THE MAINTENANCE AND MANAGEMENT OF "STRATA TITLE" PROPERTIES PRIOR TO THE FORMATION OF THE MANAGEMENT CORPORATION

THE BUILDINGS AND COMMON PROPERTY (MAINTENANCE AND MANAGEMENT) AMENDMENT ACT, 1982[1] AND THE PLANNING (AMENDMENT) ACT, 1982[2]

The subdivision of land in Singapore into units of air space is governed by the Land Titles (Strata) Act.[3] This Act also lays down the machinery for the maintenance and management of these subdivided buildings. The vehicle used is the management corporation. The management corporation is a legal entity and comprises the individual purchasers of each unit in the development project. It is formed upon registration of the strata title plan, whereupon the subsidiary strata certificate of title is issued and the individual purchaser becomes the registered proprietor of his unit of air space and a part owner of the common property.[4]

In reality, however, buildings are often occupied under temporary occupation licences before the issue of legal title. In such cases the management corporation would not have been formed. The question then arises; who is responsible for the maintenance and management of these buildings during this interim period?

Prior to 1 December 1982, developers were under no legal duty to maintain the common areas, but they often took it upon themselves to manage and maintain them, exacting in return a contribution from purchasers who had taken possession. While on the one hand developers could charge any amount they wished, on the other hand purchasers were under no obligation to pay the same, so long as there was no such stipulation in the sale agreement. The first step to regulate this state of affairs was made in 1976 when section 6A was added to the Buildings and Common Property (Maintenance and Management) Act, 1973,[5] to prohibit the owner or developer from collecting maintenance charges without first obtaining written approval from the Commissioner of Buildings. It was not until 1978 that provision was made in the prescribed sale agreement governing residential properties for the purchaser to pay the vendor an agreed sum for the maintenance of the common property.[6] In 1981 this prescribed sale agreement was again amended to provide that such maintenance fees must be paid by the purchaser either from the date of taking possession or on the expiration of a fourteen day notice to take possession whichever is earlier.[6a] A similar provision appeared

1 Act 26 of 1982 w.e.f. 1 December 1982 (No. S 310/82).
2 Act 9 of 1982 w.e.f. 24 April 1982 (No. S 102/82).
3 Cap. 277, 1970, Singapore Statutes, reprinted in 1976.
4 See ss. 8, *9,* 11, 28, and First Schedule, Land Titles (Strata) Act, *op.cit.*
5 Act 23 of 1973, amended by Act 4 of 1976.
6 See Form B, clause 12(3) Housing Developers Rules, 1976, inserted by S.224/78, now repealed and replaced by S.239/81.
6a See Form B, clause 12(3), Housing Developers Rules, 1976 inserted by S 239/81. The new clause 12(3) in the form of sale agreement provides that the first payment is a lump sum for the first 6 months, calculated monthly, and thereafter payments are to be made quarterly until the management corporation takes over the maintenance of the building. Clause 12(4) further provides for

in the prescribed sale agreement governing commercial properties.[7]

Notwithstanding these provisions, there were no regulations governing the proper management of these funds, once paid over to the developers. From the viewpoint of the purchaser, he could not query as to how the funds were being applied; there were no safeguards to ensure that they would in fact be utilised for the maintenance of the property, although there is little doubt in law, that the developers must have held the funds on trust for the purpose for which they were paid. From the viewpoint of the developer, there were inadequate provisions to compel purchasers to pay. Indeed, purchasers were hardly subjected to any penalties for late or even non-payment.[8] Collection of the funds proved to be a major headache for developers.

The problems that arose were highlighted by the Minister for National Development, Mr. Teh Cheang Wan:

> "From time to time, we have received complaints about the poor maintenance of buildings by the developers. This could be due to insufficient funds for maintenance, incompetent management or indifference on the part of the developers. There are also instances of unscrupulous developers trying to make a profit from the maintenance of the buildings.
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> Some purchasers are also to be blamed for the dilapidated state of their buildings and the common properties in such buildings. Without legal backing, developers face the difficult task of compelling some of the recalcitrant residents and owners to pay the maintenance charges. As a result the common properties are left in a state of disrepair and the building rapidly becomes dilapidated...."9

To remedy this situation, the Buildings and Common Property (Maintenance and Management) (Amendment) Act, 1982, (hereinafter after referred to as "the Amendment Act") was passed on 31 August 1982 and came into effect on 1 December 1982.[10]

THE BUILDINGS AND COMMON PROPERTY (MAINTENANCE AND MANAGEMENT) (AMENDMENT) ACT, 1982

The Amendment Act was enacted "to ensure that buildings intended for strata subdivision are properly maintained by the developers during the interim period when such buildings are ready for occupation and before they are handed over to the management corporations for maintenance."[11]

The main features of the Act are contained in section 4, which amends the principal Act by inserting eleven new sections, sections 7A to K. These provide as follows:—

the imposition of interest at 2% above the average of the prevailing prime rates of the four major local banks (i.e. DBS, OCBC, OUB and UOB). Such interest will be imposed on the expiration of 14 days after its due date.

7 S 239/81, (w.e.f. 14 July 1981). See clause 28, Schedule to Sale of Commercial Properties Rules, 1979 (No. S158/1979). Note however, that there is no provision for the charging of interest for late payment, nor is there any penalty for late or even non-payment (*cf.* note 6 *infra*).

8 See footnotes 6 and 7 *supra.*

9 In moving the second reading of the Buildings and Common Property (Maintenance and Management) (Amendment) Bill on 31 August 1982 Singapore Parliamentary Debates para. 180.

10 No. S 310/1982.

11 *Per* Teh Cheang Wan, *supra* footnote 9.

Section 7A — The Maintenance Fund

A developer is now required to establish a maintenance fund as from the date of issuance of a temporary occupation licence in respect of any flat.[12] The developer can only use this fund to meet the costs of maintaining and managing the common property of the development and other expenditures as spelt out in section 7A(a) to (h). These include the maintenance, repair and renewal of fixtures and fittings, sewers, pipes, wires, cables and ducts in common areas, the payment of insurance premiums on the development against damage by fire and other risks, and all other charges reasonably incurred in the administration of the maintenance fund and the common property of the development. This only applies to a development with planning approval for strata subdivision, and more than four units of flats must have been constructed. These flats must also have been sold to at least three purchasers.[13]

In the case of buildings with temporary occupation licences granted before 1 December 1982, the maintenance fund must be set up as from 1 July 1983.[14] There is provision for the Minister to exempt any person from this by notification in the Gazette.

Section 7B — Developers' Duties

This section lays down the duties of the developer as regards the maintenance fund. First, the developer must pay into the fund all maintenance charges collected from the purchasers, as well as all income derived from the common property. In addition the developer must bear the maintenance charges for those flats which are still unsold but for which temporary occupation licences have been issued. These charges must be paid by the developer into the maintenance fund.

All moneys in the fund will be held by the developer on trust for the owners of the flats and must be deposited with a licensed bank. They may be invested in authorised investments.[15] The funds will be transferred to the management corporation when it is set up.

The developer must *inter alia* keep proper accounts, appoint auditors to check them annually, file a certified true copy with the Commissioner, and make them accessible to the Commissioner and his agents. Contravention of Section 7B constitutes an offence bearing penalties of a fine of up to $10,000/- and further fine of up to $100/- daily.

Section 7C — Register Of Purchasers

The developer is required to maintain a register containing particulars of all purchasers, the name and address of their solicitors, the floor area of the flat and its proposed share value. The register will be in such form as is prescribed by the Commissioner and it must

[12] The term "flat" is defined in s. 2 to encompass any unit "which is need or intended to be used as a complete and separate unit for the purpose of habitation or business or for any other purpose." It thus also applies to commercial units.
[13] S.7A(3) defines when a developer is "deemed to have sold a flat."
[14] No. S 33/1983.
[15] For the meaning of "authorised investments", see Part II, Trustees Act, Cap. 18, Rev. Ed. 1970.

be produced to the Commissioner for inspection if and when required. Again, penalties are prescribed for non-compliance.

Section 7D — Managing Agents

This section empowers the Commissioner of Buildings to appoint one or more managing agents if he is satisfied that the maintenance and management of a development is not carried out satisfactorily by the developer. The managing agent so appointed is to be remunerated as the Commissioner determines, and his remuneration shall be charged to the development's maintenance fund.

The Commissioner must, however, first give the developer at least fourteen days written notice and consider the developer's representations before making such appointment. The order of appointment will be published in the Government Gazette. There is a right of appeal to the Minister within three months of the publication of the order in the Gazette.

The managing agent's appointment may at any time be revoked by the Commissioner, who can then appoint another person as managing agent in his place.

Section 7E — Powers And Duties Of The Managing Agent

Once appointed, the managing agent shall take over and control the management fund and all investments which have been purchased with the fund. He will have all the powers and duties of a developer as regards the maintenance and management of the development. More specifically, he is empowered to issue written demands in the developer's name, to purchasers of flats in the development; to receive all maintenance payments by purchasers as well as by the developers; to institute proceedings in the developer's name to recover arrears in maintenance charges and also to institute proceedings in his own name to recover monies due to the maintenance fund either from the developer or from any other person.

The managing agent must pay all the monies received by him, to the maintenance fund. He must not later than two months after his appointment, submit to the Commissioner a statement showing details of the management fund. Again, failure to comply constitutes an offence.

Section 7F — Developer's Obligations To Repair Etc.

This section provides that notwithstanding the appointment of a managing agent, a developer must still carry out repairs and other works to the common property to make good any defects, shrinkages or other faults, and also do such additional works as are necessary to ensure that the development is properly carried out.

Section 7G — Bond Of Managing Agent

A managing agent must first lodge with the Commissioner a bond in the approved form and for a prescribed amount. Such bond must be given by a bank, finance company or insurer and will bind them to make good any loss caused by the managing agent due to his failure to account to purchasers for moneys he received or held.

Section 7H — Developer's Deposit

The developer of a building which comprises more than four flats, and which is intended for strata subdivision after its completion, is now required to deposit with the Commissioner a sum prescribed by the Minister. This sum may be in cash or may take the form of a guarantee from a bank or finance company. The sum deposited may be applied by the Commissioner to rectify any defects in the common property of the development and the balance if any, will only be refunded to the developer after the lapse of three years from the date of issue of the last certificate of fitness issued for any flat in the development. This provision applies to any building whether erected before, on or after 1st December, 1982, (the commencement of the 1982 Amendment Act). Failure to comply constitutes an offence.

Section 71 — Deposits Paid Under Existing Rules

Since 1974, owners of any land erecting or constructing a building have been required to deposit in cash, with the Commissioner, an appropriate sum to ensure the proper maintenance and management of the building and any common property. This requirement is contained in Rule 6 of the Buildings and Common Property (Maintenance and Management) Rules, 1974.[16] Section 7H of the Amendment Act now provides that where a developer has already paid such a deposit, this sum shall suffice for the purposes of the section.

In the case of properties subject to the provisions of the Land Titles (Strata) Act, the deposit must be transferred to the management fund of the management corporation within a year of the first general meeting of the corporation. In cases where the Land Titles (Strata) Act does not apply, the deposit will be refunded to the developer after three years from the date of issue of the last certificate of fitness for any flat in the development.

Section 7J — Purchaser's Offence

Section 7J provides the "teeth" for compelling purchasers to pay maintenance fees. Failure or refusal to pay the fee within 28 days after receiving written demand from the developers or the managing agent constitutes an offence, carrying the penalty of a fine of up to $5000/ and a further fine of up to $50/- for each day that such fees remain unpaid. The only defence is one of "reasonable excuse". This is not defined and will therefore depend on the facts and circumstances of each case.

It has earlier been noted [17] that prior to this amendment, late or non-payment by purchasers hardly carried any penalty, the only exception being in the case of residential premises where late payment resulted in the imposition of interest at 2% above the average prevailing prime rates of the four major local banks (DBS, OCBC, OUB and UOB).

[16] No. S 25/1974. The "appropriate sum" is specified in the Second Schedule to the Rules. Rule 6(2) further provides that such deposits shall be paid to the Commissioner before the submission of building plans to the Assistant Director, Building Control Division, Public Works Department. The deposit must also be accompanied by a copy of the plan approved by the Competent Authority under the Planning Act.

[17] See footnote 6 *supra.*

With the enactment of Section 7J, in the case of residential premises, non-payment after 1 December 1982 not only carries interest but also constitutes an offence, carrying rather heavy penalties. In the case of commercial properties, although no interest can be charged for late payment, it is an offence, for which the same severe penalties apply.

Section 7K — Liability Of Directors Etc.

This section is *in pari materia* to the old Section 6B[18] and provides that where an offence under this Act has been committed by a body corporate, the directors and other officials shall also be guilty of the offence together with the company, and shall be subject to the same penalties.

Comments

The Amendment Act makes it clear that the duty of maintaining a development prior to the formation of its management corporation, rests on the developers. They have to set up a maintenance fund for this purpose, collect the fees from the purchasers and keep proper accounts. If they do not perform these duties effectively, the Commissioner may step in and appoint a managing agent to do so. The developer's task in collecting such fees from the respective purchasers is made easier by making failure to pay an offence for the purchaser, with penalties designed to hurt his pocket.

However, a number of questions arise. The first is that there is no provision enabling a purchaser to query the developer directly as to how the monies are expended. A purchaser does not seem to be entitled to inspect the books of account — the only person entitled to such inspection is the Commissioner. It is submitted that the books of account should be made available for inspection at reasonable times, on the application of a proprietor or even a mortgagee of a lot. In this regard, it must be noted that if the management corporation has been formed, the books kept by the management council are available for inspection by a proprietor or mortgagee at all reasonable times.[19]

Secondly, there is no provision requiring a developer to reply to the requisitions of a prospective purchaser as to whether the vendor is in arrears with his maintenance payments. Bearing in mind that it is not at all uncommon for such properties to change hands even prior to the issuance of legal title, it is important that the prospective purchaser obtains a clear picture of the liabilities of the vendor. This is all the more so when stringent penalties are prescribed for non-payment of the maintenance fees. Again, in contrast, when the management corporation has been formed, prospective purchasers can ask the corporation for a certificate as to *inter alia,* the current owner's position *vis a vis* the management fund.[20] It is submitted that the same right should be available to a prospective purchaser, for whether or not the management corporation has come into being, the issue (which is a crucial one) remains the same. A purchaser should have

[18] S. 6B is repealed by s. 3 of the Amendment Act.
[19] Clause 8(2) First Schedule, Land Titles (Strata) Act, *supra.*
[20] S. 34(4) Land Titles (Strata) Act.

the right to requisition the body that is administering the maintenance funds to ask for particulars regarding the vendor's assets and liabilities (if any), in this regard.

A related question is whether the sub-purchaser is liable to pay arrears in maintenance fees incurred prior to his purchase and prior to the formation of the management corporation. The problem is compounded when the management corporation is formed because section 34(5)(1) enables contributions to the management fund to be recovered as a civil debt from either the subsidiary proprietor or his successor in title. Further, unpaid contributions may constitute a charge on the lot in favour of the management corporation, entitling it to sell the property.

It is submitted that during the interim period envisaged by the Amendment Act, the developer, upon whom falls the duty of managing and maintaining the Building, should be regarded as being in the same position as the management corporation and therefore, there should be some consistency in the provisions that govern these two periods.

Yet another inconsistency relates to the appointment of the managing agent by the Commissioner. A managing agent appointed either by the Commissioner or by the Court after the formation of the management corporation is not required to provide a bond, whereas under the new section 7G, the managing agent must first lodge with the Commissioner a bond in the approved form and for a prescribed amount.

Section 9(7) — Planning Act[21]

Another attempt to ensure that developers are motivated to maintain their developments was made in 1982 with the Planning (Amendment) Act.[22] The Amendment Act inserted a new subsection (7) to Section 9, prohibiting the transfer, assignment or sale of at least 30% of the rentable floor area of the development by the developer for a period of 10 years from the date of the latest grant of temporary occupation licence before the grant of the Certificate of Fitness; unless the said 30% portion is assigned, sold or transferred *en bloc* to a single purchaser.

The owner/developer is required to give prior written notice to the competent authority of particulars of the units selected to fall within the 30% floor space for retention under the ownership of one person before any assignment, sale or transfer of the said 30% portion *en bloc* or before the expiry of a period of two years after obtaining building plan approval whichever is earlier.

The same condition was hitherto only imposed on commercial, industrial and warehouse developments with floor areas exceeding 5000 square metres. It also applied to Urban Redevelopment Authority (URA) projects. The 1982 amendment extends the condition to all developments.

[21] Cap. 279, Singapore Statutes Rev. Ed. 1970.

[22] Act 9 of 1982 w.e.f. 15 October 1982. See also s. 7A Land Titles (Strata) Act inserted by Act 23 of 1982.

The *raison d'etre* was that if developers continued to have a substantive share in the property, they would be motivated to maintain it properly. However, a substantive share would also give the developer a large say in the management corporation, and unless the other proprietors take a more active role, (perferably getting themselves into the management council), they may find the developers "running the show" and this may not be entirely satisfactory. It has not been unknown for developers to have a stake in the various companies that provide support services to the development e.g. cleaning contractors, repair and maintenance contractors. The proprietors may find themselves paying for the services of contractors who were selected by the developers but who do a poor job and at a high cost. In all fairness to the developers, there are those who are exemplary in maintaining their detachment, and obtain quotations from independent contractors. However, there will be others who will see it as an opportunity to derive some benefit for themselves, to the detriment of the other proprietors.

The solution seems to lie within the individual proprietor's hands — he should take an active role in the affairs of the corporation. If all proprietors are so motivated, they can ensure that only the most competent contractors are engaged at the most competitive quotations. However, this may not be possible in a development where the developer or some other party holds more than 50% of the total share units. Even in these instances, the likelihood of mismanagement by the predominant owner may be minimised because of the adverse effect this may have on the value of the premises.

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