sue developer for latent defects in common property

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Introduction

Facts

Decision

Comment

Introduction

A statutory duty to "properly maintain the common property and keep it in a state of good and serviceable repair" shifts between a developer, a joint management committee and a management corporation subject to the timeline provided in the Strata Management Act 2013. However, when the baton is passed to a management corporation, does the management corporation have standing to sue the developer for any defects in the common property? A high court recently addressed this question in *Dua Residency Management Corporation v Edisi Utama Sdn Bhd*.⁽¹⁾

Facts

A management corporation of a high-end condominium situated in Kuala Lumpur took an action against the developer and former property manager. In April 2008 (the material time) a joint management body, the predecessor of the management corporation, was formed by the developer and several residents of the condominium pursuant to the now-repealed Building and Common Property (Maintenance and Management) Act 2007. Both the developer and former property manager were represented by a general manager at the joint management committee.

The dispute arose from various defects in the common property, discovered between 2010 and 2019, which stemmed from water leakage problems with the condominium's swimming pool. The water leakage problems were first raised at a joint management committee meeting in 2010. Subsequently, several inspections were performed by the developer's project consultants and other building inspectors engaged by the joint management committee. These inspections revealed that the condominium had latent defects concerning the construction movement joints, swimming pool and open deck. Despite there being discussions of rectifying the defects and the parties agreeing to rectify, no repair work was carried out by the developer. The developer argued that the common property had been in good condition when it was handed over to the new management company appointed by the management corporation and that the defects were maintenance issues. By reason of the impasses between the parties in rectifying the defects, the management corporation initiated an action in the high court against the developer and the previous property management company.

Decision

The management corporation pleaded three cumulative or alternative causes of action, breach of contract, breach of statutory duty and negligence against the developer. The novel legal issue to be determined by the high court judge was the management corporation's cause of action against the developer.

Breach of contract

The management corporation relied on the sale and purchase agreements entered into by the developer and the condominium's purchasers, which covenanted that the common property would be constructed in a workmanlike manner with quality materials and that the condominium would conform to the requirements of written law.

Justice Lim Chong Fong accepted the position of the Singapore Court of Appeal's decision in *RSP Architects*

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Planners & Engineers v Ocean Front Pte Ltd(2) and held that there is no legal standing for a management corporation to initiate and sustain an action based on a breach of contract against a developer unless the purchasers have assigned or novated the sale and purchase agreements to the management corporation.

Breach of statutory duty

The management corporation contended that the developer had breached its statutory duties under the Uniform Building Bylaws 1984 made under the Street, Building and Drainage Act 1974. The management corporation also argued that the Uniform Building Bylaws gave rise to a private cause of action.

On this point, the judge agreed with the view of Justice Lee Swee Seng (now JCA) in *KL Eco City Sdn Bhd v Tuck Sin Engineering & Construction Sdn Bhd*(3) that the Uniform Building Bylaws are enforceable by the local authority against a qualified person who has submitted a plan, drawing or calculation; any breach of such law does not give rise to a right to private action. There is no statutory duty owed by a developer under the Street, Building and Drainage Act or the Uniform Building Bylaws.

Negligence

The management corporation contended that the developer owed a duty of care with respect to the design, development and construction of the condominium; the breach of such duty by the developer had caused loss and damage to the management corporation. Referring to *RSP*, the management corporation argued that there was no policy consideration to negate the developer's duty of care and that a close proximity existed between the parties where the developer was:

- the first proprietor of the condominium, including the common property, and the manager thereof after the construction had been completed;
- responsible for constructing the condominium, including the common property, in a workmanlike manner, notwithstanding the outstanding contractual obligation arising from the sale and purchase agreements with the purchasers;
- responsible for the condominium's maintenance and upkeep, including the common property, after construction had been completed. The management corporation's statutory duty to maintain and manage the condominium was dependent on the care exercised by the developer during the construction; and
- required to make good the defects caused by its negligence in constructing the condominium.

The judge accepted the principles in *RSP* and held that there was sufficient proximity between the management corporation and developer in this case as the condominium was fraught with defects and the developer had continuously participated in its management and upkeep. Therefore, the developer owed a duty of care to the management corporation to ensure good workmanship in the condominium's construction, according to the agreed specifications and approved plans in the sale and purchase agreements.

Accordingly, the high court found that the developer had acted negligently in respect of the swimming pool's defects and had breached its duty of care in respect of the workmanship of the waterproofing system applied to the swimming pool. However, the developer was not liable for the defects in the construction movement joints and open deck caused by poor maintenance.

Comment

The high court's decision is a significant and welcoming legal development concerning strata and building management. The extension of the duty of care to a developer, in addition to contractual duties, will ensure good workmanship in building construction. This case serves as a precedent for management corporations faced with defects in buildings complained of by residents and should guide their course of action. For instance, a developer may be liable for defects discovered during and after the delivery of common property to a management corporation, depending on the nature of such defects.

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Endnotes

(1) *Dua Residency Management Corporation v Edisi Utama Sdn Bhd* [2021] MLJU 140.

(2) *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1995] 3 SLR(R) 653.

(3) *KL Eco City Sdn Bhd v Tuck Sin Engineering & Construction Sdn Bhd* [2020] MLJU 435.

